The Selling of a Precedent: The Past as Constraint on Congressional War Powers?

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INTRODUCTION

U.S. presidents have enjoyed wide discretion to manage national-security affairs in the post-war era. The President received broad congressional authorization to engage in major wars in Vietnam, Iraq (in 1991 and 2003), and Afghanistan, and acted without advance authorization in "lesser" operations in Panama, Somalia, the former Yugoslavia (Bosnia and Kosovo), and Libya. In 2019, the Trump administration would not rule out using the congressional authorizations for the Afghanistan and Iraq wars as legal cover for a war with Iran, based in part on its supposed links to al-Qaeda.

According to most constitutional law scholars, however, the Framers intended to vest these discretionary powers in Congress.[1] James Madison argued, in fact, that placing the power to conduct war and the power to determine whether a war was fought, how it was fought, and when it was terminated in the hands of a

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1. Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. J. OF INT'L L. 1199 (2006); STEPHEN M. GRIFFIN, LONG WARS AND THE CONSTITUTION 22-23 (2013); and ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 56 (1976).

single leader would represent a profound conflict of interest?[2] So, how do we reconcile the discrepancy between congressional prerogatives under the Constitution with presidential war powers as currently practiced? One explanation—favored by successive administrations—is that congressional powers have eroded through precedent.[3] As one former official in the Justice Department's Office of Legal Counsel (OLC) put it, "A President does something. The next President comes along and says, 'I can do this other thing that's just a step further.'"[4] More precisely, "every extraordinary use of power by one President expands the availability of executive branch power for use by future Presidents."[5]

Presidents are hardly passive beneficiaries here; they actively "sell" precedents. They claim they are only doing what their predecessors did—with congressional consent. For evidence, they parade historical examples from attacks on the Wabash Indians and Barbary pirates under Washington and Jefferson to some of nearly a hundred presidential actions since the end of the Vietnam War.[6] Administration officials even try to sell such "precedents" as consensual: emerging through a process of coordination and consultation between the two branches of government.[7] For Secretary of State William Rogers, that was the Framer's intent: "the specification was left to the political process," when "our constitutional system is founded on an assumption of cooperation rather than conflict."[8]

Against what standards should we assess these claims? Constitutional scholars have had their say in that regard but what does social science have to offer? The analysis below holds executive claims to powers derived through precedent to standards of social-scientific inquiry. It shows that these standards can usefully supplement those employed in legal analysis. It also reveals the limitations of an exclusive focus on legal analysis in the war powers debate.

Following Elizabeth Kier and Jonathan Mercer,[9] precedent is defined here "as an act or statement that serves . . . as an example, reason, or justification for a later

2. GRIFFIN, *supra* note 1, at 21.

3. Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 6 (2018) [hereinafter 2018 OLC Memorandum].

4. Fred Barbash, *"The Law that President's Make" is Unsurprisingly Kind to Executive Branch*, WASH. POST, June 1, 2019, at A4.

5. William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 511-514 (2008). Although precedent features less in analyses of war powers in the political science literature, the term sometimes casually appears without necessary elaboration. William Howell & Jon Pevehouse argue, for instance, that President Truman, by going to war in Korea without congressional authorization, "effectively abjured constitutional requirement and established precedent for all subsequent presidents to circumvent Congress when sending the military abroad." See WILLIAM G. HOWELL & JON C. PEVEHOUSE, WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS 12 (2007).

6. For a comprehensive list of US military actions as they pertain to congressional oversight under the 1973 War Powers Act, see CONG. RSCH. SERV., THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE, R42699 (2019).

7. *Hearing on Libya and War Powers Before the Senate Committee on Foreign Relations*, 112th Cong. (2011) (statement of Harold Koh, Legal Adviser, Department of State).

8. William P. Rogers, *Congress, the President, and the War Powers*, 59 CAL. L. REV. 1194, 1210 (1971).

9. Elizabeth Kier & Jonathan Mercer, *Setting Precedents in Anarchy: Military Intervention and Weapons of Mass Destruction*, 20 INT'L SEC., 77, 79-80 (1996).

one" and assumes that "a precedent is set when *others'* expectations and beliefs converge around [an] act or statement."[10] Viewed accordingly, a precedent in the division of powers requires more than atypical behavior: "the precedents must be on point" and "the incidents compromising the practice must be accepted, or at least acquiesced in, by the other branch."[11] The precedent thereby obtains independent influence.[12]

Based on that understanding, this article evaluates the logic and evidence behind claims that presidential war-powers grew historically through three types of precedent.[13] First, it applies standards for evaluating social-scientific *theory* to assess rule-based precedents. Here, past cases supposedly clarify, or reinforce, the viewpoint (a theory of "unfettered presidential war powers") that the U.S. Constitution gives the President broad, unfettered powers.[14] Second, it applies standards for validating *conceptual and operational definitions* to assess fact-based precedents. Here, the disposition of current cases is determined by their resemblance to past cases. Third, it applies standards used in *hypothesis testing* to assess action-based precedents. Here, general principles are reinforced by the quantity, quality, and diversity of past behavior that support an alleged precedent. By exposing the frail logic undergirding rule- and fact-based precedents, and the insufficient evidence backing action-based precedents, the analysis challenges the assumption that the handling of past cases is dispositive of current cases. It concludes that the evidence is more convincingly attributed to politics, but that politics alone cannot account for congressional deference to the President when addressing ostensible security "threats."

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10. Kier & Mercer note further that, "if observers believe an event is unique, it cannot set a precedent." *Id*. at 85.

11. Michael J. Glennon, *The Cost of "Empty Words": A Comment on the Justice Department's Libya Opinion*, HARV. NAT'L SECURITY J. F., 60 (2011) https://perma.cc/5WWF-LMFD.

12. In the US legal system, "once the precedent court decides the case, the existence of that decision can be invoked as an *independent* reason for subsequent courts to decide 'similar' disputes in the same way [emphasis added]." Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 6 (1989). Indeed, "only if a rule makes relevant the result of a previous decision regardless of a decisionmaker's current belief about the correctness of that decision do we have the kind of argument from precedent routinely made in law and elsewhere." Frederick Schauer, *Precedent*, 39 STAN. L. REV. 39(3) 571, 576 (1987).

13. The distinction between rule and fact-based precedent loosely follows from the far-more elaborate assessment of legal precedents in Alexander, *supra* note 12. The fact-based model, here, draws from Alexander's "results-based" model.

14. Post-war presidents found, in Article II, much ammunition to back claims of (virtually unlimited) presidential war powers. Presidents have pointed to their standing as commander in chief, their predominance in foreign affairs (via the power to appoint ambassadors and negotiate treaties), and the inherent powers of the executive. These powers register in the presidential obligation (via the oath of office) to "preserve, protect and defend" the U.S. Constitution and "an expansive reading of Article II, Section 3 that the President 'shall take Care that the Laws be faithfully executed.'" W. TAYLOR REVELEY, III., WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? 33-34 (1981). They also derive from *Article II, Section I*, which "vests" *executive power* in the president of the United States—when interpreted as a general grant of power, not limited to the specific powers enumerated in the document. Griffin, *supra* note 1, at 20 and Richard M. Pious, *Inherent War and Executive Powers and Prerogative Politics*, 31 PRESIDENTIAL STUD. Q. 66, 69-71 (2007).

I. RULE-BASED PRECEDENTS: ISSUES OF "THEORY"

With the Supreme Court shying from addressing "political" issues—it has yet to rule directly on the division of war powers between the branches[15]—successive post-war administrations have interpreted the Constitution to give the President maximum discretion. They argue that the two branches have navigated the constitutional text—through compromise and perspective gained in the handling of prior cases—to resolve potential legal conflicts over rules pertaining to the division of war powers.[16] Because these "rules" reflect and elaborate a "theory" of executive war authority, we can evaluate their intellectual integrity using standards for evaluating social-scientific theory.

Drawing from a reading of *Article II* of the U.S. Constitution, the OLC has made bold claims concerning presidential war powers that subsequent administrations read as "precedent." It justified U.S. support to NATO forces in Libya during the Obama administration, for instance, by concluding that the President "could rely on his constitutional power to *safeguard the national interest* . . . without prior congressional authorization [italics added]."[17] That interpretation dates at least to the George H.W. Bush administration, in a legal opinion on the president's unilateral authority to send U.S. troops to Somalia. Bearing the signature of William Barr, as U.S. Attorney General, it concluded that "the President's role under our Constitution as Commander in Chief and Chief Executive vests him with the constitutional authority to order United States troops abroad to further national interests *such as protecting the lives of Americans overseas*."[18] It went even further in its claims that U.S. national interests included "maintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations."[19]

Prior practice itself is the basis of alleged precedents. The OLC opinion on Somalia cites Truman's U.N.-supported "police action" in Korea as establishing (quoting the State Department verdict) that the United States has a "'paramount'" interest in the "'continued existence of the United Nations as an effective international organization.'"[20] Indeed, it looked to past practice—Johnson's 1964 invasion

15. Julia L. Chen, *Restoring Constitutional Balance: Accommodating the Evolution of War*, 53 B.C. L. REV. 1767, 1782-84 (2012). Although the courts have interpreted the Constitution to give the president broad powers, the Supreme Court has issued only a small number of rulings that pertain to executive war powers (the 1952 *Steel Seizure Case* among the most important of these cases).

16. The OLC, in the Nixon administration insisted, for instance, that the question of war powers "is one which of necessity must be decided by historical practice." Presidential Authority to Permit Incursion into Communist Sanctuaries in the Cambodia-Vietnam Border Area, 1 Op. O.L.C. 317 (1970) [hereinafter 1970 OLC Memorandum].

17. Authority to Use Military Force in Libya, 35 Op. O.L.C. 14 (2011) [hereinafter 2011 OLC Memorandum].

18. Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 11 (1992) [hereinafter 1992 OLC Memorandum].

19. *Id*. at 11.

20. *Id*. at 11.

of the Dominican Republic—when concluding the President can use the U.S. military also "to protect Somalians and other foreign nationals in Somalia."[21] Various rules and practices—strengthened through reiteration and repetition—gave rise to new rules and practices. A "U.S. interest in mitigating humanitarian disasters" provided legal cover, then, when the Trump administration retaliated against Syria for using chemical weapons against civilians.[22] By now, "national interests" at stake had broadened significantly to include "promoting regional stability."[23]

To be sure, the OLC meticulously cites its own judgments in prior cases, and the practices of prior administrations, in claiming the existence of precedents. But we can question claims that the President can act unhindered on matters of war—a theory of "unfettered presidential war powers"—when we employ standards for assessing the validity of social-scientific theory.

Most obviously, the validity of theory has an empirical basis: "good theory" is distinguished from "bad theory" by its explanatory power. But increases in explanatory power can undermine the integrity of a theory if it is contorted or stretched—with qualifications, exceptions, and ad hoc arguments—to fit a given case. Such a "theory" loses its capacity to predict. Indeed, it begs for additional qualifications, exceptions, and arguments to extend its empirical application. Rooted in a theory of unfettered presidential powers, the existence of precedent—following the OLC's reasoning—is impugned, then in various respects.

First, good theory permits inferences drawn deductively from basic premises when administrations have relied, instead, on rules drawn inductively from evidence. Administrations can read what they want into the past, then, because inductive logic frees them to offer self-serving generalizations that fit the specifics of historical events. Indeed, administrations have looked to precedent to promote rules tangential to the prior case. The OLC cited Johnson's Dominican venture—ostensibly intended to prevent the installation of a "Communist dictatorship" in that country—as precedent for sending U.S. troops to Somalia to protect the lives of Americans and "'citizens of a good many other nations.'"[24] That interpretation begs the question, "which case was setting the precedent?" The prior operation? Or the later operation sold with the novel interpretation of the first?

Second, good theory requires consistent arguments when administrations have engaged in contradictory reasoning. They look to the Constitution and the Framer's intent as the actual source of presidential war powers, while deferring to practice to validate those claims. The OLC backed Clinton's discretion to act in Bosnia in arguing that "historical practice supplies numerous cases in which Presidents, acting on the *claim of inherent power* [italics added], have introduced armed forces into situations in which they encountered, or risked encountering, hostilities . . . "[25] Likewise,

21. *Id*. at 11.
22. 2018 OLC Memorandum, *supra* note 3, at 11.
23. *Id*. at 11.
24. 1992 OLC Memorandum, *supra* note 18, at 6.
25. Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 331 (1995) [hereinafter 1995 OLC Memorandum].

John Yoo, as Deputy Assistant Attorney General in the George W. Bush administration, made sweeping claims of inherent presidential power—insisting the administration could respond unilaterally to the September 11 attacks—even while claiming that "we give considerable weight to the practice of the political branches in trying to determine the constitutional allocation of war making powers between them."[26]

We cannot logically insist that the Constitution mandates certain powers while studying practice to determine what those powers might be. Powers derived presumably from the constitutional text are deduced; they are not acquired *inductively* through practice or through the repetition of supportive claims made by prior administrations. To assume otherwise is to engage in circular reasoning.

Third, good theory is not "saved" by ad hoc arguments. Administrations weaken their "theory" by pushing "new" arguments when "old" ones should work, if precedents held.[27] We can reasonably question the precedent-setting value of a case for plenary executive authority when administrations subsequently inject new rules into the mix—more so, when administrations resort to extraordinary (ad hoc) claims that undercut old arguments. These include claims of acting to serve an infinitely pliable conception of the national interest. What should Congress make, then, of the tautological argument of Trump administration lawyers that "we would not expect that any President would use [the power to employ military force] without a substantial basis for believing that a proposed operation is necessary to advance important interests of the Nation?"[28] Or when administrations associate highly variable (time-centric) goals—such as supporting the United Nations—with fundamental U.S. interests? How should Congress view the Bush administration's 2003 war in Iraq, then, given its failure to obtain the U.N. Security Council's endorsement?

Legal advisers surely try to strengthen a legal case by arguing it from all angles. Lawyerly doses of conditional reasoning ("even if we assume") offer lines of attack against all conceivable arguments, for all potential audiences. But the issue here is precedent. If a broad-based rule is widely accepted, the proliferation of supportive arguments is unnecessary and can undermine the precedential case by suggesting the rule is not so widely accepted.

Fourth, good theory rests on credible assumptions when presidents have relied on flimsy ones. Accordingly, they have selectively interpreted various concepts, drawn from constitutional text. Presidents look to *Article II* for broad war-making authority but it "could reasonably be said to mean no more than the power to fulfill the President's duty to see that the laws are faithfully executed."[29] If we read

26. The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, Op. O.L.C. 202 (2001) [hereinafter 2001 OLC Memorandum].

27. Ad hoc arguments are signs of a "degenerating" theory. John A. Vasquez, *The Realist Paradigm and Degenerative versus Progressive Research Programs: An Appraisal of Neotraditional Research on Waltz's Balancing Proposition*, 91 AM. POL. SCI. REV. 899, 901 (1997).

28. 2018 OLC Memorandum, *supra* note 3, at 10.

29. Sofaer, *supra* note 1, at 3.

the text, then, to grant essential war powers to Congress, protecting the Constitution requires deferring to Congress in matters of war.

At the same time, presidents have downplayed the significance of congressional "declare-war" powers, which grant wars powers *explicitly* to Congress. The OLC has argued, for example, that declarations of war were outmoded, even in the Framer's time.[30] Members of Congress could rightly ask why the Framers gave Congress a superfluous ("obsolete") power—let alone while extolling congressional virtues in keeping the country from war. Indeed, the late substitution of "declare war" for "make war" by James Madison at the Philadelphia Convention represents a far-from-conclusive transfer of war powers to the President.[31] Opinion at the Convention (and later debates) centered overwhelming on constricting presidential war powers, not increasing them to address potential contingencies. Notably, the Framers did not formally "transfer" the "make-war" power to the President; and the terminological change generated virtually no discussion or debate.

Finally, good theory nonetheless has an explanatory basis, requiring sound empirical grounding, when administrations promote rules governing war powers that defy critical facts. In arguing, for example, that congressional appropriations for a military operation constitute congressional approval for those operations, the White House explicitly contradicts the 1973 War Powers Resolution (WPR). The resolution states that appropriations, absent explicit authorization, do not constitute authorization. Likewise, presidential claims to act on behalf of the United Nations or NATO directly challenge congressional understandings entrenched in formal legislation. The WPR notes that no authorization shall be implied from existing U.S. treaties;[32] and the 1945 U.N. Participation Act requires congressional approval for "special agreements" (for instance, involving the use of U.S. forces) with the U.N. Security Council. Regardless, neither the North Atlantic Treaty nor the U.N. Charter commits the United States to military action.[33]

Thus, administrations have pushed rule-based precedents to support the principle of unbridled presidential war authority under the Constitution. Such precedents are certainly weak if their impact depends on the coherence, completeness, and strength of the underlying logic.

II. FACT-BASED PRECEDENTS: CONCEPTUAL AND OPERATIONAL ISSUES

Under the War Powers Resolution, presidents must bring their case to Congress to initiate or continue a war effort. The President must report to

30. From that perspective, the power to declare war, at most, merely ratified actions that the President was authorized to take with or without legislative consent. MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY 14 (Princeton Univ. Press 2013).

31. Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by Declare War*, 93 CORNELL L. REV., 45, 85 (2007).

32. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (1973).

33. The US Supreme Court found (in 2008, in *Medellin v. United States*) that the United Nations Charter is "non-self-executing" and thereby lacks "'domestic effect of its own force.'" Glennon, *supra* note 11, at 8.

Congress, within forty-eight hours, the commitment of U.S. forces to hostilities. Under Section 4(a)1, such reporting is necessary if U.S. forces are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."[34] Most onerously, from a presidential standpoint, the WPR—under Section 5(b)—requires the withdrawal of U.S. forces within 60 days of the report (90 days if necessary), when lacking explicit legislative authorization or when directed by Congress via a concurrent resolution (an informal resolution, not subject to a presidential veto, requiring a simple majority vote in both houses). In the wake of a 1983 Supreme Court decision (in *INS v. Chadha*, a case unrelated to war powers),[35] which ruled unconstitutional the "legislative veto," Congress rewrote the provision so that it now calls for a joint resolution of both houses, which the President can veto.[36]

Presidents have partly addressed the legislative challenge by citing "fact-based" precedents. These precedents require the similar disposition of cases that factually resemble one another. In a judicial setting, a factual precedent requires equivalent treatment when the facts of the current case are *at least as strong* as those for the precedential case.[37] Yet these fact-based precedents—much like conceptual and operational definitions in scientific research—require some agreement among the parties over the relevance, importance, and interpretation of the facts. We can reflect on the intellectual strength of these alleged precedents by assessing them using social-scientific standards for evaluating conceptual and operational definitions.

A. In Search of Conceptual Definitions: What Are War and Hostilities?

Concepts are valued for their definitional clarity and consistency in use. They are also valued for their generality, reflecting a virtue in explaining "more with less." Such economy is prized because we can always treat disconfirming as supportive evidence, or supportive as disconfirming evidence, by citing the specifics of a given case or by constructing typologies that highlight the dissimilarities of what are otherwise similar cases or the similarities of what are otherwise dissimilar cases. We must hold typologies, instead, to a standard of explanatory utility. But what standard applies when presidents have sought, *through definition*, to *except* current cases from congressional consideration? For them, the issue is not

34. It further requires the president to consult with Congress in advance in "every possible instance" and consult regularly with Congress once US forces are committed. In the congressional view, "consultation" meant providing information to members of Congress but also seeking their advice, opinions, and consent *before* the president made the important decision. Michael Rubner, *The Reagan Administration, the 1973 War Powers Resolution, and the Invasion of Grenada*, 100 POL. SCI. Q. 627, 630-32 (1985-1986).

35. *INS v. Chadha*, 462 U.S. 919 (1983).

36. For champions of Executive power, the WPR amounted to an unconstitutional attempt by Congress to seize powers that the Framers delegated to Congress. Congress's defenders viewed the provision merely as articulating congressional "declare-war" powers: how can Congress deny powers to a president that it did not possess in the first place? Martin Wald, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1432-33 (1984).

37. Alexander, *supra* note 12, at 29-30.

necessarily whether a current case amounts to war or hostilities but whether the case is, or is not, of a *type* that warrants legislative scrutiny. In that regard, they make questionable classificatory arguments.

First, administrations type operations by their means and goals—not their scale nor consequences—stripping military operations of their "military" or "hostile" content. For example, they discount the relevance for congressional oversight of aerial support, a police action, personnel evacuation, a targeted strike, and other operations.[38] Likewise, they employ "modifiers" to soften the impact of problematic concepts. The adjectives, "drone" and "humanitarian," drain the terms, "war" and "intervention," respectively, of their onerous political weight. By implication, a drone war is not actually a war; a humanitarian intervention is not really an intervention. Such typing of operations allows administrations to subordinate the "military" or "warlike" components of an operation to broader non-military means or purposes. Accordingly, the Obama administration *enforced a no-fly zone* over Libya ostensibly to *safeguard civilians* (under the auspices of a relevant U.N. Security Council resolution). The administration nonetheless "interpreted" the means and goals of the mission to permit the U.S. targeting of Libyan military assets—air-defenses; leadership targets; command, control, and logistic networks; and Libyan forces deemed a threat to civilian populations. It interpreted it further to include U.S. support and funding of anti-government groups and U.S. aid to NATO allies seeking "regime change."[39] With typological rendering, the administration could portray an operation that involved attacking enemy targets, designed ultimately to overthrow a foreign government, as a humanitarian mission.

Second, administrations focus on conflict types without due regard for their common attributes. Administrations thus seek advantage by drawing implicitly from "radial categories."[40] Following the standard ("classical") approach, we would define war—say, by the extent and nature of the violence involved—and then add qualifiers to distinguish between a conventional and nuclear war and more qualifiers still to distinguish between a strategic and theater-level nuclear conflict. With radial logic, by contrast, the term "war" acquires its meaning through its subordinate categories—civil war, asymmetric war, conventional war, nuclear war, et cetera—which stand at varying proximity to the central concept. War, itself, lacks clearly defined characteristics on which the subcategories then build. We are left to judge whether any given type of conflict is simply more, or less, like the "war" that the Framers, in 1787—or the "hostilities" that Congress, in 1973—envisioned when crafting their respective documents. Administrations

38. On such conceptualization and "war," see Antoine Bousquet, *War*, in CONCEPTS IN WORLD POL. 91 (Felix Berenskoetter ed., 2016).

39. JEREMIAH GERTLER ET AL., CONG. RSCH. SERV., R41701, NO-FLY ZONES: STRATEGIC, OPERATIONAL, AND LEGAL CONSIDERATIONS FOR CONGRESS 2 (2013).

40. David Collier & James E. Mahon, *Conceptual "Stretching" Revisited: Adapting Categories in Comparative Analysis,* 87 AM. POL. SCI. REV., 848-52 (1993).

hope to convince doubters, then, that certain subtypes stand outside the perimeter of relevant categories.

Third, to strengthen precedential arguments, administrations cite types that amount to "family resemblances,"[41] as when listing some number of "precedential" cases. By this logic, cases share features but no single feature. We recognize the common parentage of family members—that is, we see the eyes, nose, and facial contour that tie *some* members together—even if all members do not possess a common attribute. Thus, Obama's Libyan operation resembles Clinton's proposed Haitian operation in its humanitarian purpose, Clinton's Balkan operations in the aerial support role, Truman's Korean operation as a U.N. mission, and so forth. The operations are conjoined conceptually—as members of the same family—even if sharing no single feature.[42]

Lacking an exemplar, the logic is open to abuse. We recognize family similarities by tying them to a mother, father, or both. That is, we see a father's chin and eyes and a mother's round face. Absent the prototype, however, we can always find *some* "family" resemblance between *any* two people—height, weight, hair color, or prominent chin. Linking the cases together *dyadically*—each person holds hands with two others—does not make them a group.[43] Indeed, certain resemblances to members within the group could hurt the (positive) precedential value of a case. After all, the Clinton administration engaged in Balkan air strikes on a massive scale and U.S. involvement led eventually to the deploying of 20,000 troops to Bosnia. Moreover, Obama's Libya operation—like the infamous 2003 Iraq war—aimed for regime change. What we emphasize—the examples or characteristics selected—is often a matter of opinion, and politics.

Fourth, administrations support precedents by dismissing, as truly *exceptional* types, the wars or hostilities that justify congressional oversight. War as the "exception" is certainly the implication when administration officials concede Congress's power to authorize war—as in 1812, 1917, and 1941—but insist nonetheless that presidents enjoy considerable latitude to engage U.S. military forces abroad, under a wide variety of circumstances. "Hostilities" moved beyond the exceptional to the "unique" when Secretary of State John Kerry discounted the WPR's relevance to the Libyan operation. He claimed that the resolution was a "direct reaction to a particular kind of a war, to a particular set of events, the Vietnam war, which at that time was the longest conflict in our history and which resulted, without a declaration of war, in the loss of over 58,000 American lives, spanning three administrations."[44]

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41. *Id*. at 846-48.

42. GARY GOERTZ, SOCIAL SCIENTIFIC CONCEPTS: A USER'S GUIDE 45 (Princeton Univ. Press 2006).

43. On the challenge to conceptual coherence, see John Gerring, *What Makes a Concept Good? A Criterial Framework for Understanding Concept Formation in the Social Sciences*, 31 POLITY 357, 373-75 (1999).

44. *Hearing Before the U.S. Senate Committee on Foreign Relations*, *supra* note 7, at 2 (statement by Senator John Kerry).

In Kerry's thinking, the WPR was intended then to address that "kind of a war." But what "kind" was it exactly? That is, what specifics of that conflict made it a "Vietnam?" What were its cautionary reference points that did not apply to Libya? Rather than address these questions directly, Kerry treated the Vietnam War as an ambiguous "whole," divorced from its identifiable parts: the precipitating conditions that led to wholesale U.S. intervention, the lack of consultation between the legislative and executive branches, and how the war was conducted. We are left to judge whether a conflict de jure is simply more, or less, like Vietnam, not whether today's conflict differs in important—clearly specified—respects from its predecessor.

Kerry's views resonated widely. When the OLC supported Clinton's prerogatives to act unilaterally in Haiti, it interpreted the intent of the WPR as requiring congressional authorization for "major, prolonged conflicts such as the wars in Vietnam and Korea."[45] We can certainly question the circular logic of requiring prior authorization for *prolonged* conflicts, but such logic only begs the more general question, "where precisely should Congress draw the line?" Analogies here are hardly the friend of precision, nor favorable precedent. After all, for much of Kerry's generation, the Vietnam legacy lingered in fears that U.S. involvement in any conflict, around the globe, would become "another Vietnam."

Harold Koh, a State Department legal advisor in the Obama administration, justified ongoing U.S. operations in Libya, absent congressional authorization, by arguing that "hostilities" under the WPR "has been determined more by inter-branch practice than by a narrow parsing of dictionary definitions."[46] We need not be swayed, however, by an administration's characterization of the facts. Successive administrations have sought to redirect inquiry by highlighting some case attributes while ignoring others and dismissing comparisons when they are due. By this, they can avoid the central question: what do we mean by war and hostilities?

B. The Validity of Operational Definitions

Operational definitions, or measures, tie our concepts to the empirical world. That is, they answer the question, "how do I know one when I see one?" Measures are judged, then, by whether they measure what they are supposed to measure; and their accuracy is compromised when operational procedures stray from the underlying concepts. Administrations thereby distort the meaning of "war" and "hostilities" when: 1) seeking to exclude given military actions from congressional purview or 2) imposing a high threshold for congressional involvement.

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45. Deployment of U.S. Armed Forces into Haiti, 18 Op. O.L.C. 176 (Sept. 27, 1994) [hereinafter 1994 OLC Memorandum].

46. He also cited a prior determination (from the Ford administration) that the term is "definable in a meaningful way only in the context of an actual set of facts." *Hearing Before the U.S. Senate Committee on Foreign Relations*, *supra* note 7, at 13 (statement by Harold Koh).

1. Questionable Exclusions: What Actions Contribute to War and Hostilities?

Presidents have framed specific military actions to avoid triggering reporting under the WPR. Presidents employ two main tactics to short-circuit debate.

First, presidents conceive of "hostilities" in exceedingly narrow terms. For instance, after deploying U.S. Marines to Lebanon in 1983 to help its government and armed forces deal with civil unrest, the Reagan administration dismissed suggestions that the deployment required congressional authorization by noting that violence in the country was not directed at U.S. forces.[47] Elsewhere, it sought an exclusion for "defensive" actions. Reagan authorized aerial attacks on Libyan targets in 1986—in retaliation for the bombing of a discotheque in West Berlin that killed three people, ten days *after the bombing*—in part by citing the provision of the U.N. Charter that allowed states to act in "self-defense."[48] Of course, any offensive action is arguably defensive in nature; and even defensive actions can fuel violent exchanges. The party that is offending rather than defending, and initiating rather than responding, depends on judgments about the nature of a conflict, which side is challenging the status quo, and even which side is right or wrong.

Second, presidents downplay the *collective* relevance of events. Accordingly, they seek to distance implicating events—conceptually, chronologically, and geographically—from one another to deny that they aggregate in an ambient level of hostility. In 1987, U.S. naval vessels in the Persian Gulf were caught in violence stemming from the Iran-Iraq war. Many dozens of U.S. sailors were killed by an Iraqi missile fired at the USS *Stark*; the United States was reflagging Kuwait oil tankers and providing them with naval escort; mines were endangering local ship traffic; and tensions were high. In the spring of the following year, an Iranian mine struck a U.S. guided missile frigate, injuring many sailors. In retaliation, the United States struck two Iranian oil platforms and sunk numerous Iranian naval vessels. Later that summer, fearing a potential attack, the USS *Vincennes* shot down an Iranian civilian plane over the Gulf, killing 290 passengers and crew members. In this period, the Reagan administration filed a half dozen reports that did not cite Section 4(a)1, arguing that the various incidents did not cumulatively amount to hostilities or involved isolated defensive actions.[49] At one level, the administration was correct. The set of proximate conditions and events that led to an attack by an Iraqi jet on a U.S. ship differed from those behind a mine that damaged a commercial freighter. Yet we can always pronounce related occurrences unrelated by playing to alleged gaps in time, physical distances, or superficial distinctions among them. For that matter, we can decompose portentous events to reduce their *apparent* significance. For instance,

47. Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 105 (1984).

48. Jordan J. Paust, *Constitutionality of U.S. Participation in the United Nations-Authorized War in Libya*, 26 EMORY INT'L L. REV. 43, 52 (2012).

49. CONG. RSCH. SERV., *supra* note 6, at 16.

we can view each unit deployed to a conflict zone as a single event to minimize the significance of a military buildup.

Still, suspicions, military preparations, and heightened responsiveness could, together, induce more "isolated" events which could feed on one another to boost the sense of hostility or escalatory risks. After all, even seemingly "normal events" or "nonevents" might trigger escalation. During the Cold War, a test of a U.S. ICBM in the Pacific was certainly not a "big" event; it was potentially catastrophic, however, when it occurred, as it did, at the height of the Cuban Missile Crisis. Thus, Secretary of State George Shultz missed the point when he dismissed the *Stark* incident by observing that the United States had maintained a naval presence in the Gulf for many decades.[50] We lose much (of the "big picture") when we view acts in isolation, apart from how they reflect and create context. Indeed, the introduction, in 1965, of U.S. Marines—ostensibly to protect U.S. airbases—foretold the important U.S. shift toward a ground combat role in South Vietnam. The Johnson administration introduced the next contingent of Marines shortly thereafter with what amounted to an offensive mission.

We see, then, that administrations prey on distinctions between events and non-events to avoid WPR reporting, and thereby create wiggle room for future presidential action. Yet absent conceptual grounding, selectivity and exclusivity severely compromise operational validity.

2. Suspect Thresholds: At What Point Do Actions Amount to War or Hostilities*?*

When administrations concede U.S. involvement in some level of warfare or hostilities, they still skirt the Congress by positing a threshold of action that precludes congressional authorization. In this regard, they adopt four main tactics.

First, presidents and their advisers posit an ill-defined threshold, through negation, that keeps U.S. actions under the bar of "war" or "hostilities." That is, they emphasize what the current conflict is *not*, rather than address its properties and propensities. For example, the OLC backed the Trump administration's attacks on Syrian chemical-weapons targets, then, by asserting that Congress's power to "declare war" was reserved for "full-scale" conflict.[51]

Second, administrations reduce war or hostilities to ill-defined subordinate components that (individually and collectively) muddy the location of the threshold. The OLC's citing of its prior legal opinion on Clinton's planned Haiti deployment, to justify action against Syria, offers a case in point. That report viewed war as involving "'prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.'"[52] But terms like "prolonged," "substantial," and "significant"

50. James Nathan, *Salvaging the War Powers Resolution*, 23 PRESIDENTIAL STUD. Q. 235, 245 (1993).

51. 2018 OLC Memorandum, *supra* note 3, at 4.

52. 1994 OLC Memorandum, *supra* note 45, at 18.

are open to interpretation. Should we assess "significant risk," for instance, by considering casualties, escalation potential, or even economic costs given the potential for "mission creep?" The actual "risk" here is that policy preferences will drive risk assessment given the large number of variables involved, their unclear value and impact, and their susceptibility to political influence. When the Reagan administration challenged Libya's control over the Gulf of Sidra, the Pentagon placed the chances of conflict below 50-percent, its own threshold for determining sufficient risk to trigger WPR reporting, though the Navy sought to change its rules of engagement given the likelihood of a Libyan attack.[53]

With similar logic, Harold Koh, as a State Department legal expert, exempted the Libyan mission of the Obama administration from congressional authorization. He argued specifically that the operation satisfied four legal criteria from the Ford administration (with the Mayaguez incident). The operation thus fell below the reporting threshold because it was limited: a) in mission, b) exposure of U.S. troops, c) risk of escalation, *and* d) military means—and involved a necessary but "*unusual* confluence of these four limitations [emphasis added]."[54] Yet we can again question the precedential import of these criteria. After all, they went uncited over multiple decades. Administrations focused on a narrower set of criteria or ignored them entirely. Even in the Libyan case, Justice Department lawyers offered a somewhat different take. Its opinion was predicated on the "limited operations under consideration" and the absence of U.S. ground forces and low "risk of substantial casualties for U.S. forces."[55] It noted further that U.S. airstrikes were to be "limited in their nature, duration, and scope."[56] Then, the importance of precedent is impugned by how Koh's criteria achieved prominence. Lawyers, both in the Departments of Justice and Defense, refused to certify that U.S. forces were not engaged in "hostilities." That was an important consideration: Congress, in writing the WPR, intentionally selected the term "hostilities" for its breadth, over "armed conflict." Obama thus decided to do a bit of "shopping" by choosing Koh's justification from among the discordant opinions.[57] His was an unusual step. The OLC opinion is generally treated as authoritative within the executive branch,[58] and the OLC tends to view its role as a presidential enabling force.[59]

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53. Brian J. Atwood, *War Powers and the Responsibility of Congress (Special Session on Capitol Hill)*, 82 PROC. OF THE ANN. MEETING (AM. SOC'Y OF INT'L L.), Apr. 20-23, 1988, at 14.

54. *Hearing Before the U.S. Senate Committee on Foreign Relations*, *supra* note 7, at 10 (statement by Harold Koh).

55. 2011 OLC Memorandum, *supra* note 17, at 1, 9.

56. *Id*., 14.

57. Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1148 (2013). *See also* Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), https://perma.cc/LZ49-BEN4.

58. Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 63 (2011).

59. Marshall, *supra* note 5, at 511. On the resulting tension between promoting a president's agenda and the obligation to interpret the law and protect the rule of law, see Arthur H. Garrison, *The Role of the OLC in Providing Legal Advice to the Commander-in-Chief After September 11th: The Choices Made by*

Third, presidents conveniently frame "thresholds" in relative terms. Indeed, Koh's "limits" were based on relative criteria. He compared U.S. actions, events, and consequences in Libya with those of prior U.S. interventions. For example, he offered a list of cases where "past administrations declined to find hostilities" under the WPR though U.S. military forces "were repeatedly engaged by other sides' forces and sustained significant casualties."[60] He also compared U.S. operational contributions relative to those of U.S. NATO allies. By the administration's accounting, for example, U.S. allies—not U.S. pilots—were flying most of the missions over Libya.

Absent an *absolute* threshold for determining the existence of "hostilities," a President could play off relative criteria to downplay the size and significance of any U.S. operation *through comparisons*:[61] "every use of force that the United States has ever undertaken has in some sense been 'limited.'"[62] After all, the United States has not employed a weapon of mass destruction in war since the bombing of Hiroshima and Nagasaki. Indeed, we can easily argue that the heavy U.S. bombing of Cambodia, after the signing of the 1973 Paris Accord—which gave impetus to the WPR—was a limited mission based on Koh's four criteria. Given the reliance on aircraft, and final exodus of U.S. ground forces from the combat zone, the operation was limited in mission, troop exposure, risk of escalation, and military means.

Relative standing changes moreover with the reference group, which can change, in turn, when current cases join prior cases in that group. Indeed, relative logic provides for a "ratchet effect." The "limited" mission of old can serve as reference in judging the scale of a future mission. The OLC in the Trump administration cited the U.S. operation in Libya to argue that the Libyan operation set the bar *high* in assessing the permissible scale of unauthorized U.S. military action. It noted that the Libyan air campaign "lasted over a week and involved the use of over 600 missiles and precision-guided munitions."[63] A threshold based on a comparison of relative contributions *within* a mission in the Obama administration yielded absolute numbers that would allow the Trump administration to draw useful relative contrasts *across* missions. Such bootstrapping could permit the President to act without constraint. For that purpose, the OLC has found available reference points. In the G.W. Bush administration, it pronounced that President Clinton's discretionary actions in the former Yugoslavia—two short years before—amounted to a "unilateral deployment" in a "full-scale war" involving tens of thousands of U.S. military personnel, bombs, and missiles.[64]

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the Bush Administration Office of Legal Counsel, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 648 (2012). On the constitutional standing of OLC opinions, see Kimberly L. Wehle, *"Law and" the OLC's Article II Immunity Memos*, 32 STAN. L. & POL'Y REV. 1 (2021).

60. *Hearing Before the U.S. Senate Committee on Foreign Relations*, *supra* note 7, at 9 (statement by Harold Koh).

61. Critics could easily make the opposite case given US domination of the air-defense suppression mission and control of all pilotless aircraft that hit Libyan military targets.

62. Glennon, *supra* note 11, at 5.

63. 2018 OLC Memorandum, *supra* note 3, at 19.

64. 2001 OLC Memorandum, *supra* note 26, at 202.

The problem, here, with relational thinking is that it avoids absolute issues. How do we measure the exposure of U.S. troops? That is, does exposure stem from participating in combat operations, and then of what intensity and duration? How do we assess escalatory potential? Does it follow, as Koh implies,[65] from factors like combat intensity or, instead, from U.S. decisions—the choices, electoral constraints, and changing stakes—that could draw the United States into the fighting? We remember that, in 1983, hundreds of U.S. Marines were killed in a Shiite suicide bomb attack on the Marine barracks in Lebanon; less often remembered is that the Reagan administration chose, before the bombing, to make the United States an active combatant by bombarding the Lebanese coast (in retaliation for earlier attacks) shortly before the barracks attack.[66]

If judgments reduce to assessments of risk and acceptable casualty levels, and the standards used to evaluate them, legislators have strong reasons to resist presidential entreaties. Evidence that presidents have defined thresholds creatively most certainly adds to these reasons.

III. ACTION-BASED PRECEDENTS: PARSING THE EMPIRICAL EVIDENCE

Action-based precedents assume that past decisions per se—that is, apart from accompanying rules and facts—shape future decisions. Action-based precedents thus have a perceptual-normative rather than logical-legalistic basis. They do not reduce to specifics and arguments that constrain the actions of a party; instead, they acquire influence from the quantity, salience, and variety of actions that *reinforce a common principle*—the primacy of the presidency in matters of war and national security. Whether such action-based precedents hold is appropriately addressed, not by assessing intellectual rigor, but rather by employing the standards of hypothesis testing.

A. The Empirical Case Supporting Action-Based Precedents

The consistency of congressional behavior arguably provides considerable support for the argument that congressional deference builds on past deference. The supportive evidence is as follows.

First, case evidence suggests that Congress willingly delegates open-ended authority to the executive. Its authorizations sometimes served as blank checks to presidents, allowing them to determine the intensity, nature, and length of combat. The Gulf of Tonkin resolution provides Exhibit A in that regard. The resolution authorized the President "to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression."[67] Going further, the resolution proclaimed that the United States is "prepared, as the President determines, to take all necessary steps, including the use of armed

65. *Hearing Before the U.S. Senate Committee on Foreign Relations*, *supra* note 7, at 15 (statement by Harold Koh).

66. Micah Zenko, *When Reagan Cut and Run*, FOREIGN POL'Y (Feb. 7, 2014, 10:36 PM), https://perma.cc/4N8Z-9S8E.

67. Tonkin Gulf Resolution of 1964, Pub. L. No. 88-408, 78 Stat. 384, 384 (1984).

force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom."[68] To similar effect, the Bush administration drafted the broadly empowering resolution (introduced in the Senate) that would inform the eventual 2002 Iraq war authorization. It authorized "the President to use all means that he determines to be appropriate, including force, to enforce United Nations Security Council Resolutions concerning Iraq, defend U.S. national security interests against the threat posed by Iraq, and restore international peace and security in the region."[69] The charge to the President remained essentially unaltered in the congressional version.

Second, when imposing (at least implied) limits, Congress has allowed presidents to broadly interpret authorizations. Notably, the 2001 Authorization for the Use of Military Force against Terrorists (AUMF) authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."[70] Aimed at those who participated in *one* set of attacks, on a specific day, the authorization became open-ended largely through default. Successive administrations viewed it as authorizing the war with the Taliban insurgency, even after the United States had decimated al-Qaeda and its leadership, but also the Islamic State (ISIS)—in Iraq, Syria, Afghanistan, North and East Africa, and elsewhere around the world—though ISIS emerged as a bitter rival of al-Qaeda (and was hardly responsible for the September-11 attacks).

Third, Congress has permitted presidents to finesse the WPR through faux compliance. As previously noted, administrations have pushed rules and facts to escape congressional oversight. They have also played "beat the clock" by treating the 60 to 90-day allowance, before congressional authorization is required, as a permissive period. The Reagan and Bush administration conducted their invasions of Grenada and Panama, respectively—without congressional authorization—by working within the time "constraint." When presidents have supplied reports to Congress, they have done so "consistent with" the WPR, not "under" or "pursuant to" the relevant provisions of the resolution. Only the Ford administration filed a report under the WPR—then, only *after* the Mayaguez incident. Then, presidents reported actions undertaken without prior congressional consultation and pointedly avoided using the resolution's trigger terms, "hostilities" or "imminent hostilities,"[71] to start the clock on required congressional authorization.

Finally, Congress has arguably legitimized presidential encroachments by authorizing action—with or without limits—and failing subsequently to challenge executive claims to unchecked authority. In 1971, Congress finally rescinded the Gulf of Tonkin resolution but allowed Nixon to claim he had the

68. *Id.*

69. S.J. Res. 45, 107th Cong. § 2 (2002); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

70. Joint Resolution of 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001).

71. Rubner, *supra* note 34, at 637.

constitutional authority to act without it. Congress slammed the door shut in 1973—with the Case-Cooper amendment, which prevented the return of U.S. forces to Vietnam, Cambodia, or Laos—months, however, after the final exodus of U.S. troops. Even the congressional passage of the WPR proved a challenge. The House passed "weak" war powers legislation multiple times (in the 91st and 92nd Congress) only to see the measures die from lack of Senate support.[72] We need not dig deep into history to make the same point. Congress has been unable to agree on a replacement for the AUMF resolution despite its controversial uses by successive administrations.

B. The Empirical Case against Action-Based Precedents

These patterns of behavior suggest that Congress has conceded its constitutional prerogatives to the executive branch. The question, however, is whether past congressional action, or inaction, amount to actual concessions. Making an empirically sound affirmatory case requires that we: a) establish a priori what constitutes disconfirming evidence, b) consider rival explanations, and c) define the parameters within which Congress can act given potential constraints. More specifically, the supportive evidence is unconvincing, then, for the following reasons.

First, the case for action-based precedents ignores substantial evidence that undercuts the notion of congressional deference to presidential encroachments. Whereas action-based precedents lead us to expect a (progressive or dramatic) reduction over time in congressional challenges to presidential claims on war powers, the legislative response to presidential claims has been inconsistent. Sometimes Congress *has* acted to reinforce its prerogatives under the WPR (and Constitution). Just as Congress pushed the Reagan administration to accept restrictions in Lebanon,[73] Congress invoked the WPR (albeit for the first time) in 2019—when directing the President to cease U.S.-troop support for the war in Yemen. Even congressional authorizations contain a nod to legislative prerogatives. In 1991, Congress noted, for instance, its Iraq-war resolution constituted "specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution" and required reports from the President every 60 days.[74] Other authorizations did not come easily. Despite the broad authority granted eventually to the president, the 2002 Iraq-war deliberations sparked contentious debate and a profusion of amendments aimed at controlling presidential prerogatives.[75]

In short, Congress has not been silent nor inactive. It has passed resolutions, held hearings, and attached budgetary strings too often to insist that Congress is

72. David P. Auerswald & Peter F. Cowey, *Ballotbox Diplomacy: The War Powers Resolution and the Use of Force*, 41 INT'L STUD. Q. 505, 514 (1997).

73. Steven V. Roberts, *Congress and Reagan Back Compromise on War Powers Keeping Marines in Lebanon*, N.Y. TIMES (Sept. 21, 1983), https://perma.cc/6X7X-RSSE.

74. Joint Resolution of 1991, Pub. L. No. 102-1, 105 Stat. 3 (1991).

75. Karl K. Schonberg, *Global Security and Legal Restraint: Reconsidering War Powers after September 11*, 119 POL. SCI. Q. 115, 121 (2004).

trapped by its prior inactivity. Even Republicans who believe the President should have strong war powers as Commander in Chief have feared gutting the WPR out of concern for lost congressional leverage.[76]

Indeed, Presidents frequently act in ways that reinforce Congressional authority. What critics charge is faux compliance with the WPR—the short operations by Reagan and Bush in Grenada and Panama, respectively—still amounts to compliance. In each instance, the administration appears to have accepted or tailored operations to remain compliant with the resolution. It is not a big leap then to acknowledge plausible "dogs that do not bark"—the possibility that presidents have *not* acted, at various times, to avoid congressional criticism. Although these instances are obviously harder to discern, they speak nonetheless to a plausible legislative "veto" on potentially unpopular, less-than-essential military operations. Indeed, a party might contend, then, that a prior "concession" is not what it seems—that it reinforced Congressional prerogatives. Some observers claim, for instance, that the WPR has at least confined unauthorized military operations to short durations or smaller footprints, pressed the President to report to Congress, and kept presidents in check, in some instances, by inhibiting military action.

Second, the case for action-based precedents ignores a "missing-variables" problem—the exclusion of critical explanatory variables from the analysis. What champions of presidential prerogatives attribute to precedent could stem instead from the influence of perceptual, institutional, or political factors.

The case for action-based precedents assumes, for one, that the past provides perceptual reference points but ignores the variability of perception that stems from differences in attribution. Current parties might disagree in their judgments of essential facts. They might conflict over whether prior cases originated, instead, in political or strategic calculations. The AUMF did not amount to a precedent for quick (and uncritical) congressional authorization if legislators believe the authorization was a response, for instance, to an extraordinary threat. Alternatively, parties might conflict over whether prior action amounted, not to a "decision," but rather a political compromise or victory by the majority party. A Democratic majority might feel unconstrained by the actions of a prior Republican-controlled legislature.

The affirmative case also downplays institutional changes that can account for Congressional inaction. Congress has abdicated its oversight of the executive branch in recent years for reasons unrelated to precedent. The reasons reside, instead, in congressional turnover which drains the legislature of policy expertise, member distraction due to multiple committee assignments, Executive holds on documents and claims of privilege, political disincentives to invest in hearings that garner limited attention or results, and fears of being on the "wrong side" politically of an issue.[77] The public generally assumes that presidents have the right (maybe, responsibility)

76. Ryan C. Hendrickson, *War Powers, Bosnia, and the 104th Congress*, 113 POL. SCI. Q. 241, 246 (1998).

77. James Goldgeier & Elizabeth N. Saunders, *The Unconstrained Presidency*, FOREIGN AFF. (Sept./Oct. 2018), https://perma.cc/TY5H-MGQZ.

to act unilaterally. It does not penalize presidents for unilateral action per se. Thus, the incentive for Congress is to avoid taking sides since the public will only take notice, when looking to assign blame, should the operation flounder.[78]

The case for action-based precedents, moreover, downplays the influence of partisanship. Republicans overwhelmingly supported the 2002 Iraq resolution, Democrats were split: 58 percent supported it in the Senate compared to 39 percent in the House.[79] The Yemen resolution also passed the House and Senate, drawing largely on a partisan (Democratic) vote.[80] The partisan pattern continued as Congress confronted the possibility of an unauthorized U.S. war with Iran. In 2019, Senators could not obtain the 60 votes needed for an amendment requiring Donald Trump to seek congressional authorization for any strike on Iran. Only four Republicans voted with the Democratic minority.[81] Likewise, in summer 2019, the Democratic-controlled House voted finally to repeal the AUMF and to require congressional authorization for any war with Iran; the repeal and Iran measure would die, nevertheless, in the Republican-controlled Senate. In early 2020, the House again considered various measures to curtail presidential war powers, provoked further by the drone killing in Iraq of Iran's Quds Force leader, Qasem Soleimani, without prior congressional consultation.[82] The Senate passed a resolution, 55-45, with but eight Republicans joining all 47 Democrats, requiring the administration to obtain congressional authorization for any war with Iran. A similar House resolution had passed 224-194, with support from only three Republican members.[83]

Importantly, partisanship cuts both ways. Just as Democrats used the WPR to flog Reagan for his support to anti-Communist insurgents in Nicaragua, Republicans assailed Clinton for sending U.S. ground troops to Bosnia.[84] In 2011, Republican lawmakers joined liberal Democrats to contest Obama's Libya operation.[85] Democrats, however, largely stood with the president, again for partisan reasons. Indeed, the Obama administration employed the AUMF, unchecked by Congress, despite its unpopularity among Democrats in the Bush administration and Democratic control of both houses (in the 2009-11 period).

78. Sarah Burns, *Debating War Powers: Battles in the Clinton and Obama Administrations*, 132 POL. SCI. Q. 203, 219 (2017).

79. Schonberg, *supra* note 75, at 119.

80. Catie Edmondson, *U.S. Role in Yemen War Will End Unless Trump Issues Second Veto*, N.Y. TIMES (Apr. 4, 2019), https://perma.cc/JLV8-NUXW.

81. Nine Republicans abstained from the vote. Joe Gould, *Senate Shoots Down Attempt to Curb Trump's Iran War Powers*, DEF. NEWS (June 28, 2019), https://perma.cc/58BD-MP79.

82. House efforts were spurred, no less, by the proliferation of administration justifications for the killing, and the lack of prior congressional consultation. In their variety and content, the justifications undermined administration claims of an imminent threat to US national security.

83. Karoun Demirjian, *Measure to Curb Trump's Iran Options Clears Senate*, WASH. POST, Feb. 14, 2020, at A1.

84. Hendrickson, *supra* note 76, at 252; Schonberg, *supra* note 76, at 124.

85. Scott Wilson, Obama Administration: Libya Action Does Not Require Congressional Approval, WASH. POST (June 15, 2011), https://perma.cc/WV94-YCBN.

Third, the case for action-based precedents benefits by default for it overstates the latitude that Congress possesses to act. The constraints stem largely from the WPR's strictures which confine key congressional checks mainly to the initial stages of a conflict. With congressional authorization, such checks considerably diminish. The President is required only to convey information routinely to Congress and seek its advice. Congress would have to reach a consensus, and ply other legislative means, should it seek to control the direction of combat. Then, Congress is disadvantaged over the course of a conflict when the central issues become the terms of a settlement, protecting U.S. forces in country, or ensuring an orderly or phased troop withdrawal. Congress lacks the access, presence, and information—much less constitutional authority—to lead on these issues. Congressional efforts are encumbered further by changing stakes which favor staying the course. U.S. credibility and honor are reputedly at risk once the United States commits to battle, whatever the goals that justified intervention. Indeed, Congress—if choosing to rescind its authorization for a military operation—could place itself in a weaker political and constitutional position. Republicans have argued that recent efforts to repeal the authorizations used as legislative cover by successive presidents could backfire if not replaced with new authorizations. By this, the Congress would tacitly cede constitutional authority to the President by allowing military operations to continue without formal legislative support. Only once—in 1983, for Lebanon—did Congress pass a resolution that constrained an ongoing military operation. Even then, the resolution was negotiated with the Reagan administration. Members of both parties generally believed that, under the circumstances, their options were limited. To quote one senior Democratic House member, "Staying in is bad, but leaving is worse."[86]

Yet presidents can engineer conditions from the start to constrain congressional latitude to act. They can frame the mission—potentially with public support (via a "rally 'round the flag" effect)—to suggest that congressional action amounts to "interference" and the abandonment of some critical goal. Reagan sold the Grenada mission, for example, as a quick operation to rescue Americans in country.[87] A President can also play to a sense of threat—as in the Gulf of Tonkin, and the prelude to the 2003 Iraq War—to secure authorization before the "facts" are known or reality tested. Indeed, a President can place forces in harm's way or instigate conflicts—as in the Tonkin Gulf—to create realities that soften congressional resistance.[88] Congress is left finally to focus its concerns on presidential laxness in fulfilling the WPR's reporting and consultation obligations.[89]

86. Quoted in Roberts, *supra* note 73.

87. Rubner, *supra* note 34, at 643.

88. Presidents can increase US forces incrementally in a potential combat zone capitalizing on ambiguity in the WPR surrounding what constitutes a "substantial" US force-size increase.

89. Eileen Burgin, *Congress, the War Powers Resolution, and the Invasion of Panama*, 25 POLITY 217, 227-229 (1992).

The challenge to Congress stems in part from the WPR's deficient drafting. The resolution conceded "declare-war" authority by allowing the President to determine whether existing conditions should trigger section 4(a)(1) of the resolution; by giving the President a 60 to 90-day period to exercise broad discretion;[90] and by requiring that a President only consult with Congress—and then only "in every possible instance"—before committing U.S. forces to combat. Thereby "pressured to produce a bill, House and Senate conferees fashioned a compromise" that ended up widening Presidential power.[91] As one legal scholar lamented, the WPR "has had the unfortunate effect of creating the perception that the constitutional authority is subject to distributive bargaining between the executive and legislative branches."[92] The unintended effect—albeit anticipated at the time by various legislators[93]—was to increase Executive power by giving the President latitude to act unchecked, around the world, over an extended period. Walter Dellinger, when serving in the OLC in the Clinton administration, argued accordingly that Congress *deliberately* gave the President the authority to engage in low-level hostilities for brief periods[94]—indeed, that the WPR set a *precedent* of sorts in recognizing "unilateral presidential authority" to send U.S. forces into hostilities.[95]

Congressional leverage was further damaged, of course, with the Supreme Court decision in *INS v. Chadha*. Once the Congress was denied a "legislative veto," the WPR could no longer substitute for Congress's own inability, or unwillingness, to use its funding powers to block a presidential war. War opponents were placed in the extremely difficult position of having to muster a two-thirds majority, in both houses, to override a presidential veto. Absent the (likely) bipartisan majority necessary to override a veto, the President had essentially acquired *declare-war* authority. The distinction between declaring war and making war had narrowed—though in a manner that fundamentally contravened the Framer's intent.

In sum, we can viably attribute congressional behavior to explanations other than congressional deference. The latter is too easily inferred from consistency in congressional behavior.

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90. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (1973). Whereas the Senate version (with a longer, 120-day permissive period) explicitly outlined the emergency conditions under which presidents could act unilaterally, the shorter permissive period of the House version, minus the Senate stipulations, shaped the final draft. War Powers Resolution, H. J. Res. 542, 93rd Cong. (1973); War Powers Act of 1973, S. 440, 93rd Cong. (1973).

91. Louis Fisher & David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, 113 POL. SCI. Q. 1, 3 (1998).

92. Michael A. Newton, *Inadvertent Implications of the War Powers Resolution*, 45 CASE W. RSRV. J. INT'L L. 173, 187 (2012).

93. Fisher & Adler, *supra* note 91, at 5.

94. Lori Fisler Damrosch, *The Clinton Administration and War Powers*, 63 L. & CONTEMP. PROBS. 125, 133-34 (2000).

95. Fisher & Adler, *supra* note 91, at 11.

IV. THE LIMITS OF PRECEDENTIAL ARGUMENTS

We see, then, that the case for unfettered presidential war powers weakens significantly under social-scientific scrutiny. Indeed, it provides many reasons to conclude that the alleged constitutional precedents are grounded in politics.[96]

First, the executive branch implicitly acknowledges, through its arguments and actions, that its "precedents" are politically motivated. Their primary audience is Congress, not the judicial branch. Indeed, administrations have consistently chosen to avoid Supreme Court adjudication of war-powers disputes. The executive intent, through precedents, is to endow presidential actions with an aura or patina—critics might say, "fig leaf"—of constitutional authority. For that purpose, administrations offer "plausibly" valid justifications for executive encroachments on legislative prerogatives. Congress is left to adjudicate executive claims at a political disadvantage: incentives press legislators to avoid showdowns on issues of national security and to invest in other issues.

Second, the weak structural integrity of alleged precedents exposes their political underpinnings. They arguably amount to a jumble of legal, factual, and self-referential assertions—crafted to encompass the case de jour, to enable executive action, and less to reflect a consistent set of standards and principles that anticipate a current application.[97] The 2008 report of the bipartisan War Powers Commission was thus correct in its fundamental judgment that "historical practice provides no decisive guide."[98] That is, "it is hard to find a 'golden age' or an unbroken line of precedent in which all agree the Executive and Legislative Branches exercised their war powers in a clear, consistent, and agreed-upon way."[99]

Scattershot claims might increase the probability of generating viable arguments; but the compiling of weaker or specious arguments can also taint the stronger ones. If, for instance, a general statement of constitutional principle applied, presidents need not lean on factual resemblances between a current and "precedential" case. By arguing the facts, then, administrations indicate backhandedly that an encompassing rule that covers the case is less than compelling, and that the logic was contrived for a political purpose.

Third, events that inspire alleged "precedents" are open to politically inspired interpretations.[100] Take, for instance, the alleged precedent set by the George H.W. Bush Administration, when it sent U.S. troops to Somalia. What precedent

96. *See* Burns, *supra* note 78 and Zeisberg, *supra note* 30, at 222-261.

97. After all, judgments pertaining to precedential claims, given the enormous stakes and vague constitutional text, must be held to a high standard. *See generally* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 430-31 (2012).

98. JAMES A. BAKER, III & WARREN CHRISTOPHER, THE NATIONAL WAR POWERS COMMISSION REPORT 6 (2008).

99. *Id*. at 6. For a critique of the Commission's findings, see Louis Fisher, *The Baker-Christopher War Powers Commission* 39 PRESIDENTIAL STUD. Q. 128 (2009).

100. The interpretive latitude afforded administrations allows political needs to determine the meaning given to past cases. Precedent setting is impaired "when the relevance of an earlier precedent depends on how we characterize the facts arising in the earlier case." Schauer, *supra* note 12, at 577.

did the administration set? That a President can commit U.S. troops unilaterally to a *limited* humanitarian mission? Such a mission but only with UN support? Or, that a President can generally commit troops to a humanitarian mission—maybe even a combat mission—whatever its scale or multilateral support? Interested observers can choose, then, whether the Somali operation created a "small" or "big" precedent.

Finally, the case for the primacy of politics is strengthened by an inherent contradiction: precedents arise from the neglect or defiance of precedent. That is, precedents cannot explain the establishment of precedents. Precedents governing war powers arise when U.S. leaders believe—perhaps for political reasons—that some "new" understanding of constitutional rules, the facts, or prior legislative action is required.

That strong evidence thus backs the conclusion that politics inspires alleged precedents is hardly surprising. The vagueness of the constitutional text created a tension between the branches that they could resolve only through a political process.[101] The separation of powers was, in fact, predicated on the principle "that the branches jealously guard their powers and fight off any other branch that encroaches."[102] That Congress, however, has strong legal and intellectual grounds to deflect such encroachments, and *does not*, is the most telling part of a story that most certainly involves some degree of legislative consent. But what is the source of such deference?

To answer that question, we must also acknowledge assumptions—shared widely *across government*—concerning the requisites of U.S. security. The postwar demands of addressing the Soviet challenge, strengthened the notion across the U.S. government that a large, permanent, and vigilant military establishment—housed within the executive branch—was essential to U.S. security. Congress was widely supposed too unwieldy, uninformed, and political a body to make all-important security decisions requiring quick and decisive action against a diverse—indeed, existential—global threat.[103]

Yet even these assumptions fail to explain the major concessions of authority by the legislature when it perceives threats to U.S. security. On these occasions, Congress has given presidents a wide berth to act without much concern for protecting constitutional prerogatives. The claim, by Truman, that he could act under U.N. Security Council's auspices in Korea, absent congressional authorization, represented a brazen affront to congressional "declare war" powers. His seeming insouciance was met in the main, however, by congressional passivity.[104] In Vietnam, Afghanistan, and Iraq (in 1964, 2001, and 2002, respectively), Congress gave the executive great latitude to act—absent a consensus, even

101. Zeisberg, *supra* note 30, at 222-261.

102. Burns, *supra* note 78, at 222.

103. On this position, see BRIEN HALLETT, DECLARING WAR: CONGRESS, THE PRESIDENT, AND WHAT THE CONSTITUTION DOES NOT SAY 4-6 (2012).

104. Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 34 (1995).

within the executive branch, about the appropriate response to the threats. The President thus had a mandate for action, with critical questions left answered. Could the United States depend on the Saigon government to achieve stability much less carry the burden of fighting? Would victory in Vietnam require addressing the insurgent threat in South Vietnam, whatever the involvement of Hanoi? Would an end to the fighting represent but a lull until North Vietnam or the Viet Cong took the offensive? What would come after the United States disposed of the regimes in Iraq and Afghanistan? Might removing these regimes simply set the stage for the next phase of fighting? Would the timing and costs of a U.S. departure ultimately depend, in all three countries, on the U.S. capability to engage in "nation-building?" If so, how easily could the United States surmount the various impediments—corruption, lack of professionalism, poverty, and conflicting loyalties—to achieving stability in these countries?

That Congress recognized the Tonkin "events" as a cause for war stemmed from a broad consensus that the United States was engaged in an existential global battle with Communism. Given the prevailing view that a Communist win anywhere would reverberate everywhere, Congress might have "declared war" at Lyndon Johnson's request, even without the alleged provocation. How else to explain the open-ended provisions of the related resolution which could justify almost any U.S. action, in virtually any part of the world? A strong sense of threat was also behind Congress's 2002 Iraq-war authorization. The Bush administration could play on fears of Iraqi WMD, stoked by the 9-11 events and a conflation of nefarious global forces. Iraq, as an alleged "rogue-state" was implicitly aligned with other such states—an "axis of evil"—that shared interests with terror groups that sought to do the United States harm. The case was sufficiently strong to convince prominent Democrats—Hillary Clinton among them—to join Republicans in support of the Bush administration.

To be sure, the 2001 AUMF lacked the bloated content of the Iraq resolution. Its sparseness testifies to the clarity of the case (and seeming rectitude and directedness of the U.S. cause) against al-Qaeda and those who harbored the terrorist group. Aimed at those who participated in *one* set of attacks, on a specific day, the authorization nonetheless provided successive administrations with wide latitude to act.

The eventual stretching of the authorization was predictable. Concerns over the authorization's open-endedness were expressed in the drafting process.[105] That it passed regardless, and remains in force, speaks more to an interbranch understanding concerning the requisites of U.S. security than to an acceptance by Congress of its subordinate role on matters of security.

CONCLUSION

Thus, the war-powers debate centers excessively on legalistic arguments—whether the U.S. Constitution grants war powers to *either* the executive or the legislative branch and whether practice has resolved textual ambiguities concerning the power distribution. But how easily can we separate our thinking about executive

105. Schonberg, *supra* note 75, at 117-118.

prerogatives in matters of war from the prevailing assumption that U.S. security—in general or on specific occasions—hinges on a strong and unfettered executive to address national-security threats? Conversely, how easily can we separate our thinking about executive excesses in matters of war from widespread concerns that the costs of war have increased beyond control or that the risks of escalation are excessive? Although Congress has allowed successive administrations, for instance, to pursue "drone warfare" relatively unhindered, it has balked when fearing—as with the Soleimani killing in Iraq—that pilotless warfare could trigger a larger conflict.

It is no accident that Congress passed the War Powers Act, cut military aid to the Saigon government, and halted U.S. bombing in Southeast Asia within months of signing the 1973 Paris Peace Agreement. It is also no accident, more recently, that the Democratic-controlled House—*in 2021*—finally voted with support from 49 Republicans—to repeal the military authorizations for the *first* Gulf War along with an Eisenhower-era authorization meant to support operations in the Middle East. Or that, when the House in the same year voted to repeal the 2002 authorization for the second Gulf War, the effort proceeded with support from the Biden administration.[106] Or that the House was not prepared to repeal the 2001 AUMF, used to authorize U.S. counter-terror operations worldwide and the still ongoing U.S. war in Afghanistan, though an administration could employ the AUMF—as the Obama administration did[107]—as legislative backing for U.S. operations *in Iraq*. Or that bipartisan Congressional efforts to revise the WPR to make it more restrictive in its wording and timelines, and less open to executive interpretation, gained strength with the pending U.S. exit from Afghanistan,[108] but efforts to replace the 2001 authorization sputtered with issues raised by the hasty U.S. withdrawal from that country.[109]

Does this not suggest that current thinking about the allocation of constitutional war powers reflects a reinterpretation of text to *suit the current threat environment*? In other words, does our reading of powers "under the Constitution" derive, instead, from a *prevailing* view of the requisites of national security, which is also open, then, to revision and dispute? If so, the issue for Congress is not whether it has the authority to act, the issue is whether it has *reason* to act, contrary to presidential wishes or efforts.

Put simply, "what Congress has given, Congress can also take back."[110] For that purpose, it could even allege "precedents" of its own. Whether it will do so, of course, is another matter.

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106. Karoun Demirjian, *House Votes to Repeal 2002 Authorization for Military Force with Strong Bipartisan Support and a White House Endorsement*, WASH. POST (June 17, 2021, 4:07 PM), https://perma.cc/YJC6-LF6X.

107. Charlie Savage, *Obama Sees Iraq Resolution as a Legal Basis for Airstrikes Official Says*, N.Y. TIMES (Sept. 12, 2014), https://perma.cc/ER7V-DHTY.

108. Karoun Demirjian, *Bipartisan Bill Aims to Assert Congress's Power Over Arms Sales, Emergencies and Military Operations*, WASH. POST (July 20, 2021, 3:02 PM), https://perma.cc/5EAA-RDS2.

109. Andrew Desiderio, *Afghanistan Politics Imperils Effort to Claw Back 2001 War Powers*, POLITICO (Sept. 23, 2021, 12:44 PM), https://perma.cc/8RN8-JJE2.

110. Carter, *supra* note 47, at 124.