

## The University of New Hampshire Law Review

---

Volume 12  
Number 2 *University of New Hampshire Law Review*

Article 4

---

January 2014

# Where's the Consultation? The War Powers Resolution and Libya

Eileen Burgin  
*University of Vermont*

Follow this and additional works at: [https://scholars.unh.edu/unh\\_lr](https://scholars.unh.edu/unh_lr)

 Part of the [International Law Commons](#), [International Relations Commons](#), [Military, War, and Peace Commons](#), [Near and Middle Eastern Studies Commons](#), and the [Transnational Law Commons](#)

---

### Repository Citation

Eileen Burgin, *Where's the Consultation? The War Powers Resolution and Libya*, 12 U.N.H. L. REV. 175 (2014), available at [http://scholars.unh.edu/unh\\_lr/vol12/iss2/4](http://scholars.unh.edu/unh_lr/vol12/iss2/4)

This Article is brought to you for free and open access by the University of New Hampshire – School of Law at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in The University of New Hampshire Law Review by an authorized editor of University of New Hampshire Scholars' Repository. For more information, please contact [ellen.phillips@law.unh.edu](mailto:ellen.phillips@law.unh.edu).

# Where's the Consultation? The War Powers Resolution and Libya

EILEEN BURGIN\*

## CONTENTS

I.	INTRODUCTION.....	176
II.	THE WPR IN BRIEF.....	178
	A. Consultation in the WPR.....	179
	B. Other Key WPR Provisions: Reporting and Congressional Action .....	182
III.	FURTHER REFLECTIONS ON CONSULTATION .....	183
	A. Consultation and the Constitution .....	184
	B. Why Collective Judgment Requires Consultation .....	185
	C. Additional Benefits of Consultation .....	186
	D. Congressional Responses to Presidential Violations of Section 3 Over the Years .....	187
IV.	THE LIBYA CRISIS: A BRIEF RECAP OF RELEVANT EVENTS .....	189
V.	THE NEXUS BETWEEN THE WPR'S CONSULTATION PROVISIONS AND U.S. ACTIONS IN LIBYA .....	192
	A. Presidential Non-Compliance with the Consultation Mandate .....	193
	B. Congressional Response: Acquiescence and Passivity.....	196
	C. Summary Comments on Compliance with Section 3 .....	200
VI.	EXPLORING CONGRESS'S INATTENTION TO CONSULTATION DURING THE LIBYA CRISIS .....	202
	A. Timing: Congressional Recess .....	203
	B. The Libya Mission Itself.....	205
	C. The 112th Congress .....	207
	D. What Real Consultation Would Entail: Members Acting Counter to Inherent Political Incentives .....	210
	E. Concluding Remarks on the Congressional Silence .....	212
VII.	SYRIA, CONSULTATION, AND THE CONGRESSIONAL REACTION .....	212
VIII.	LOOKING AHEAD.....	215

---

\* Associate Professor, University of Vermont. I appreciate the time my interviewees spent with me, sharing their reflections and insights. Thanks also to George Young and Philip Burgin-Young for their helpful comments on my first draft of this Article. And finally, this Article benefitted from discussions I have had over the years with students in my Congress and Foreign Policy seminar.

## I. INTRODUCTION

President Barack Obama triggered a War Powers Resolution (WPR)<sup>1</sup> controversy with his military response to the anti-government rebellion and civil war in Libya in 2011.<sup>2</sup> Members of Congress seized upon the WPR, questioning whether the Obama administration had complied with the WPR's requirements when the United States launched the initial Libyan Operation Odyssey Dawn (OOD) and subsequently participated in the North Atlantic Treaty Organization (NATO) Operation Unified Protector (OUP). Many legislators charged that President Obama had violated the WPR.<sup>3</sup> Concerns centered on such issues as presidential reliance on the United Nations (U.N.) Security Council—rather than Congress—for authorization to act, the WPR's relevance to what some perceived to be humanitarian missions, our nation's role in a larger NATO operation, the Obama administration's definition of "hostilities" under the WPR, and the expiration of the WPR's sixty-day clock (requiring the termination of military involvement).<sup>4</sup> As debate raged about these and other matters, the WPR's

---

1. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–48).

2. The Obama administration articulated various explanations and justifications of its response to the Libya crisis over time. *See, e.g.*, Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya, 2011 Daily Comp. Pres. Doc. 193 (Mar. 21, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/21/presidential-letter-libya> [hereinafter Commencement of Military Operations Against Libya]; President Barack Obama, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011) [hereinafter Address to the Nation on Libya], *available at* <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya>; Memorandum Opinion from Caroline D. Krass, Principal Dep'y Asst. Att'y Gen., Office of Legal Counsel, to Eric Holder, Att'y Gen. (Apr. 1, 2011) [hereinafter Krass Memorandum], *available at* [www.justice.gov/olc/opiniondocs/authority-military-use-in-libya.pdf](http://www.justice.gov/olc/opiniondocs/authority-military-use-in-libya.pdf); Letter from President Barack Obama to John Boehner, Nancy Pelosi, Harry Reid & Mitch McConnell (May 20, 2011) [hereinafter Letter on Efforts in Libya], *available at* [http://www.nytimes.com/2011/05/21/world/africa/21libya-text.html?\\_r=0](http://www.nytimes.com/2011/05/21/world/africa/21libya-text.html?_r=0).

3. *See, e.g.*, 157 CONG. REC. S1963–64 (daily ed. Mar. 30, 2011) (statement of Sen. Rand Paul); 157 CONG. REC. H4015 (daily ed. June 3, 2011) (statement of Rep. Barney Frank); 157 CONG. REC. H4017 (daily ed. June 3, 2011) (statement of Rep. Brad Sherman); 157 CONG. REC. H4019 (daily ed. June 3, 2011) (statement of Rep. Jeff Miller); 157 CONG. REC. S3744 (daily ed. June 14, 2011) (statement of Sen. Mark Udall).

4. *See, e.g.*, 157 CONG. REC. S1951 (daily ed. Mar. 30, 2011) (statement of Sen. John Ensign); 157 CONG. REC. H2111 (daily ed. Mar. 31, 2011) (statement of Rep. Tom McClintock); 157 CONG. REC. H4001 (daily ed. June 3, 2011) (statement of Rep. Barbara Lee). *See also* Angie Holan & Louis Jacobson, *Are U.S. Actions in Libya Subject to the War Powers Resolution? A Review of the Evidence*, POLITIFACT.COM (June 22, 2011, 11:38 AM), <http://www.politifact.com/truth-o-meter/article/2011/jun/22/are-us-actions-libya-subject-war-powers-resolution/>; Jonathan Broder & Seth Stern, *Obama Faces Criticism Over War Powers Resolution Interpretation*, CQ WKLY., June 27, 2011, at 1368–69.

consultation provisions failed to attract serious congressional scrutiny.<sup>5</sup>

Consultation, however, is at the WPR's core and the prerequisite for the law's stated goal that military ventures be based on the "collective judgment" of both Congress and the President.<sup>6</sup> Thus, this Article concentrates on the subject of consultation and its glaring absence from the congressional conversation during the Libya crisis. After providing background on the WPR generally, the consultation requirement more specifically, and the U.S. response to the violence in Libya during the Libyan Revolution, I examine President Obama's disregard for the consultation mandate's letter and spirit. I then explore Congress's muted response to the administration's consultation violations, analyzing why the administration's non-compliance did not spark greater congressional outrage. The congressional reaction to President Obama's initial failure to consult on U.S. policy in Syria in August 2013, I also show, conforms to the analysis here. Finally, I consider what this study suggests for the future of the WPR's consultation obligation. This Article hence highlights a specific WPR topic—consultation—that heretofore has received neither dedicated nor significant scholarly attention.<sup>7</sup>

To supplement my primary and secondary source research, I sought insiders' perspectives on the relevance of the WPR in the Libya crisis. This Article draws on informal discussions that I had with a dozen key staff

---

5. Cf. *Operation Odyssey Dawn and U.S. Military Operations in Libya: Hearing Before the H. Comm. on Armed Servs.*, 112th Cong. 9 (2011) [hereinafter *Hearing on Operation Odyssey Dawn*] (featuring discussion between Rep. Adam Smith, ranking member of the House Armed Services Committee, and Hon. Robert Gates, Secretary of Defense), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hrg65802/pdf/CHRG-112hrg65802.pdf>.

6. See 50 U.S.C. § 1541(a) (2006) (discussing the law's goal of achieving "collective judgment").

7. Works on the WPR abound, but do not focus on consultation. See, e.g., BRIEN HALLETT, *DECLARING WAR: CONGRESS, THE PRESIDENT, AND WHAT THE CONSTITUTION DOES NOT SAY* (2012); RYAN HENDRICKSON, *THE CLINTON WARS: THE CONSTITUTION, CONGRESS, AND WAR POWERS* (2002); WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS* (2007); Timothy S. Boylan & Karen M. Kedrowski, *The Constitution and the War Power: What Motivates Congressional Behavior?*, 30 *ARMED FORCES & SOC'Y* 539 (Summer 2004); Eileen Burgin, *Rethinking the Role of the War Powers Resolution: Congress and the Persian Gulf War*, 21 *J. LEGIS.* 23 (1995); John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 *COLUM. L. REV.* 1379 (1988); Louis Fisher, *The Baker-Christopher War Powers Commission*, 39 *PRESIDENTIAL STUD. Q.* 128 (2009); Louis Fisher & David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, 113 *POL. SCI. Q.* 1 (1998), available at <http://www.constitutionproject.org/wp-content/uploads/2012/09/430.pdf>; Glenn A. Phelps & Timothy S. Boylan, *Discourses of War: The Landscape of Congressional Rhetoric*, 28 *ARMED FORCES & SOC'Y* 641 (Summer 2002); Robert F. Turner, *The War Powers Resolution at 40: Still an Unconstitutional, Unnecessary, and Unwise Fraud That Contributed Directly to the 9/11 Attacks*, 45 *CASE W. RES. J. INT'L L.* 109 (2002); Michael Benjamin Weiner, Note, *A Paper Tiger with Bite: A Defense of the War Powers Resolution*, 40 *VAND. J. TRANSNAT'L L.* 861 (2007).

people, including Democratic and Republican aides in leadership offices, on pertinent committees (often in leadership positions), and in the personal offices of those integrally involved in the Libya debate.

## II. THE WPR IN BRIEF

The Constitution created a so-called invitation to struggle between Congress and the President on war powers (and other foreign policy) issues.<sup>8</sup> The executive branch seemed to prevail in the consequent “tug for more of the foreign policy blanket”<sup>9</sup> on military matters, particularly after the Korean conflict, despite having fewer and less substantial war powers prerogatives than Congress.<sup>10</sup> To reassert its authority, Congress approved the WPR over President Richard Nixon’s veto in 1973.<sup>11</sup> The WPR’s objective is “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.”<sup>12</sup> The law requires that Congress be involved in decision making from before the takeoff and through the landing via three principal procedures: presidential consultation with Congress, executive reports to Congress, and congressional action regarding military initiatives.<sup>13</sup> Consultation is the foundation in this co-determination formula.<sup>14</sup> Presidential consultation with Congress, especially prior to troop deployment, ensures that the legislative branch helps

---

8. See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957* (4th ed. 1957).

9. Louis Henkin, *Foreign Affairs and the Constitution*, 66 FOREIGN AFF. 284, 285 (1987).

10. See MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990). In considering Congress’s war powers, Glennon argues that the President’s powers “are paltry in comparison with, and are subordinate to, [the] grants to Congress.” *Id.* at 72. See also THE FEDERALIST NO. 69, at 418 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stressing that the President is less threatening than the British king, for it is Congress’s power, not the President’s, which “extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies”) (emphases in original). This is not to imply, of course, that differing interpretations of the war power do not exist. See generally HALLETT, *supra* note 7; ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: THE ORIGINS* (1976); David Gray Adler, *The Constitution and Presidential Warmaking: The Enduring Debate*, 103 POL. SCI. Q. 1 (1988); J. Terry Emerson, *The War Powers Resolution Tested: The President’s Independent Defense Power*, 51 NOTRE DAME L. REV. 187 (1975).

11. See Veto of the War Powers Resolution, 5 Pub. Papers 893 (Oct. 24, 1973).

12. 50 U.S.C. § 1541(a) (emphasis added). The WPR also identifies instances in which Presidents may introduce U.S. forces. See, e.g., 50 U.S.C. § 1541(c) (attempting to link executive use of force to Congress’s ability to declare war, a statutory authorization, or an attack on this country, its territories, or its military).

13. *Id.* §§ 1542–44.

14. See *id.* § 1542.

to establish the policy direction that affects all subsequent choices.<sup>15</sup> Consultation is not intended to substitute for formal congressional authorization to use force, but it is the first required WPR step.<sup>16</sup>

No President to date has fully accepted the WPR,<sup>17</sup> and Congress has never demanded execution of the law as written.<sup>18</sup> Nonetheless, the WPR remains the law of the land and a focal point for Congress as global events periodically catapult it into lawmakers' minds. Members have consistently questioned presidential military actions in the context of the WPR, because it establishes a framework for asserting legislative prerogatives and offers a foil for attacking a policy's substance.<sup>19</sup>

#### A. Consultation in the WPR

Consultation, in theory, enables Congress to influence the decision about whether, and how, to commence a military initiative.<sup>20</sup> According to Section 3 of the WPR,

The President in every possible instance shall consult with  
Congress before introducing United States Armed Forces

---

15. H.R. REP. NO. 93-287, at 7 (1973).

16. *But cf.* Fisher & Adler, *supra* note 7, at 3 (arguing that consultation under the WPR may unconstitutionally allow the President to commit troops without prior congressional authorization, thereby potentially subverting the underlying goal of collective judgment).

17. Every President since the WPR's enactment, in fact, has argued at some point in his tenure that the WPR unconstitutionally infringes upon the President's role as the Commander-in-Chief. *See* RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R42699, THE WAR POWERS RESOLUTION: AFTER THIRTY-EIGHT YEARS 6 (2012).

18. *See generally id.*

19. *See* Eileen Burgin, *Congress, the War Powers Resolution, and the Invasion of Panama*, 25 POLITY 217 (1992) (reviewing WPR-related activities of legislators in all major tests of the law through the 1989 Panama invasion). Notably, congressional action surrounding the WPR was extensive in every military operation in the WPR's early years—that is, 1973-1989—except for the 1989 Panama incursion. Even the 1986 bombing of Libya, the case prompting the least WPR activity other than Panama, sparked a noticeable response: legislators in 1986 introduced four measures regarding Libya and the WPR; the relevant House subcommittee held seven hours of hearings over three days; several members made floor statements; and two letters were sent to President Ronald Reagan, one from former House Foreign Affairs Committee Chairman Dante Fascell, and the other from a group of eight senators and representatives. *Id.* at 224. The congressional patterns established in the law's early years have continued. In the Persian Gulf War from 1990-1991, the multi-year involvement in Somalia beginning in 1992, the former Yugoslavia/Bosnia/Kosovo entanglement starting in 1992, the enforcement of the U.N. embargo against Haiti in 1993, the military endeavors prompted by the 9/11 terrorist attacks, and more, lawmakers have continually turned to the WPR to question presidential actions and assert Congress's constitutional powers. GRIMMETT, *supra* note 17, at 21-44.

20. H.R. REP. NO. 93-287, at 7.

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.<sup>21</sup>

Obvious textual ambiguities in Section 3, however, have allowed for divergent congressional and executive interpretations, compounding differences in perceived institutional interests that complicate consultation.

First, what constitutes consultation? The House Foreign Affairs Committee Report on the WPR underscores that consultation is not “synonymous with merely being informed,” and means instead “that a decision is pending” and that members “are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated.”<sup>22</sup> Nevertheless, the executive branch typically contends that it has fulfilled consultation obligations through notification after the fact, such as through informational briefings in which a *fait accompli* is presented and the counsel of legislators is not solicited.<sup>23</sup> When Presidents convene these meetings or conference calls, frequently they have already issued orders for military action.<sup>24</sup> And in terms of content, although “meaningful” consultation requires the full sharing of information,<sup>25</sup> “because information is power[,] . . . presidents and their aides are loath to share it.”<sup>26</sup>

---

21. 50 U.S.C. § 1542.

22. H.R. REP. NO. 93-287, at 7.

23. Burgin, *supra* note 19, at 233. For instance, officials in President Reagan’s administration took the position that they had consulted on the Grenada incursion, even though congressional leaders were not even informed of the imminent invasion until after President Reagan had issued the final order. See Michael Rubner, *The Reagan Administration, the 1973 War Powers Resolution, and the Invasion of Grenada*, 100 POL. SCI. Q. 627, 630–36 (1986). Similarly, in a televised address on the invasion of Panama, President George H. W. Bush stated, “I contacted the bipartisan leadership of Congress and informed them of [the] decision.” President George H. W. Bush, Address to the Nation at the White House (Dec. 20, 1989), available at <http://millercenter.org/president/speeches/detail/3422>. President Bush’s notification on the Panama mission took place just several hours prior to the invasion. See also RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 3–11 (2012).

24. In the Persian Gulf War, President George H. W. Bush went a step further. As his aides explained, “It’s true we’ve promised to consult Congress if there’s a war. In other words, we’ll phone them just after the first bombs have been dropped.” PIERRE SALINGER & ERIC LAURENT, SECRET DOSSIER: THE HIDDEN AGENDA BEHIND THE GULF WAR 176 (Howard Curtis trans.) (1991).

25. See H.R. REP. NO. 93-287, at 7.

26. Michael J. Glennon, Note & Comment, *The War Powers Resolution, Once Again*, 103 AM. J. INT’L L. 75, 77 (2009).

Second, what situations require consultation? Presidents have interpreted the language to consult “in every possible instance”<sup>27</sup> as a license to sidestep Section 3, because it allows them to claim that the exigencies of the moment prevented consultation.<sup>28</sup> Yet the House Report clarifies that the term “every” signifies that consultation “should apply in extraordinary and emergency circumstances”; the clause more broadly is meant to be “simultaneously *firm* in its expression of congressional authority” and “*flexible* in recognizing the possible need for swift action.”<sup>29</sup> Questions also surround the terms “hostilities” and “imminent involvement in hostilities,” as Presidents are required to consult prior to sending armed forces into such potentially dangerous environments.<sup>30</sup> The House Foreign Affairs Committee, during consideration of the WPR, substituted “hostilities” and “imminent hostilities” for “armed conflict,” deeming those terms to be “somewhat broader in scope” than “armed conflict.”<sup>31</sup> According to the House Foreign Affairs Committee Report,

In addition to a situation in which fighting actually has begun, *hostilities* also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. “*Imminent hostilities*” denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.<sup>32</sup>

Here too, though, Presidents have construed these terms more narrowly than Congress intended.<sup>33</sup>

Third, who represents Congress for consultation purposes? The WPR states that consultation should be with “Congress.”<sup>34</sup> The House-Senate Conference Committee chose this inclusive language rather than the House version that called for consultation with only party and relevant committee leaders.<sup>35</sup> Indeed, it is Congress, not a few senior lawmakers, that has the constitutional power to declare war.<sup>36</sup> The leadership, moreover, may not

---

27. 50 U.S.C. § 1542.

28. See, e.g., *The Situation in Iran: Hearing Before the S. Comm. on Foreign Rel.*, 96th Cong. iii (2d Sess. 1980) [hereinafter *Hearing on the Situation in Iran*].

29. H.R. REP. NO. 93-287, at 6–7 (emphases in original).

30. 50 U.S.C. § 1542.

31. H.R. REP. NO. 93-287, at 7.

32. *Id.* (emphases in original).

33. See GRIMMETT, *supra* note 17, at 7.

34. 50 U.S.C. § 1542.

35. See H.R. REP. NO. 93-547, sec. 3, at 2 (1973).

36. U.S. CONST. art. I, § 8, cl. 11.



even reflect the views of the larger congressional membership, as the debt ceiling and other recent crises have illustrated.<sup>37</sup> But the obligation to consult with “Congress” creates a logistical quandary of how to consult with 535 individuals. President George H. W. Bush underscored this challenge, along with his constitutional interpretation of the requirement, at a news conference regarding the Persian Gulf War: “I cannot consult with 535 strong-willed individuals. I can’t do it, nor does my responsibility under the Constitution compel me to do that.”<sup>38</sup>

#### B. Other Key WPR Provisions: Reporting and Congressional Action

The reporting and congressional action processes, located primarily in Sections 4 and 5 of the WPR, supply the mechanisms by which the law attempts to ensure congressional participation after a President’s initial decision to use force.<sup>39</sup> The President is enjoined, under Section 4(a), to submit a written report to the House Speaker and the Senate President pro tempore within forty-eight hours when, “in the absence of a declaration of war,” armed forces are sent into any one of three situations: (1) hostilities or imminent hostilities; (2) a foreign nation’s “territory, airspace or waters” while “equipped for combat”; or (3) in numbers substantially enlarging pre-existing forces “equipped for combat” in a foreign country.<sup>40</sup> The report must explain the conditions compelling military use, the constitutional and legislative basis for taking action, and the mission’s estimated scope and duration.<sup>41</sup> While troops remain in hostile or potentially hostile situations, the President is obliged to periodically report to Congress,<sup>42</sup> just as he was instructed to consult regularly.<sup>43</sup>

The Section 4(a)(1) reporting requirements—addressing situations in which troops are introduced into hostilities or imminent hostilities—relate to congressional action in Section 5.<sup>44</sup> Most notably, the Section 4(a)(1) reporting mandate launches the Section 5(b) time limitation, which stipulates that within sixty days after a Section 4(a)(1) report is “submitted or is required to be submitted,” the President must end deployment of forces

---

37. See THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 3–30 (2012).

38. President George H. W. Bush, News Conference at the White House (Nov. 30, 1990), available at <http://www.presidency.ucsb.edu/ws/?pid=19119#axzz2jcWmeXyE>.

39. 50 U.S.C. §§ 1543–44.

40. *Id.* § 1543(a).

41. *Id.*

42. *Id.* § 1543(c).

43. *Id.* § 1542.

44. *Id.* § 1544(b).

unless Congress has declared war, has authorized the action, has extended the sixty-day period, or cannot convene because of an attack on the United States.<sup>45</sup> Section 5(b) does allow for the sixty-day period to be lengthened by thirty days if necessary for troop removal.<sup>46</sup> Presidential failure to label a report under Section 4(a)(1) technically does not invalidate the clock-triggering process, because the time limitation takes effect simply if a Section 4(a)(1) report was required.<sup>47</sup> Nevertheless, Presidents generally have argued that by reporting to Congress “pursuant to” or “consistent with” the WPR, the clock does not start ticking.<sup>48</sup> Most joint resolutions authorizing the use of force since 1973 have been Section 5(b) statutory authorizations under the WPR.<sup>49</sup> Finally, according to Section 5(c), Congress may terminate military involvement at any point by passing a concurrent resolution.<sup>50</sup>

These Section 4 and 5 provisions, relevant once an operation has commenced, are intended to keep Congress informed about an ongoing military venture and place emphasis on authorization after the fact or on the cessation of hostilities.<sup>51</sup> (In theory, the clock also may offer Congress a mechanism by which to punish an administration for inadequate consultation.) Congressional focus on Sections 4 and 5 tends to immerse members in process-related questions and issues of institutional prerogatives *during* a military mission. Thus, even if faithfully observed, in contrast to Section 3, the procedures set forth in Sections 4 and 5 do not facilitate the two branches making joint policy choices about military involvement.

### III. FURTHER REFLECTIONS ON CONSULTATION

Part III explores consultation in greater depth. I consider the constitutional basis for the WPR’s Section 3 requirements, why consultation

---

45. 50 U.S.C. § 1544(b).

46. *Id.*

47. *Id.*

48. And in the one venture in which a President explicitly referred to Section 4(a)(1), the clock was irrelevant because U.S. forces were already withdrawing. *See* Letter from President Gerald Ford on U.S. Actions in the Recovery of the SS Mayaguez, to the Speaker of the House and the President Pro Tempore of the Senate (May 15, 1975) (on file with the Pub. Papers of the Presidents).

49. *See, e.g.*, Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991).

50. 50 U.S.C. § 1544(c). *See also* *INS v. Chadha*, 462 U.S. 919, 970–71 (1983). Because *Chadha* cast doubt on the validity of the WPR’s concurrent resolution, Congress passed legislation in 1983, substituting a joint resolution for the concurrent resolution. Although not amending the WPR, this measure offers procedures that can be invoked should the Supreme Court specifically strike down § 1544(c) of the WPR.

51. *See generally* H.R. REP. NO. 93-287, at 7–12.

is a necessary component of collective judgment, the inherent benefits of consultation, and legislators' protests when executives have consistently sidestepped the consultation mandate in prior military interventions.

#### A. Consultation and the Constitution

The WPR's Section 3 consultation provisions flow from Congress's Article I powers.<sup>52</sup> Most pertinent are Congress's Article I, section 8, national security powers (to "declare War," to "raise and support Armies," to "provide and maintain a Navy," to "make Rules for the Government and Regulation" of the armed forces, and to "provide for calling forth the Militia"),<sup>53</sup> the necessary and proper clause,<sup>54</sup> and the power of the purse.<sup>55</sup> Congress's power to raise and support armies, for instance, indicates the framers' intentions that instead of maintaining large standing armies during peace, armies would be raised at Congress's direction for war.<sup>56</sup> Hence, for a President to engage the nation in hostilities, consultation would be essential because of executive dependence on Congress for troops. According to a U.S. District Court in *Davi v. Laird*,<sup>57</sup> "the Founding Fathers envisioned congressional power to raise and support military forces as providing that body with an effective means of controlling presidential use thereof."<sup>58</sup> Early exercises of Congress's war powers also suggest that the powers "extend to establishing the scope of hostilities."<sup>59</sup> Even Harold Koh (who, as President Obama's State Department legal advisor, championed the controversial and narrow definition of "hostilities" regarding Libya, as discussed below), contended in *Dellums v. Bush*<sup>60</sup> that "the structure and history of the Constitution . . . require that the President meaningfully consult with Congress . . . before engaging in war."<sup>61</sup> Koh underscored that individual lawmakers' "stray remarks" or "collateral legislative activity" that others might construe as "'acquiescence' in executive acts" does not constitute consultation.<sup>62</sup> Consequently, Section 3 may be viewed as a means by which

---

52. U.S. CONST. art. I, § 8.

53. *Id.*

54. *Id.*

55. *Id.*

56. See JENNIFER K. ELSEA, MICHAEL J. GARCIA & THOMAS J. NICOLA, CONG. RESEARCH SERV., R41989, CONGRESSIONAL AUTHORITY TO LIMIT MILITARY OPERATIONS 3–6 (2013).

57. 318 F. Supp. 478 (W.D. Va. 1970).

58. *Id.* at 480.

59. ELSEA, GARCIA & NICOLA, *supra* note 56, at 5.

60. 752 F. Supp 1141 (D.D.C. 1990).

61. Bruce A. Ackerman et al., Ronald V. Dellums v. George Bush (*D.D.C. 1990*): *Memorandum Amicus Curiae of Law Professors*, 27 STAN. J. INT'L L. 257, 261 (1991).

62. *Id.*

Congress can assert its constitutional prerogatives in the war powers invitation to struggle.<sup>63</sup>

#### B. Why Collective Judgment Requires Consultation

A pre-condition for co-determination is that both Congress and the President are fully engaged participants in the decision-making process. Through consultation, Congress becomes informed, addressing the natural imbalance of information between the branches, and then has the opportunity and venue to provide advice and counsel to the executive. Consultation when first determining whether to use force is critical, because that initial choice defines and constrains subsequent options. Without input on a possible military endeavor at the start, Congress may become prisoner of a *fait accompli* or may simply be presented with a crash landing. Once a mission is ongoing, disengaging may not be practical; it may affect allies who are relying on the United States, or it may be perceived to be more damaging than completing the mission. Questioning a President also becomes problematic because the rally-around-the-flag effect emerges and members run the risk of being charged with failing to support American troops. Once armed forces are in conflict, as Representative Dennis Ross (R-FL) lamented, “You can’t unscramble [the] egg.”<sup>64</sup>

No explicit constitutional power granted to Congress can substitute for consultation to achieve collective judgment. Congress’s appropriations power, for instance, is neither a replacement for consultation nor a magic wand; moreover, it is difficult to use, is a somewhat kludge tool, and has limited effectiveness. Cutting appropriations, or defeating funding for an ongoing venture, may not stymie a President from relying on pre-existing dollars to act militarily. To prevent the executive from transferring pre-existing funds to use for military conflict, Congress would need to pass legislation subject to a presidential veto, thus likely requiring a two-thirds super-majority in both chambers for an override, a tough hurdle to surmount.<sup>65</sup> The veto override obstacle also decreases the viability of

---

63. Beyond the scope of this Article, but noteworthy, some scholars question whether Section 3 unconstitutionally delegates congressional power to the President. *See, e.g.,* Fisher & Adler, *supra* note 7, at 3 (“Since [Section 3] empowers the president to introduce the troops into combat without prior congressional authorization, it . . . vests in the president authority that far exceeds his constitutional powers.”); Fisher, *supra* note 7, at 137 (“The Constitution is not designed to ensure that Congress will be ‘consulted’ before the president initiates war. It is written to place singularly in the hands of Congress the decision to take the country from a state of peace to a state of war.”).

64. Sean Sullivan, *A New Twist in GOP Views on Military Intervention*, NAT’L J., June 11, 2011, at 11.

65. *See* MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., R98157, CONGRESSIONAL

amending an appropriations bill to limit a President's permissible course of action if the President seeks to engage or continues engaging militarily.<sup>66</sup> The appropriations power, furthermore, cannot even facilitate future consultation regarding a military mission when a President, without consulting, initiates and quickly completes the operation. Congress can use the power of the purse in this situation to retaliate against an unrelated presidential endeavor, yet this does not remedy the problem or achieve collective judgment. Similarly, Congress employing its legislative prerogatives to rescind a military authorization when U.S. forces are in conflict, to establish a statutory deadline for terminating hostilities, or to enact a declaration of peace are not alternatives for consultation, and carry the added complication of a probable veto. The practical effect of such legislative actions is unclear, as well, if Congress keeps funding the military venture. Appropriation of funds may confer authority for executive military maneuvers in contraindication of other congressional measures.<sup>67</sup>

### C. Additional Benefits of Consultation

Beyond supplying a necessary component for collective judgment, consultation has other inherent benefits for a President and for U.S. policy more broadly. Former Senator Richard Lugar (R-IN), when serving as the ranking Foreign Relations Committee member, explained in a committee hearing that "going to war without Congress" is neither "wise" nor "helpful to the operation."<sup>68</sup> It is prudent to have Congress's support, because that provides protection for the executive and signifies that the American people are behind the mission. Politically, Representative Tom Cole (R-OK) argued that "getting Congress involved is simply smart politics. . . . 'Get as many fingerprints on the murder weapon as you can,' then everybody is on your side; they can't get away."<sup>69</sup>

---

OVERRIDES OF PRESIDENTIAL VETOES 2 (2004).

66. Ending a war, consequently, may essentially require a super-majority, whereas starting a war presumably requires only a majority.

67. Vietnam is the only case in which Congress repealed a military authorization during major combat operations. President Nixon responded by lowering U.S. troop numbers but continuing involvement until Congress stopped all funding for military missions in Indochina. See ELSEA, GARCIA & NICOLA, *supra* note 56, at 24–39.

68. *Libya and War Powers: Hearing Before the S. Comm. on Foreign Rel.*, 112th Cong. 4 (2011) [hereinafter *Hearing on Libya and War Powers*] (statement of Sen. Richard Lugar, ranking member, Senate Committee on Foreign Relations), available at [http://www.fas.org/irp/congress/2011\\_hr-libya.pdf](http://www.fas.org/irp/congress/2011_hr-libya.pdf).

69. Broder & Stern, *supra* note 4, at 1368–69.

#### D. Congressional Responses to Presidential Violations of Section 3 Over the Years

Despite the theoretical benefits of consultation, presidential circumvention of Section 3's letter and intent has been the norm.<sup>70</sup> Presidents may deem it easier in most instances to ask for forgiveness (if that becomes necessary), than to ask for permission through consultation. In response, lawmakers have scrutinized presidential non-adherence to the consultation mandate and have protested inadequate consultation.<sup>71</sup> Members have had ample opportunities to raise executive evasions of the consultation requirements over the years, given the routine violation of Section 3 and the frequency with which U.S. armed forces have entered situations of hostilities or imminent hostilities.<sup>72</sup> Legislators have utilized a full range of legislative actions (e.g., introducing and seeking to pass bills, resolutions, and amendments), and non-legislative actions (e.g., making floor speeches and substantive statements in hearings, writing letters to the executive and to fellow legislators, grandstanding, framing opinion, and filing lawsuits), in confronting White House non-compliance with the WPR.<sup>73</sup> The following four brief examples illustrate typical congressional responses to executive disregard for Section 3. As these examples demonstrate, although members generally assume a reactive approach, emphasizing the situation at hand, members also occasionally focus their efforts on how to ensure consultation in subsequent missions.

First, after President Jimmy Carter's 1980 hostage rescue attempt—undertaken with no prior consultation—the Senate Foreign Relations Committee (most notably) held hearings to rebuke the administration for its lack of consultation.<sup>74</sup> The Committee also briefly considered, but ultimately did not establish, guidelines regarding future consultation.<sup>75</sup> Second, the absence of consultation in President Ronald Reagan's Persian Gulf reflagging and escort operation triggered legislators' complaints about executive non-adherence and prompted the Senate to pass an amendment

---

70. See discussion *supra* Part II.A.

71. Burgin, *supra* note 19, at 223–31.

72. Presidents submitted 132 WPR reports to Congress from the passage of the WPR in 1973 through President Obama's final WPR report regarding Libya on June 15, 2011. See Eileen Burgin, *War Over Words: Reinterpreting "Hostilities" and the War Powers Resolution*, 28 *BYU J. PUB. L.* (forthcoming Fall 2014). The vast majority of these reports addressed situations of hostilities or imminent hostilities, thus suggesting that consultation should have occurred. See generally *id.*

73. Burgin, *supra* note 19, at 223–31.

74. See generally *Hearing on the Situation in Iran*, *supra* note 28.

75. *Id.* at iii.

requiring an extensive report *before* implementation of the U.S.-Kuwaiti reflagging agreement.<sup>76</sup>

Third, President George H. W. Bush's circumvention of the consultation mandate in the buildup to the 1990-1991 Persian Gulf War inspired multiple noteworthy congressional actions. Democrats and Republicans alike publicly chastised the President; even former Representative William Broomfield (R-MI), longtime friend of the President and ranking Foreign Affairs Committee member, "angrily charged that the administration's failure to consult more closely with key lawmakers 'is the main reason support for the policy is eroding.'" <sup>77</sup> And fear that the White House would commence a war without consultation while Congress was adjourned drove the House and Senate leadership to form a joint, bipartisan congressional consultation body for use during adjournment. Former House Foreign Affairs Committee Chairman, Dante Fascell (D-FL), explained,

[I]n our meetings with Bush [probably taking place because of the WPR] we asked him to set up such a consultative group on his own. We even told the administration to name whoever they wanted to be in the group, but the administration didn't act. . . . So the leadership took it on themselves to do it."<sup>78</sup>

Fourth, lawmakers' unease in 1995 over President Bill Clinton's consultation violations regarding Bosnia prompted numerous congressional actions. Members, for instance, made floor speeches on consultation,<sup>79</sup> sent letters (with GOP leadership support) to the President imploring him "to consult earnestly and forthrightly,"<sup>80</sup> inserted a conference committee provision into the FY 1996 Defense Department Appropriations bill requiring consultation before deploying armed forces to Bosnia,<sup>81</sup> and added a prohibition into the FY 1996 State, Commerce, and Justice Appropriations measure against using any of the bill's funds for sending troops to Bosnia

---

76. STAFF OF H. COMM. ON FOREIGN AFF., 101ST CONG., REP. ON CONG. AND FOREIGN POL'Y 1987 40-42 (Comm. Print 1989).

77. Carroll Doherty, *Uncertain Congress Confronts President's Gulf Strategy*, CQ WKLY., Nov. 17, 1990, at 3879-80.

78. Telephone interview with former Rep. Dante Fascell, Chairman, H. Comm. of Foreign Aff. (Aug. 25, 1993).

79. *See, e.g.*, 141 CONG. REC. 14271-72 (1995); 141 CONG. REC. 17517-18 (1995); 141 CONG. REC. 17525-26 (1995); 141 CONG. REC. 18679-82 (1995).

80. 141 CONG. REC. 14271-72 (1995).

81. The House rejected the conference report over matters unrelated to Bosnia. *See* GRIMMETT, *supra* note 17, at 31-32.

without advance congressional approval.<sup>82</sup> Displeasure over the status quo on consultation even motivated a group of senior congressional leaders to introduce proactive legislation to try to ensure future consultation.<sup>83</sup>

#### IV. THE LIBYA CRISIS: A BRIEF RECAP OF RELEVANT EVENTS

On February 23, 2011, in his first public remarks on the anti-government rebellion in Libya, President Obama indicated that he was considering a full range of options.<sup>84</sup> He imposed economic sanctions on Libya two days later.<sup>85</sup> On February 26, the U.N. Security Council acted by approving Resolution 1970, which demanded an end to the violence, and imposed an arms embargo on Libya and a travel ban and assets freeze on Muammar al Qadhafi's family.<sup>86</sup> The Senate responded, as well, by passing Senate Resolution 85 on March 1; the resolution condemned Libya's human rights violations and encouraged the U.N. to protect civilians.<sup>87</sup>

When this initial flurry of activity failed to improve the situation, international pressure mounted on Qadhafi. The U.N. Security Council adopted Resolution 1973 on March 17, establishing a no-fly zone in Libyan airspace, authorizing strong enforcement of Resolution 1970's arms embargo, and encouraging member states to protect civilians without occupying Libya.<sup>88</sup> President Obama commenced OOD on March 19 as the U.S. contribution to enforce a no-fly zone and safeguard civilians.<sup>89</sup> He reported to Congress on March 21, "consistent with" the WPR, that he had directed U.S. forces to act "with the support of European allies and Arab

---

82. *Id.*

83. *See, e.g.*, Peace Powers Act of 1995, S. 5, 104th Cong. (1995). The Peace Powers Act of 1995 would have repealed the WPR but re-enacted the WPR's consultation and reporting provisions.

84. President Barack Obama, Remarks by the President on Libya (Feb. 23, 2011) [hereinafter Remarks on Libya], available at <http://www.whitehouse.gov/the-press-office/2011/02/23/remarks-president-libya>.

85. Helene Cooper & Mark Landler, *U.S. Imposes Sanctions on Libya in Wake of Crackdown*, N.Y. TIMES (Feb. 25, 2011), [http://www.nytimes.com/2011/02/26/world/middleeast/26diplomacy.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/02/26/world/middleeast/26diplomacy.html?pagewanted=all&_r=0).

86. Press Release, U.N. Security Council, *In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protestors* (Feb. 26, 2011), <http://www.un.org/News/Press/docs/2011/sc10187.doc.htm>. The name of Muammar al Qadhafi is transliterated in various ways. This Article refers to him as Qadhafi, except when a quoted source spells his name differently.

87. 155 CONG. REC. S1068–69 (daily ed. Mar. 1, 2011).

88. Press Release, *Security Council Approves 'No-Fly Zone' Over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, By Vote of 10 in Favour with 5 Abstentions* (Mar. 17, 2011), <http://www.un.org/News/Press/docs/2011/sc10200.doc.htm> [hereinafter *No-Fly Zone*].

89. *See* Commencement of Military Operations Against Libya, *supra* note 2.



partners” as part of an international effort authorized by the U.N. Security Council.<sup>90</sup> He further claimed that the air strikes were taken pursuant to his “constitutional authority,” and were to be limited in “nature, duration, and scope.”<sup>91</sup> In his March 28 national address, President Obama reiterated the objectives of establishing a no-fly zone, stopping Qadhafi’s forces, and responding to the humanitarian crisis.<sup>92</sup> NATO assumed (at least nominal) command of coalition military operations on March 31 with the start of OUP.<sup>93</sup>

The Justice Department’s Office of Legal Counsel (OLC) issued a memorandum opinion on April 1 that President Obama’s use of force was constitutional because he “could reasonably determine” that it was in the “national interest,” and that prior congressional approval was not required for the “limited operations under consideration.”<sup>94</sup> The administration also suggested that congressional prerogatives were not implicated for several reasons: (1) U.S. participation in OUP was limited, and becoming progressively more so; (2) the intervention was unlikely to expose Americans to attack, especially given the mission’s reliance on missiles and drones; and (3) the operation was likely to end quickly, and the WPR permits the executive “to use force for up to 60 days without congressional approval.”<sup>95</sup> While President Obama was claiming the absence of “hostilities,” however, the Pentagon added \$225 per month in hazard pay for service members flying sorties over Libya or stationed within 110 nautical miles of Libya’s shores.<sup>96</sup> And when the U.S. military involvement exceeded the WPR’s sixty-day clock, President Obama modified his justification for action, underscoring the U.S. supporting role after transferring responsibility to NATO.<sup>97</sup>

Congress responded with increased legislative activity. On June 3, the House defeated a resolution directing President Obama to remove U.S. forces, and then passed a broad non-binding resolution, House Resolution 292 (268-145), which included provisions opposing ground force deployment, requiring executive reports with requested information about OOD and OUP, and noting Congress’s constitutional power to withhold

---

90. *Id.*

91. *Id.*

92. See Address to the Nation on Libya, *supra* note 2.

93. See Florence Gaub, *The North Atlantic Treaty Organization and Libya: Reviewing Operation Unified Protector*, LETORT PAPERS (June 28, 2013), available at <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=1161>.

94. Krass Memorandum, *supra* note 2, at 1.

95. *Id.* at 8.

96. See Broder & Stern, *supra* note 4, at 1368–69.

97. See Letter on Efforts in Libya, *supra* note 2.

funding for unauthorized military missions such as in Libya.<sup>98</sup> Although it did not ultimately become law, the House approved an amendment on June 13 that prohibited the use of any funds in association with U.S. involvement in Libya in contravention of the WPR.<sup>99</sup> The next day, Speaker John Boehner (R-OH) sent President Obama a letter warning that the WPR clock was expiring and asking for his legal basis for continuing action.<sup>100</sup>

President Obama answered in his June 15 WPR Report to Congress, claiming constitutional authority to act given “the important U.S. interests” and the mission’s anticipated “limited nature, scope and duration.”<sup>101</sup> Moreover, he argued that his actions were “consistent” with the WPR and did not require congressional authorization because the operation lacked the kind of “hostilities” contemplated by the law’s sixty-day clock.<sup>102</sup> Specifically, qualities such as “sustained fighting,” “active exchanges of fire,” the “presence of U.S. ground forces,” and “U.S. casualties or a serious threat thereof” were absent, and the United States was “playing a constrained and supporting role” in a U.N. legitimated multinational coalition.<sup>103</sup> In other words, the executive argued that it did not need to terminate military operations for two reasons: (1) the sixty-day clock stopped ticking when NATO assumed control on March 31; and (2) U.S. forces in OUP were not in “hostilities” because they were only dropping bombs from unmanned aerial vehicles, not fighter jets.<sup>104</sup>

Congress again responded, but not with the administration’s desired action of passing the supportive resolution, sponsored by former Senator John Kerry (D-MA) and Senator John McCain (R-AZ), allowing the limited

---

98. H.R. Res. 292, 112th Cong. (2011) (enacted).

99. Rep. Brad Sherman, *House Votes to Comply with War Powers Act in Defense Spending Bill* (July 7, 2011, 6:55 PM), <http://www.bradsherman.house.gov/2011/07/house-votes-to-comply-with-war-powers-act-in-defense-spending-bill.shtml> [hereinafter *Defense Spending Bill*].

100. Letter from John Boehner, Speaker of the House of Representatives, to President Barack Obama (June 14, 2011) [hereinafter *Boehner Letter on Libya*], available at <http://www.speaker.gov/press-release/speaker-boehner-challenges-president-obama-legal-justification-continued-operations>. Note that Speaker Boehner’s letter was technically incorrect, as he had granted the President a ninety-day clock. The WPR’s sixty-day clock may be extended for an additional thirty days, but the President needs to so request in writing. See 50 U.S.C. §1544(b).

101. Letter to Congressional Leaders on the Global Deployments of United States Combat-Equipped Armed Forces, 2011 Daily Comp. Pres. Doc. 448 (June 15, 2011), <http://s3.documentcloud.org/documents/204673/united-states-activities-in-libya-6-15-11.pdf> [hereinafter *June 15 WPR Report*].

102. *Id.*

103. *Id.*

104. Robert Chesney, *A Primer on the Libya/War Powers Resolution Compliance Debate*, BROOKINGS INST. (June 17, 2011), available at [http://www.brookings.edu/opinions/2011/0617\\_war\\_powers\\_chesney.aspx?p=1](http://www.brookings.edu/opinions/2011/0617_war_powers_chesney.aspx?p=1); see generally Burgin, *supra* note 72.

use of U.S. military force in Libya for one year.<sup>105</sup> On June 24, the House defeated two measures: House Joint Resolution 68, which was based on the Kerry-McCain language;<sup>106</sup> and House Resolution 2278, which would have ended direct U.S. combat activity in Libya while remaining supportive of NATO's efforts.<sup>107</sup> The Senate, meanwhile, never considered the Kerry-McCain proposal—when Majority Leader Harry Reid (D-NV) sought to raise it during a July debt ceiling crisis impasse, senior GOP members stymied him, arguing that “the budget crisis was more pressing.”<sup>108</sup> The House, in contrast, continued sending mixed signals during early July votes on defense appropriations bill amendments. It prohibited funding equipment and training for rebels seeking Qadhafi's overthrow, yet stopped short of defunding the U.S. role in OUP.<sup>109</sup> Congress thus failed to rein in President Obama before Qadhafi died on October 20, and OUP ended on October 31.

#### V. THE NEXUS BETWEEN THE WPR'S CONSULTATION PROVISIONS AND U.S. ACTIONS IN LIBYA

Meaningful consultation neither occurred nor was demanded regarding U.S. involvement in Libya. President Obama disregarded the law's letter and spirit, despite his previous contention when he was a senator that the President must adhere to the consultation mandate before using force.<sup>110</sup> Congress, moreover, did not insist upon compliance or even highlight the administration's violation. As Barack Obama also stated when serving in the Senate, “No law can give Congress a backbone if it refuses to stand up as the co-equal branch the Constitution made it.”<sup>111</sup>

---

105. S. Res. 20, 112th Cong. (2011).

106. H.R.J. Res. 68, 112th Cong. (2011) (authorizing the President to continue the use of U.S. armed forces in Libya but for limited purposes).

107. H.R. 2278, 112th Cong. (2011) (also limiting the funds appropriated to the Department of Defense to be used in Libya in support of NATO). See also Jennifer Steinhauer, *House Spurns Obama on Libya, But Does Not Cut Funds*, N.Y. TIMES (June 24, 2011), <http://www.nytimes.com/2011/06/25/us/politics/25powers.html> (discussing the “symbolic blow to President Obama”).

108. Josh Rogin, *Senate Punts on Libya Debate, Again*, THE CABLE (July 5, 2011, 3:58 PM), [http://thecable.foreignpolicy.com/posts/2011/07/05/senate\\_punts\\_on\\_libya\\_debate\\_again](http://thecable.foreignpolicy.com/posts/2011/07/05/senate_punts_on_libya_debate_again).

109. *House Passes \$649B Defense Spending Bill*, USA TODAY (July 8, 2011, 5:41 PM), [http://usatoday30.usatoday.com/news/washington/2011-07-08-defense-spending-bill\\_n.htm](http://usatoday30.usatoday.com/news/washington/2011-07-08-defense-spending-bill_n.htm).

110. Michael J. Glennon, *The Cost of “Empty Words”: A Comment On the Justice Department's Libya Opinion*, 125 HARV. NAT'L SEC. J. FORUM 2089 (2012), available at [http://harvardnsj.org/wp-content/uploads/2011/04/Forum\\_Glennon\\_Final-Version.pdf](http://harvardnsj.org/wp-content/uploads/2011/04/Forum_Glennon_Final-Version.pdf) (discussing Barack Obama's contention when he was serving in the Senate).

111. Jennifer Bendery, *Kucinich Sues Obama for Violating War Powers Act in Libya*, HUFFINGTON POST (June 15, 2011, 1:19 PM), [http://www.huffingtonpost.com/2011/06/15/kucinich-obama-war-powers-act-libya\\_n\\_877396.html](http://www.huffingtonpost.com/2011/06/15/kucinich-obama-war-powers-act-libya_n_877396.html) (explaining Barack Obama's

### A. Presidential Non-Compliance with the Consultation Mandate

An examination of critical junctures in the Libya crisis underscores that President Obama never sought legislators' advice and opinions when decisions were pending; rather, the administration simply testified before committees and briefed members and staff about its approach and ongoing operations.<sup>112</sup> As former Senator John Ensign (R-NV) stressed on the Senate floor, "The administration unilaterally developed, planned, and executed its no-fly zone policy. The President consulted with the United Nations, he consulted with NATO, he consulted with the Arab League, but he did not consult with . . . the U.S. Congress."<sup>113</sup>

Consultation should have commenced in the early days when the administration was first establishing the direction of U.S. policy. President Obama acknowledged considering all possible forms of intervention in his February 23 speech.<sup>114</sup> Given that intervention in the Libyan civil war suggests that U.S. forces might be in hostilities or imminent hostilities, President Obama was required to consult with Congress.<sup>115</sup> Yet by the executive's own account in the June 15 WPR Report, it did not consult Congress.<sup>116</sup>

During the pre-OOD period from the end of February until March 19, the administration engaged U.N. members and consulted with foreign leaders.<sup>117</sup> White House Chief of Staff Bill Daley explained, "The President knows that the ultimate decision he has to make at times is to put men and women in harm's way, and you do that only with great consultation with your allies."<sup>118</sup> While consulting allies about what the administration perceived as a situation

---

statement at DePaul University, suggesting that Congress must take action to ensure then President George W. Bush's compliance with the law during the Iraq War).

112. See e.g., June 15 WPR Report, *supra* note 101.

113. 157 CONG. REC. S1952 (daily ed. Mar. 30, 2011).

114. See Remarks on Libya, *supra* note 84 (explaining that the Obama administration was considering the "full range of options" in responding to the Libyan crisis, including sending Secretary of State Hillary Clinton to Geneva for talks).

115. See 50 U.S.C. § 1542.

116. See June 15 WPR Report, *supra* note 101, at 26–31 (claiming consultation with Congress only *after* March 1).

117. Greg Clary, *Political Hot Topics*, CNN POLITICS (Feb. 25, 2011, 4:17 AM), <http://politicalticker.blogs.cnn.com/2011/02/25/political-hot-topics-friday-february-25-2011>; see also CNN Wire Staff, *Obama Talks Libya with Leaders of France, Italy, UK*, CNN POLITICS (Feb. 25, 2011, 6:20 AM), <http://www.cnn.com/2011/WORLD/africa/02/24/us.obama.libya/index.html> [hereinafter *Obama Talks Libya Abroad*].

118. Interview by David Gregory with Bill Daley, White House Chief of Staff, on *Meet the Press* (NBC television broadcast Mar. 6, 2011) [hereinafter Daley Interview], available at [http://www.nbcnews.com/id/41906285/ns/meet\\_the\\_press-transcripts/t/meet-press-transcript-march/#.UvztdHIN1uY](http://www.nbcnews.com/id/41906285/ns/meet_the_press-transcripts/t/meet-press-transcript-march/#.UvztdHIN1uY).

of hostilities or imminent hostilities, according to its own June 15 WPR Report, the executive merely arranged “conference calls with congressional staff” to offer “updates,” provided classified and unclassified “briefings” and “updates” to legislators and key staff, and “testified” at hearings.<sup>119</sup> The administration wrote that President Obama did not even brief congressional leaders until March 18,<sup>120</sup> once the international efforts had provided the foundation for OOD.<sup>121</sup> All of these meetings and conference calls were notification of a policy, not consultation.<sup>122</sup> The administration, nonetheless, deemed this adequate “compliance in terms of consultation,” in the words of Defense Secretary Robert Gates when he appeared before the House Armed Services Committee, because “having the leadership of the Congress in the very next day seemed . . . pretty prompt.”<sup>123</sup>

The President did not consult with Congress during OOD, which spanned from March 19 - March 31.<sup>124</sup> Yet with the executive’s later rationale that the United States was not engaged in “hostilities” once it began “playing a *constrained and supporting role* in a multinational coalition,” it implicitly acknowledged that during OOD, a hostile or imminently hostile situation existed.<sup>125</sup> In the first week of OOD with B-2 stealth planes dropping bombs and about two hundred missiles being launched from submarines in the Mediterranean,<sup>126</sup> President Obama merely submitted a report to Congress “consistent with” the WPR and verbally updated lawmakers.<sup>127</sup> According to administration testimony, notification of a policy was tantamount to consultation: “the President *consulted immediately after* the decision was made.”<sup>128</sup> In addition, members subsequently received

---

119. June 15 WPR Report, *supra* note 101, at 26, 30–31.

120. *Id.* at 29–30.

121. *See No-Fly Zone*, *supra* note 88 (discussing approved measures by the Security Council to protect Libyan civilians).

122. *See Hearing on Operation Odyssey Dawn*, *supra* note 5, at 9 (discussing the difference between consulting Congress and telling Congress what is going to happen).

123. *Id.* at 8–9. The “very next day” refers to the day after the President decided on his policy with respect to military force in Libya, not the day after a military strike.

124. *See* June 15 WPR Report, *supra* note 101, at 29.

125. *Id.* at 25 (emphasis added). Although the administration created the “hostilities” argument to address the problem of exceeding the WPR’s sixty-day clock, it also is relevant to the consultation language.

126. Kevin Baron, *For the U.S., War Against Qaddafi Cost Relatively Little: \$1.1 Billion*, THE ATLANTIC (Oct. 21, 2011, 9:20 AM), <http://www.theatlantic.com/international/print/2011/10/for-the-us-war-against-qaddhafi-cost-relatively-little-11-billion/247133/>.

127. Commencement of Military Operations Against Libya, *supra* note 2.

128. *Hearing on Operation Odyssey Dawn*, *supra* note 5, at 44 (emphasis added); *see also Libya: Defining U.S. National Security Interests: Hearing Before the H. Comm. on Foreign Aff.*, 112th Cong. 44 (2011) (statement of Dep’y Sec’y of State James Steinberg) (“But I would say that we consulted the Congress, we provided the notification that is consistent with the War Powers Act within 48 hours after the beginning of hostilities.”).

briefings, but deemed their content inadequate. As former Senator Pete Sessions (R-TX) griped, “Frankly, I did not get a lot out of [the March 30 classified] briefing. . . . We turned on the television this morning, and we saw news about the CIA involvement there. . . . It would have been nice to have heard it straight from the administration’s leaders, rather than seeing it on television.”<sup>129</sup>

From the end of March with the commencement of OUP until early June as hostilities in Libya escalated, the executive branch, based on its June 15 WPR Report, continued communicating with Congress only via testimony at hearings, briefings, phone calls, and e-mails; however, the verbiage during this period shifted to lauding its own consultation.<sup>130</sup> Press Secretary Jay Carney contended sixty days after the United States intervened, in his May 2 press briefing, that President Obama “believes that consultation with Congress in matters like these is vital, and that’s why he has consulted so regularly with Congress and will continue to do so.”<sup>131</sup> Legislators perceived the administration’s minimal interactions with members, though, as qualitatively sub-par, with the executive failing to provide information that members needed.<sup>132</sup> The United States was OUP’s largest contributor: the United States performed seventy percent of reconnaissance missions and over seventy-five percent of refueling flights as of mid-May;<sup>133</sup> the United States provided unique forms of assistance “including but not limited to armed drones;”<sup>134</sup> U.S. forces had “a sporadic but continuing role in direct uses of force;”<sup>135</sup> and a U.S. officer commanded NATO forces that were involved in “hostilities.”<sup>136</sup> But consultation occurred neither in May as “U.S. and NATO forces carried out some of the heaviest bombardments of Tripoli of the entire war,”<sup>137</sup> nor at the beginning of June, as NATO

---

129. 157 CONG. REC. S2010 (daily ed. Mar. 31, 2011) (statement of Sen. Pete Sessions).

130. See June 15 WPR Report, *supra* note 101, at 26–28.

131. Press Briefing by Press Sec’y Jay Carney (May 20, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/05/20/press-briefing-press-secretary-jay-carney-5202011>.

132. Interview with two senior Republican staff (anonymity requested), in Wash., D.C. (May 7–8, 2012).

133. Jeremy Lemer & Christine Spolar, *Pentagon Sees Libya Military Costs Soar*, FIN. TIMES (June 9, 2011), <http://www.ft.com/cms/s/0/11d5624c-920f-11e0-b8c1-00144feab49a.html#axzz2tFMdqv7X>.

134. Chesney, *supra* note 104.

135. *Id.*

136. See *id.* (providing further analysis of the implications of Admiral James G. Stavridis of the U.S. Navy serving as NATO’s Supreme Allied Commander and directing NATO troops in Libya).

137. Complaint ¶ 77, *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011) (No. 1:11-cv-01096), 2011 WL 2349072.

maneuvers included “direct combat operations against Libyan ground forces”<sup>138</sup> and “attack helicopters.”<sup>139</sup>

The administration also did not consult Congress on several key decisions in June.<sup>140</sup> President Obama simply informed Congress in his June 15 WPR Report of the OUP extension through September.<sup>141</sup> And there was no consultation regarding the shift in OUP’s goal from only defending civilians to ousting Qadhafi, which made the mission more offensive and ventured into territory not explicitly authorized by a U.N. resolution; instead, the executive merely distinguished the “diplomatic goal” of regime change from the military mission of protecting civilians.<sup>142</sup> In addition, President Obama continued claiming that he had complied with Section 3, stating at a June 29 news conference, “Throughout this process we’ve consulted with Congress. We’ve had 10 hearings on it. We’ve released reams of information about the operation. I’ve had members of Congress over to talk about it. So a lot of this fuss is politics.”<sup>143</sup>

#### B. Congressional Response: Acquiescence and Passivity

Despite both the absence of meaningful consultation and its importance for achieving co-determination, Congress’s WPR focus during the Libya crisis was not on consultation. In prior military interventions, in contrast, members consistently responded to presidential violations of Section 3 with legislative and non-legislative actions.<sup>144</sup> Yet in the Libya crisis, members criticized the administration’s non-compliance with the WPR without

---

138. *Id.* ¶ 79.

139. *Id.* ¶ 80.

140. *See generally* June 15 WPR Report, *supra* note 101.

141. *See id.* at 13.

142. *See* Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 15, 2011), [http://www.nytimes.com/2011/06/16/us/politics/16powers.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/06/16/us/politics/16powers.html?pagewanted=all&_r=0).

143. President Barack Obama, Press Conference (June 29, 2011) [hereinafter Obama Press Conference], *available at* <http://www.whitehouse.gov/the-press-office/2011/06/29/press-conference-president>. Congress obviously was not even notified of administration deliberations about devising a new interpretation of WPR “hostilities” during this period. *See* Chesney, *supra* note 104. OLC lawyers believed that President Obama had to abide by the WPR’s timetable when the clock expired. *See* Broder & Stern, *supra* note 4, at 1371. The Pentagon agreed, arguing that “if the definition of hostilities depends on which side suffers the casualties, then the U.S. could launch a massive pre-emptive military strike using conventional or even nuclear missiles without congressional say-so, as long as U.S. troops weren’t in danger.” Marc Ambinder, *Obama Follows Bush Playbook on Libya*, NAT’L J., 1, 12 (2011). Given opinions such as these, one might argue that the White House went “lawyer shopping” to find a body to justify its interpretation.

144. *See* discussion *supra* Part III.D.

concentrating on consultation.<sup>145</sup> And when legislators discussed consultation, they often conflated it with notification, expressing greater and more frequent distress over the perceived poor quality of briefings than over the lack of real consultation.<sup>146</sup> Members' discontent increased as U.S. involvement in OUP extended beyond the sixty-day deadline; notably, however, they did not demand, or even seek, consultation on subsequent decisions.<sup>147</sup> A review of lawmakers' legislative and non-legislative efforts regarding Libya and the WPR illustrates their inattention to consultation.

Neither the House nor the Senate considered any binding or non-binding legislative measure revolved around ensuring presidential adherence to Section 3. For instance, Senate Resolution 85, passed after President Obama's initial consultation violation, centered on Libya and the U.N. rather than on the lack of consultation.<sup>148</sup> Once the administration had established clear patterns of non-compliance with consultation obligations and incomplete notifications, instead of addressing the consultation evasions and mandating compliance, the House cleared House Resolution 292, which only directed executive officials to send pertinent records from communications with Congress.<sup>149</sup> The House also approved Libya funding-related amendments (unrelated to consultation) to the defense appropriations bill in June and July, although they were deleted from the final law.<sup>150</sup> The one measure that would have authorized the limited use of force in Libya—Senate Joint Resolution 20—did contain a minor provision requiring frequent consultation; however, the full Senate never considered it and the House defeated a similar measure.<sup>151</sup>

Members displayed the same disregard for consultation in their non-legislative activities. A review of floor speeches reveals this phenomenon. Of the over one hundred representatives making floor remarks regarding the WPR and Libya (many of them on multiple occasions), only eleven (under three percent of the House membership), mentioned consultation.<sup>152</sup> Some of these legislators simply used the word "consultation" once, others merely quoted the WPR's text, and still others confused consultation with notification. Representative Phil Gingrey (R-GA), for instance, complained,

---

145. *But see, e.g., Hearing on Operation Odyssey Dawn, supra* note 5, at 9.

146. *See, e.g.,* 157 CONG. REC. H3996 (daily ed. June 3, 2011) (statement of Rep. Phil Gingrey).

147. *See, e.g., Hearing on Libya and War Powers, supra* note 68, at 6–7.

148. S. Res. 85, 112th Cong. (2011) (enacted).

149. H.R. Res. 292, 112th Cong. (2011).

150. *Defense Spending Bill, supra* note 99.

151. H.R.J. Res. 68, 112th Cong. (2011).

152. I searched the House portion of the Congressional Record reading debates and representatives' inserted statements, looking for remarks on consultation. A University of Vermont student of mine conducted an independent search to ensure accuracy.



“I don’t know who the President notified in regard to this operation. What did he do—send a tweet to the chairmen?”<sup>153</sup> While proportionately more senators made floor statements mentioning consultation—perhaps because senators perceived President Obama’s violation as a greater affront since he had been a senator<sup>154</sup>—it still was discussed infrequently.<sup>155</sup> And several of the approximately ten senators who alluded to consultation conflated it with informing Congress. Senator Richard Durbin (D-IL) displayed this tendency when he explained on the chamber floor that the President invited the leadership via conference call “to listen to a briefing from the Situation Room. . . . [T]he War Powers Act, requires the President to notify Congress when he initiates this form of military action.”<sup>156</sup>

In addition, in the over half-dozen relevant committee hearings from March through June 2011, consultation received minimal consideration.<sup>157</sup> Even in hearings with the most extended discussions about consultation, just a few members broached the issue, legislators’ remarks prompted only brief exchanges, lawmakers’ criticisms lacked specific requests that might encourage improved consultation, and executive officials’ unresponsiveness to congressional concerns provoked neither concrete member action nor explicit member appeals. For example, when responding to Representative Steve Chabot’s (R-OH) criticism about the absence of consultation when adequate opportunity existed, the administration equated consultation with notification, claiming that it had consulted by providing “the *notification* that is consistent with the War Powers Act.”<sup>158</sup> When Representative Adam Smith (D-WA) suggested that discussions should not wait until final decisions are made, Secretary Gates attempted to justify the administration’s actions by noting that in subsequent executive branch talks with Congress, members did not raise “a single question . . . that wasn’t debated intensively during the administration’s deliberations.”<sup>159</sup> Neither of these statements by the administration elicited congressional responses highlighting their

---

153. 157 CONG. REC. H3996 (daily ed. June 3, 2011) (statement of Rep. Phil Gingrey).

154. Telephone interview with senior Democratic aide (anonymity requested) (May 4, 2012).

155. I searched the Senate portion of the Congressional Record, reading debates and senators’ inserted statements, looking for remarks on consultation. A University of Vermont student of mine conducted an independent search to ensure accuracy.

156. 157 CONG. REC. S1963–64 (daily ed. Mar. 30, 2011) (statement of Sen. Dick Durbin).

157. See, e.g., *War Powers, United States Operations in Libya, and Related Legislation: Hearing Before the H. Foreign Aff. Comm.*, 112th Cong. (2011) [hereinafter *Hearing on U.S. Operations in Libya*] (emphasis added); *Hearing on Operation Odyssey Dawn*, *supra* note 5; *Hearing on Libya and War Powers*, *supra* note 68.

158. *Hearing on U.S. Operations in Libya*, *supra* note 157, at 12, 44–45 (emphasis added).

159. *Hearing on Operation Odyssey Dawn*, *supra* note 5, at 9, 21 (statement of Sec’y of Def. Robert Gates).

erroneous underpinnings. And in his introductory speech in a Foreign Relations Committee hearing, former Senator Lugar briefly turned to consultation, merely labeling the dialogue with Congress as “perfunctory, incomplete, and dismissive of reasonable requests,” without seeking or insisting on improved administration compliance.<sup>160</sup>

Members’ letters to the executive and to fellow legislators, expressing various complaints about executive non-compliance with the WPR, expose the same disregard for consultation. The one condemnation of the administration’s evasion of Section 3 appeared in Speaker Boehner’s letter to President Obama about the expiration of the WPR clock, in which he also articulated unhappiness with the “lack of genuine consultation prior to commencement of operations.”<sup>161</sup> Nonetheless, after this one comment about consultation in a letter dedicated to the WPR’s automatic withdrawal provision, Speaker Boehner made no concrete requests pertaining to consultation on Libya or specific proposals to ensure compliance with Section 3 in future endeavors.<sup>162</sup>

The least common non-legislative activity regarding the WPR is lawsuits against the executive. Former Representative Dennis Kucinich (D-OH) and Representative Walter Jones (R-NC), along with eight colleagues, filed a lawsuit against President Obama on June 15, 2011, alleging that he had violated the Constitution and the WPR.<sup>163</sup> They contended that President Obama had “unilaterally attacked Libya and provided military assistance to Libyan rebels without congressional authorization or consultation.”<sup>164</sup> Because of the lawsuit’s extensive claims for relief, though, the single mention of “consultation” was insignificant. And following precedent, the court found that the case did not present a matter for judicial resolution.<sup>165</sup>

Finally, while not specifically targeting consultation, it is relevant that a few legislators critiqued their own institution and acknowledged Congress’s inadequate response to the crisis. In the words of former Senator Jim Webb (D-VA), Congress “could not even bring itself to have a formal debate on whether the use of military force was appropriate.”<sup>166</sup> The Senate passed

---

160. *Hearing on Libya and War Powers*, *supra* note 68, at 6–7 (statement of Sen. Dick Lugar).

161. Boehner Letter on Libya, *supra* note 100.

162. *Id.*

163. *See* Kucinich v. Obama, 821 F. Supp. 2d 110 (D. D.C. 2011) (dismissing case for lack of standing).

164. Complaint, *supra* note 137, ¶ 173.

165. *See generally* MICHAEL GARCIA, CONG. RESEARCH SERV., RL30352, WAR POWERS LITIGATION INITIATED BY MEMBERS OF CONGRESS SINCE THE ENACTMENT OF THE WAR POWERS RESOLUTION (2012).

166. Sen. Jim Webb, *Congress Must OK Military Intervention*, THE DAILY BEAST (May 18, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/05/18/sen-jim-webb-congress->

Senate Resolution 85, condemning Libya's human rights violations and encouraging the U.N. to protect Libyan civilians, for instance, with only thirty-five seconds of consideration.<sup>167</sup> Lawmakers also underscored the communication problems between the rank-and-file membership and the leadership. Representative Jim Cooper (D-TN) commented in the House Armed Services Committee hearing, "Many people have wondered about the lack of adequate notice to this body. Well, the leadership in each party was informed promptly after the President's decision. So perhaps we should question our own contact with our own party leadership."<sup>168</sup>

### C. Summary Comments on Compliance with Section 3

The Obama administration circumvented its consultation obligations; the executive simply informed members of its decisions and deemed that adequate compliance. Legislators' advice and opinions could never influence presidential actions, however, because meetings were not convened to deliberate pending choices. Despite this, Congress did not demand adherence to the WPR's consultation provisions.

Might the exigencies of the moment have prevented consultation? As discussed earlier,<sup>169</sup> given that the WPR requires consultation "in every possible instance," this just might have been an occasion in which consultation was not attainable. In this case, though, sufficient time did exist for consultation. From the initial February decision to consider a range of options, through OOD and OUP, President Obama and his team talked with leaders around the world.<sup>170</sup> Consulting with fellow Americans, often situated only a mile plus up Pennsylvania Avenue to Capitol Hill, thus did not present an insurmountable obstacle. Instead, the executive chose to follow precedent and construe Section 3 narrowly, and Congress acquiesced.

If timing did not impede consultation, did the Libya intervention fail to meet the necessary standard of consultation—namely, forces being introduced into or continuing to engage in situations of hostilities or imminent hostilities? Based on the "hostilities" exception the administration attempted to carve out in its June 15 WPR Report (and using its own rationale in the Report regarding what constitutes hostilities under the WPR), the White House implicitly acknowledged that the initial U.S. mission of OOD was the sort of situation contemplated by the WPR authors as hostile:

---

[must-ok-military-intervention.html](#).

167. See 157 CONG. REC. S1068–69 (daily ed. Mar. 1, 2011).

168. *Hearing on Operation Odyssey Dawn*, *supra* note 5, at 32 (statement of Rep. Jim Cooper).

169. See discussion *supra* Part II.A.

170. See, e.g., Daley Interview, *supra* note 118.

the United States was commanding its own operation with American forces, intervening militarily in response to a civil war.<sup>171</sup> Harold Koh was more explicit on this matter, explaining in congressional testimony that under OOD, U.S. military actions “were significantly more intensive, sustained, and dangerous” than under NATO’s OUP; therefore, Koh admitted that if OOD had “lasted for more than 60 days, it may well have constituted ‘hostilities’ under the War Powers Resolution’s pullout provision.”<sup>172</sup> Hence, the absence of a hostile or potentially hostile situation did not preclude consultation in February and March. And considering the questions surrounding the legitimacy of the administration’s June re-interpretation of “hostilities,”<sup>173</sup> it also is reasonable to suggest that President Obama was required to consult regularly for OUP because the hostile situation continued. Furthermore, in light of the executive’s broad definition of “imminence” in its subsequent 2013 legal justification of drone strikes,<sup>174</sup> the existence of “imminent” hostilities throughout the Libya crisis (therefore requiring consultation), cannot be denied.

When President Obama nonetheless merely provided legislators with after-the-fact briefings and post-hoc justifications about decisions (albeit incomplete), Congress had few options. Congress was, in effect, presented with a *fait accompli*. As an aide to former Senator Kay Bailey Hutchison griped,

Even in classified settings, they wouldn’t say how many sorties had been conducted, how much ammunition we had used, how we determined targets, who decides on targets, and so much more. Their stall tactics precluded Congress’s involvement and oversight, but there really wasn’t anything we could do about it. . . . The only thing to do would be to defund the operation, but there wasn’t the support for that.<sup>175</sup>

---

171. June 15 WPR Report, *supra* note 101, at 5–8, 25.

172. *Hearing on Libya and War Powers*, *supra* note 68, at 58 (statement of Harold Koh, Legal Advisor, U.S. Dep’t of State).

173. Burgin, *supra* note 72.

174. The initially confidential Obama administration memo justifies drone strikes when the target poses an “imminent threat” to the United States, and claims that imminence does not signify that the United States “has to have clear evidence that a specific attack . . . is underway.” Eric Dolan, *NBC Reporter on Leaked Memo: Obama Admin. Using “Elastic” Definitions to Justify Drones*, THE RAW STORY (Feb. 4, 2013, 11:04 PM), <http://www.raw-story.com/rs/2013/02/04/nbc-reporter-on-leaked-memo-obama-admin-using-elastic-definitions-to-justify-drones/>. Simply a belief that a target has previously been involved in violent activities and has not renounced them is sufficient evidence to assume the target now presents an “imminent threat,” justifying a U.S. attack. *Id.*

175. Interview with staffer for former Sen. Kay Bailey Hutchison (anonymity requested), in Wash., D.C. (May 8, 2012).

And as discussed above,<sup>176</sup> even if the votes existed to defund the mission, that might not have restrained President Obama.<sup>177</sup>

#### VI. EXPLORING CONGRESS'S INATTENTION TO CONSULTATION

President Obama's actions in Libya aroused congressional interest in the WPR broadly. Whether members' concerns were procedural or substantive, lawmakers believed that the WPR presented a convenient foil, provided a tool to try to hold the President accountable, facilitated a legitimate conversation about Congress's role, offered a framework to play out congressional disagreements, forced a national discussion, had been considered by President Obama, and much more.<sup>178</sup> During the crisis, former Representative Lee Hamilton (D-IN) stated that the WPR has become a "political tool that allows members of Congress to dodge taking a position on the intervention itself . . . argu[ing] the process rather than the substance."<sup>179</sup> For some Democrats typically aligned with President Obama, criticizing WPR non-compliance may have been easier, politically, than condemning specific substantive policies. And for some GOP lawmakers, President Obama's WPR violations supplied "just another political opportunity" to oppose a President they were dedicated to "limiting to one term."<sup>180</sup> Republican silence on the WPR, moreover, could be problematic, prompting charges of ceding power to a Democratic President and complicity in committing more Americans to another costly war. Members' perceptions that constituents and supporters wanted Congress to have a stronger voice on

---

176. See discussion *supra* Part III.B.

177. Although well beyond the scope of this Article, it is interesting to note Harold Koh's wording regarding consultation when he discussed the Obama administration's new notion of "hostilities." Koh explained in a *New York Times* interview, "We are not saying the War Powers Resolution is unconstitutional or should be scrapped[,] or that we can *refuse to consult* Congress." Savage & Landler, *supra* note 142 (emphasis added). Because the President is required to initiate consultation, framing consultation as a process that the executive cannot "refuse" muddles the mandate—to "refuse" suggests affirmatively declining something that is offered. But since Congress cannot extend an offer to consult with the President, the verbiage is nonsensical; it just appears to be an effort to subtly shift the onus and blame for consultation not occurring to Congress. See Louis Fisher, *Military Operations in Libya: No War? No Hostilities?*, 42 PRESIDENTIAL STUD. Q. 176 (2012) (offering a broader discussion of administrations' tendencies to be duplicitous with words).

178. Such points as these regarding the WPR's impact were raised by the vast majority of Democratic and Republican interviewees with whom I spoke in 2012. In other words, despite the WPR's failure to meet its authors' objectives, these congressional staff people saw that their bosses did not perceive the WPR as a "dead letter."

179. Chesney, *supra* note 104.

180. Interview with House Republican staffer (anonymity requested), in Wash., D.C. (May 7, 2012).

Libya, further motivated members of both parties to focus on the WPR.<sup>181</sup> The WPR supplies the ideal instrument for legislators to address and placate such perceived constituent desires, without having their actions be construed as weakening our nation's military.

Despite complaints about the administration's lack of adherence to the WPR generally, Congress did not publicly and clearly denounce the evasion of Section 3. Given the importance of consultation in the WPR framework for achieving the law's stated purpose, this absence of congressional attention is striking. To understand why President Obama's failure to consult did not fuel the usual congressional protest, I consider the timing of the crisis (beginning during a congressional recess), characteristics of the Libya mission (and the domestic and international context in which it occurred), the dynamics of the 112th Congress, and how real consultation would entail members acting counter to inherent political incentives. No single factor can fully explain why Congress did not, at a minimum, showcase President Obama's disregard for Section 3; instead, the confluence of these variables contributed to congressional inaction. This is not to suggest, however, that all lawmakers were oblivious to the administration's circumvention of its consultation obligations; a few senators "soured on Libya because they weren't consulted at the beginning," and were "insulted that Obama went internationally to get approval but just gave Congress information."<sup>182</sup> Yet this displeasure did not incite much of a response.

#### A. Timing: Congressional Recess

The timing of both the Libyan rebellion and President Obama's initial failure to consult, depressed members' reactions. The critical juncture for consultation is before commencing action, when a President is weighing policy choices. Although the WPR requires consultation regularly throughout a mission's duration, early consultation is the most likely catalyst for co-determination. Timing is of the essence; if a President sidesteps consultation from the beginning and Congress is to seek meaningful redress, Congress must respond when decisions are still pending. President Obama's February 23 announcement that he was considering multiple options given the revolt in Libya, however, occurred during a congressional recess.<sup>183</sup> Two days later, when President Obama imposed economic sanctions on Libya,

---

181. Interview with staffer for Rep. Brad Sherman (anonymity requested), in Wash., D.C. (May 7, 2012).

182. Telephone interview with senior Sen. Democratic Foreign Policy aide (anonymity requested) (May 4, 2012).

183. Remarks on Libya, *supra* note 84.

and three days later, when the U.N. Security Council approved Resolution 1970, members remained outside of Washington, D.C.

Theoretically, consultation can occur without the physical presence of members on Capitol Hill. President Obama did, in fact, consult with French, Italian, and British leaders on February 24 despite their locations abroad.<sup>184</sup> But if a President does not consult legislators and Congress is not in session, the congressional recess hinders members' ability to react. This is what happened immediately after February 23. Lawmakers could neither introduce legislation nor act on legislation that might beget or even encourage consultation. When the Senate reconvened on February 28 and the House reconvened on March 1, both the policy direction and the pattern of consulting with foreign nations—but not with Congress—had been established. Certainly, during the recess, members and staff could have started planning hearings for March, sent letters to the administration, or begun crafting lawsuits to file against President Obama; however, hearings were delayed, and letters and lawsuits are less common non-legislative activities.<sup>185</sup>

If Congress had been in session when President Obama began confronting the violence in Libya, it is more likely that individual members with an understanding of Section 3's letter and intent would have responded. In prior cases, as discussed above,<sup>186</sup> Presidents have sparked congressional activity when they placed the United States on the brink of military involvement without consultation. In late February 2011, lawmakers in Washington, D.C. similarly might have introduced (and perhaps approved) legislation as they had regarding the Persian Gulf reflagging and escort operation<sup>187</sup> and Bosnia,<sup>188</sup> convened hearings as they did in response to President Carter's hostage rescue attempt,<sup>189</sup> taken to the floor to denounce the President's military endeavors as occurred in reaction to President Clinton's initiatives in Somalia,<sup>190</sup> and so much more. This is not to imply

---

184. See Greg Clary, *Political Hot Topics*, CNN POLITICS (Feb. 25, 2011, 4:17 AM), <http://politicalticker.blogs.cnn.com/2011/02/25/political-hot-topics-friday-february-25-2011>; *Obama Talks Libya Abroad*, *supra* note 117.

185. See Burgin, *supra* note 19, at 225–26, tbl.1 (explaining that, in reviewing legislators' WPR-related activities, legislators undertake other activities more frequently than sending letters to the President to voice concerns or filing lawsuits against the President in response to WPR violations).

186. See discussion *supra* Part III.D.

187. STAFF OF H. COMM. ON FOREIGN AFF., 101ST CONG., REP. ON CONG. & FOREIGN POL'Y 1987 40–42 (Comm. Print 1989).

188. GRIMMETT, *supra* note 17, at 31–32.

189. See generally *Hearing on the Situation in Iran*, *supra* note 28.

190. See, e.g., 139 CONG. REC. 7737 (1993); 139 CONG. REC. 23,997 (1993); 139 CONG. REC. 25,817–18 (1993).

that Congress as a collective body would have demanded adherence to the consultation mandate regarding Libya, but it is simply to note that a greater number of members might have scrutinized President Obama's disregard for the consultation requirement more carefully.

#### B. The Libya Mission Itself

To appreciate members' inattention to President Obama's evasion of the consultation provisions, we also need to consider the Libya mission and the context in which it occurred. Beyond the obvious impact of pressing domestic policy problems and pre-existing foreign policy entanglements, public opinion, congressional concerns about other WPR provisions, and confusion regarding the U.S. objectives in Libya all inhibited Congress from protesting President Obama's failure to consult.

First, the Libyan rebellion occurred at a time when congressional attention was focused intensely on other matters. Most importantly, it unfolded alongside major controversies over raising the debt limit and spending, and talk of a potential government shutdown.<sup>191</sup> Although competing priorities are inevitable, these financial issues consumed Congress to a new degree; it was not "politics as usual" as rank-and-file Republicans were willing "to let a default [on the national debt] happen as a negotiating chip."<sup>192</sup> Moreover, internationally, the United States was still engaged in two costly and unpopular wars,<sup>193</sup> the perilous global economic situation persisted,<sup>194</sup> and the tumultuous Arab spring (with its democratic uprisings across the Arab world) was ongoing.<sup>195</sup> Given that "time is [members'] most precious commodity, and . . . [a]llocating time requires exceedingly tough personal and political choices,"<sup>196</sup> these domestic and international problems, which dominated members' radar screens, undoubtedly deterred consultation-related activity.

---

191. See, e.g., Brian Friel, *Waiting for the Deal: Debt Talks Put Lawmaking on Hold*, CQ WKLY., June 20, 2011, at 1310.

192. MANN & ORNSTEIN, *supra* note 37, at 26.

193. See, e.g., *Iraq*, GALLUP POLITICS (Mar. 20, 2014), <http://www.gallup.com/poll/1633/iraq.aspx> (providing polling information on the unpopularity of U.S. involvement in Iraq); <http://www.gallup.com/poll/116233/afghanistan.aspx> (providing polling information on the unpopularity of U.S. involvement in Afghanistan).

194. See U.N. Dep't of Pub. Info., *2011 World Economic Situation: Report Launched by the U.N.*, PRESS ROOM (Mar. 20, 2014), <http://pressroom.ipc-undp.org/2011-world-economic-situation-report-launched-by-the-un/>.

195. See NPR Staff, *The Arab Spring: A Year Of Revolution*, NPR (Dec. 17, 2011), <http://www.npr.org/2011/12/17/143897126/the-arab-spring-a-year-of-revolution>.

196. ROGER H. DAVIDSON, WALTER J. OLESZEK, FRANCES E. LEE & ERIC SCHICKLER, *CONGRESS AND ITS MEMBERS* 113 (14th ed. 2014).



Second, public opinion further restrained many members. In March 2011, forty-seven percent of Americans approved of U.S. actions in Libya and thirty-seven percent disapproved,<sup>197</sup> with little difference in opinion between Democrats and Republicans.<sup>198</sup> In other words, significant intra-party disagreement existed. Unlike most contentious issues at that time, Libya divided members' supporters in their districts and states. Hence, lawmakers were wary of framing the Libya discussion in terms of consultation, as it might have forced them to articulate the policy preferences they would promote if consulted, thereby potentially alienating at least segments of the supportive constituency. A safer approach to placate some constituents' concerns without raising the ire of others (while still responding more broadly to perceived constituent interest in congressional involvement in decision making), was to sidestep the issue of consultation and the member's particular views about the U.S. role, instead objecting, for instance, to yet another expensive military conflict with an uncertain time frame.

Third, the specifics of the Libya operation prompted various WPR provisions, rather than Section 3, to preoccupy members. Initially, legislators revisited concerns about whether U.N.-endorsed action provides a quasi-exemption from WPR requirements—expressed regarding previous interventions, such as in the former Yugoslavia/Bosnia, Iraq post-1991, Haiti, and Somalia<sup>199</sup>—notwithstanding the fact that the WPR's Section 8 makes clear it does not.<sup>200</sup> Early on, lawmakers also considered the WPR's relevance to humanitarian missions (as addressed during entanglements in the former Yugoslavia/Bosnia, Kosovo, and Somalia), and how the law related to situations in which the United States was supporting a NATO effort (an issue raised about U.S. involvement in Bosnia and Kosovo).<sup>201</sup>

---

197. Alan Greenblatt, *Americans Willing to Help Libya to a Point*, NPR (Mar. 25, 2011, 10:36 AM), <http://www.npr.org/2011/03/31/134801219/americans-willing-to-help-libya-to-a-point>.

198. Jeffrey M. Jones, *Americans Shift to More Negative View of Libya Military Action*, GALLUP POLITICS (June 24, 2011), <http://www.gallup.com/poll/148196/americans-shift-negative-view-libya-military.aspx>.

199. See GRIMMETT, *supra* note 23, at 2–11.

200. See 50 U.S.C. § 1547(a) (“Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—(1) from any provision of law . . . ; or (2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this chapter.”).

201. GRIMMETT, *supra* note 23, at 3–11.

Later, debate raged about the expiration of the WPR clock and the administration's revised definition of "hostilities." Speaker Boehner captured many critics' sentiments:

[T]he White House says there are no hostilities taking place. Yet we've got drone attacks underway. They're spending \$10 million a day, part of an effort to drop bombs on Qadhafi's compounds. It just doesn't pass the straight-face test in my view, that we're not in the midst of hostilities.<sup>202</sup>

Fourth, the Libya mission's objective was unclear and in dispute. Was this a humanitarian initiative, an endeavor to ensure that Libya's civil war did not threaten international peace, an operation to support an international coalition, a maneuver to protect vital U.S. interests, an effort to topple Qadhafi, or something else? Many legislators might oppose military action regarding some of these objectives, although no legislator wanted to appear soft on Qadhafi. Thus, with the uncertainties and divergent views about U.S. goals, as well as the possible multiplicity of purposes, it is intuitively logical that members were not clamoring for consultation; consultation would require them to articulate their vision of the venture's objective and potentially suck them into a political and military quagmire.

### C. The 112th Congress

The political climate in 2011 also inhibited members from focusing on consultation. Extreme partisan polarization and the perpetual campaign mentality characterized the 112th Congress, the least productive Congress since 1948 when scholars began charting legislative productivity.<sup>203</sup> The sharpened partisanship affected relationships within each chamber, between the GOP-controlled House and the Democratic Senate, and between the congressional Republicans and the Democratic President.<sup>204</sup> Thomas Mann and Norman Ornstein lay the source of the 112th Congress's "dysfunction" on "vehemently adversarial" political parties in a separation-of-powers government and on the GOP becoming "an insurgent outlier."<sup>205</sup> According to Mann and Ornstein, "The single-minded focus on scoring political points over solving problems . . . has reached a level of such intensity and bitterness

---

202. Holan & Jacobson, *supra* note 4.

203. Ezra Klein, *Good Riddance to Rottenest Congress in History*, BLOOMBERG (Jan. 2, 2013), <http://www.bloombergtview.com/articles/2013-01-02/good-riddance-to-rottenest-congress-in-history>.

204. *See generally* MANN & ORNSTEIN, *supra* note 37.

205. *Id.* at xiii–xiv.

that the government seems incapable of taking and sustaining public decisions responsive to the existential challenges facing the country.”<sup>206</sup> It is in this hostile and legislatively unproductive environment that Congress failed to assert itself regarding consultation on Libya. A look inside each chamber illuminates other more specific climate-related problems that stymied the congressional response.

At first blush it might seem that President Obama’s evasion of the consultation requirement would be an ideal issue for many House Republicans; they could gain “electoral mileage” by opposing President Obama without needing their own “positive record of policy achievement.”<sup>207</sup> But in 2011, internecine warfare plagued the GOP majority, quashing its ability to reap the full benefits of its majority status. The “Young Guns,” led by Majority Leader Eric Cantor (R-VA), the Tea Party members, the eighty-seven freshmen (most elected with Tea Party backing), and the Republican Study Committee, routinely prevented Speaker Boehner from being able to fashion a GOP position, negotiate effectively with Democrats, and pass legislation.<sup>208</sup> The Speaker, for instance, could not even garner the requisite votes in June to clear House Resolution 2278 to end direct U.S. combat activity in Libya, despite polls indicating that GOP approval for the mission had sunk to thirty-four percent.<sup>209</sup> Considering his relative impotence, Speaker Boehner had to selectively calculate where to battle, or try to herd, his fellow partisans. And while the Speaker finally did condemn President Obama’s lack of consultation, the overdue nature of his criticism (in June), and the fact that he tossed the issue out as an aside in a letter dedicated to the WPR’s sixty-day clock, suggests that consultation was not a priority on which Speaker Boehner chose to expend scarce political capital.

The Speaker also undoubtedly perceived his members’ disinterest in Section 3, and thus had few incentives to concentrate on it. The consultation mandate did not align easily with Tea Party members’ core constitutional message, upon which their governing to campaign mentality hinged. Other GOP factions had different non-consultation priorities. “Some just used the WPR because they wanted to prove that Obama was wrong because they opposed military endeavors led by Democratic Presidents. Others didn’t want to have to vote. A few used the WPR as a demagoguery tool. And the

---

206. *Id.* at 101.

207. FRANCES E. LEE, BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE 9 (2009).

208. MANN & ORNSTEIN, *supra* note 37, at 8–15.

209. Greenblatt, *supra* note 197.

splits continued from there.”<sup>210</sup> No House Republican group, though, was seeking to highlight President Obama’s consultation violations.

In the Senate, venomous partisanship and the “permanent campaign”<sup>211</sup> consumed members and hampered the body from demanding consultation, or at least rebuking the executive for failing to consult. It seems intuitively logical that Senate Republicans might have had the most interest in underscoring the lack of consultation, or even achieving real consultation—reflexive opposition to a Democratic President and the constant campaign, combined with senators’ individualism and sense of importance in the smaller upper chamber with its elevated foreign policy role on some issues. However, as the Senate minority, the GOP could not move issues forward without ample Democratic support; the Republicans could only obstruct Senate Democratic initiatives, a power they exercised routinely in the 112th Congress’s hostile climate.<sup>212</sup> And the Democratic majority, notwithstanding its diversity, had political incentives not to purposefully attack a fellow partisan in the White House and not to offer Republicans a potentially damaging issue for President Obama. Such actions could hurt Senate Democrats electorally, a prospect too familiar in 2011 with their recent 2010 election losses. If a Democratic intra-party consensus regarding the consultation violations somehow emerged, though, Democratic senators still might have been wary of harping on the administration’s non-compliance and fueling White House wrath. Furthermore, with Senate Republicans’ constant threat of a filibuster and the requisite sixty votes needed to invoke cloture, even majority party unity did not guarantee the passage of legislation.

Finally, it merits mention that in this highly-charged partisan climate, patterns of selectively targeting presidential WPR violations based on party allegiances continued.<sup>213</sup> A review of lawmakers’ floor speeches and remarks in hearings expose the party differences. Over seventy-five percent of verbal criticisms of President Obama’s non-compliance were statements by Republicans.<sup>214</sup> When a handful of Democrats did fault the administration

---

210. Informal interview with aide to senior GOP Rep. (anonymity requested), in Wash., D.C. (May 7, 2012).

211. See generally Sidney Blumenthal, *THE PERMANENT CAMPAIGN: INSIDE THE WORLD OF ELITE POLITICAL OPERATIVES* (1980) (providing background on the permanent campaign).

212. See Barbara Sinclair, *The New World of U.S. Senators*, in *CONGRESS RECONSIDERED 1* (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 10th ed. 2013).

213. Members tend not to invoke the WPR when the President is of their party, even if they invoked it for the prior President of the other party. While legislators seek to protect congressional prerogatives, they also seek to protect a fellow partisan in the White House. See Alan Greenblatt, *Why the War Powers Act Doesn't Work*, NPR (June 16, 2011), <http://www.npr.org/2011/06/16/137222043/why-the-war-powers-act-doesnt-work>.

214. I reviewed members’ criticisms of President Obama’s WPR violations both in the

for evading the law's mandate, their language was both less harsh and softened by objections to their own institution's shortcomings (as evidenced in quotes above).<sup>215</sup> GOP senators also undertook relatively more non-legislative endeavors regarding consultation than their House counterparts, and their minority status in the Senate virtually ensured that words would not translate into binding legislative action.

#### D. What Real Consultation Would Entail: Members Acting Counter to Inherent Political Incentives

In exploring Congress's muted response to President Obama's disregard for Section 3, the broader issue of what real consultation would entail becomes relevant. While consultation is the linchpin for collective judgment, and thus a key WPR provision meriting congressional scrutiny, the nature of consultation and characteristics of the mandate in fact may dissuade or discourage members from vehemently challenging Section 3 violations. Since the WPR's appeal in part is as a political tool, as described earlier,<sup>216</sup> highlighting inadequate consultation may be counterproductive from many lawmakers' perspectives: it may force them to identify the policy preferences they would advocate in joint deliberations; or, it may yield actual consultation, with members then assuming responsibility for a substantive policy approach, and assuming responsibility for politically risky foreign policies is anathema to most legislators. A debate over process problems is politically safer because members do not need to declare their policy positions and potentially share accountability for a foreign policy debacle. As Representative Brad Sherman (D-CA) complained to his Foreign Affairs Committee colleagues, "[A] lot of [members] would just as soon duck the [Libya] issue."<sup>217</sup> It is often simpler and more politically beneficial for legislators to remain on the sidelines and retain the flexibility to engage in the "blame game," particularly when American lives are in jeopardy.

Section 3's ambiguity further diminishes Congress's incentives to focus on consultation, and complicates an assertive congressional response. As discussed earlier,<sup>218</sup> textual imprecision pervades the consultation obligations, with lingering questions about what constitutes consultation, what situations require consultation, and who represents Congress for consultation purposes. Many lawmakers, therefore, do not fully comprehend

---

Congressional Record and in hearing transcripts. A University of Vermont student of mine conducted an independent search to ensure accuracy.

215. See discussion *supra* Part V.B.

216. See discussion *supra* Part VI.

217. *Hearing on Libya and War Powers*, *supra* note 68, at 7.

218. See discussion *supra* Part II.A.

the consultation mandate, incorrectly conflating consultation with notification (as seen above in members' public statements).<sup>219</sup> Also contributing to members' misconceptions, all Presidents since 1973 have chosen to interpret consultation as notification, and few sitting members have the historical appreciation of the provision's letter and intent because they were elected well after the WPR's enactment and they have not read the very short law.<sup>220</sup> Several staff interviewees similarly misconstrued Section 3; some did so, ironically, while charging that others did not understand it.<sup>221</sup> With this congressional confusion, legislators may perceive presidential violations as less flagrant than they are, consequently dampening their displeasure.

Along these lines, and not surprisingly, the public lacks awareness of the consultation mandate as well.<sup>222</sup> And because perceived supportive constituency opinions, desires, and potential reactions exert the principal influence on whether members become involved in a foreign policy issue, the absence of a constituent incentive is significant.<sup>223</sup> Members influenced by the constituent connection to raise the WPR, therefore, are not induced to target consultation evasions; they are more apt to concentrate on the WPR broadly or on the sixty-day clock. The automatic withdrawal clock is easier than consultation for the public to understand.<sup>224</sup> Beyond lacking a constituent-related motivation to highlight executive disregard for Section 3, consultation itself also carries electoral risks. Specifically, it would impel members to identify their policy preferences and to assume responsibility for a military venture, without potentially commensurate electoral benefits.

The impact of this variable—namely, the nature of consultation and characteristics of the mandate—on members' responses to presidential non-compliance has increased over time. As the governing-to-campaign mentality has become the norm, members religiously calculate the electoral consequences of their actions, prompting them to avoid matters with clear political pitfalls such as targeting a President's evasion of Section 3. The diminished appreciation of the consultation provisions, enacted forty years ago when few current members were in Congress,<sup>225</sup> compounds members'

---

219. See discussion *supra* Part V.B.

220. Telephone interview with senior Sen. Democratic Foreign Policy aide (anonymity requested) (May 4, 2012).

221. Both House and Senate staff interviewees erred in this manner.

222. Both Democratic and Republican House and Senate staff interviewees underscored this point.

223. See Eileen Burgin, *Representatives' Decisions on Participation in Foreign Policy Issues*, 16 LEGIS. STUD. Q. 521 (1991).

224. Both Democratic and Republican House and Senate staff interviewees raised this point.

225. See generally MATTHEW E. GLASSMAN & AMBER H. WILHELM, CONG. RESEARCH

reticence to champion the issue. Lawmakers personally invested in upholding Section 3's letter and spirit due to their involvement in the WPR drafting and the memories of Vietnam it evokes, also are becoming scarce.<sup>226</sup> The continually expanding number of presidential precedents of not consulting further reinforces Congress's tendency to acquiesce, rather than to try to ensure compliance. Moreover, as the WPR has come to be viewed through a more partisan lens, perhaps countervailing incentives to stress consultation emerge only for some legislators not in the President's party.

#### E. Concluding Remarks on the Congressional Silence

The simultaneous occurrence of four factors—the timing of the Libya revolt, characteristics of the U.S. operation, the 112th Congress's political climate, and the nature of the consultation mandate—appear to have decreased members' interest in showcasing President Obama's inadequate consultation regarding Libya. Congress's muted response is striking, especially given that prior administrations' disregard for the consultation mandate sparked Congress to pursue both legislative and non-legislative actions. And because consultation is the prerequisite for the WPR's key objective that military engagements be based on co-determination, Congress's inattention to this WPR provision might appear to be counter-intuitive.

### VII. SYRIA, CONSULTATION, AND THE CONGRESSIONAL REACTION

When President Obama declared in August 2013, without consulting Congress, that a U.S. military strike against Syrian President Bashar al-Assad (in retaliation for his use of chemical weapons on Syrian citizens) was imminent,<sup>227</sup> Congress responded in its typical fashion. In contrast to Congress's anomalous passivity following the administration's circumvention of its consultation obligation regarding Libya, in late August 2013 (albeit during a congressional recess), lawmakers once again stressed

---

SERV., R41545, CONGRESSIONAL CAREERS: SERVICE TENURE AND PATTERNS OF MEMBER SERVICE, 1789-2013 (2013), *available at* <https://www.fas.org/sgp/crs/misc/R41545.pdf> (examining turnover in the U.S. House of Representatives and the U.S. Senate).

226. *Id.*; JENNIFER E. MANNING, CONG. RESEARCH SERV., R41647, MEMBERSHIP OF THE 112TH CONGRESS: A PROFILE, 1-2 (2011), *available at* <http://www.senate.gov/reference/resources/pdf/R41647.pdf> (discussing the ages of members in the U.S. House of Representatives and the U.S. Senate in the 112th Congress).

227. Naureen Khan, *Obama Readies for Syrian Strikes in Shadow of Iraq War*, ALJAZEERA AM. (Aug. 30, 2013), <http://america.aljazeera.com/articles/2013/8/30/obama-presses-forsyrianinterventioninshadowofiraqwar.html>.

their consultation concerns.<sup>228</sup> Conforming to the analysis above, President Obama's non-compliance elevated Section 3 to the forefront of Congress's WPR focus. Notwithstanding the limitations on the legislative and non-legislative activities that members may undertake when not in Washington, D.C., senators and representatives vocally admonished the White House for inadequate consultation.<sup>229</sup> Speaker Boehner underscored, in an August 28, 2013 letter to President Obama, that while "chairmen of the national security committees" appreciate the "initial outreach from senior administration officials," "substantive consultation" has yet to occur.<sup>230</sup> And a letter sent to President Obama from 116 representatives (98 Republicans and 18 Democrats), also on August 28, began, "We strongly urge you to consult and receive authorization from Congress before ordering the use of U.S. military force in Syria. Your responsibility to do so is prescribed in the Constitution and the War Powers Resolution of 1973."<sup>231</sup> Members concentrated, as is the norm, on what they viewed as sub-par consultation regarding Syria, rather than on any underlying weaknesses with the consultation mandate.

Thus, despite constraining influences—the congressional recess, the 113th Congress's continuing partisan polarization, and the disincentives inherent in the nature of consultation and the characteristics of the mandate—legislators criticized what many perceived to be President Obama's evasion of the consultation requirement.<sup>232</sup> Various factors pertaining to the specifics of a possible military retaliation against Syria, and the context in which the U.S. military endeavor would occur, differed significantly from the Libya situation and helped to ignite consultation-related activity. Congress, for instance, was not consumed at that time with other immediate crises, such as budget and debt-ceiling deadlines (although they were approaching).<sup>233</sup> Moreover, public opinion was firmly opposed to a U.S. strike.<sup>234</sup>

---

228. See, e.g., Tom Cohen, *How Much Say Will Congress Have on Syrian Chemical Weapons Response*, CNN POLITICS (Aug. 30, 2013, 6:29 AM), [http://www.cnn.com/2013/08/29/politics/obama-congress-syria/index.html?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+rss%2Fcnn\\_allpolitics+%28RSS%3A+Politics%29](http://www.cnn.com/2013/08/29/politics/obama-congress-syria/index.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+rss%2Fcnn_allpolitics+%28RSS%3A+Politics%29).

229. See *id.*

230. Letter from John Boehner, Speaker of the House of Representatives, to President Barack Obama (Aug. 28, 2013), [hereinafter *Boehner Letter on Syria*], available at <http://www.speaker.gov/press-release/boehner-seeks-answers-president-obama-syria>.

231. Letter from Rep. Scott Rigell & 115 Members of Congress, to President Barack Obama (Aug. 28, 2013) [hereinafter *Rigell Letter*], available at <http://rigell.house.gov/news/documentsingle.aspx?DocumentID=347024>.

232. See, e.g., Cohen, *supra* note 228; *Boehner Letter on Syria*, *supra* note 230; *Rigell Letter*, *supra* note 231.

233. Daniel Newhauser & Emily Ethridge, *Shutdown Showdown*, CQ WKLY., Sept. 23, 2013, at 1550–54 (discussing the partisan wrangling over the continuing resolution to keep the government running).

234. Andrew Dugan, *U.S. Support for Action in Syria is Low vs. Past Conflicts*, GALLUP



Additionally, in the absence of U.N. Security Council resolutions encouraging action against Syria, members were not distracted from Section 3 by debates about U.N. resolutions' significance vis-à-vis the WPR. Instead, the lack of U.N. Security Council (and broad international) support for a military response to the Syrian government, increased members' concerns about policy formulation, highlighting the importance of consultation with Congress.<sup>235</sup> The extended decision making on a mission not deemed to be urgent also meant that Congress had the opportunity to deliberate. Congress did not have to respond at once to a commencing intervention.

As the congressional calls for consultation persisted, in an unexpected turn of events, President Obama announced that he would seek congressional authorization for his planned military attack on Syria (an action he still claimed authority to undertake on his own).<sup>236</sup> Without U.N. Security Council and tangible international backing for enforcing his "red line"—and facing a complex and explosive geopolitical situation, a war-weary and unsupportive American public wanting congressional involvement, and a no-win political and military decision about U.S. policy<sup>237</sup>—President Obama chose to share the decision-making responsibility (and possibly the blame), with Congress.<sup>238</sup> Some legislators did not relish this position because, as discussed earlier,<sup>239</sup> members generally seek to avoid politically difficult votes with potentially negative electoral ramifications. This displeasure may have contributed to the ironic situation of several lawmakers actually criticizing President Obama for turning to Congress.<sup>240</sup> Representative Peter

---

POLITICS (Sept. 6, 2013), <http://www.gallup.com/poll/164282/support-syria-action-lower-past-conflicts.aspx>.

235. See, e.g., Lara Jakes, *Syria Strikes Lack International Support, Obama in Difficult Position*, HUFFINGTON POST (Aug. 30, 2013, 8:40 PM) [http://www.huffingtonpost.com/2013/08/30/syria-strikes-international\\_n\\_3846626.html](http://www.huffingtonpost.com/2013/08/30/syria-strikes-international_n_3846626.html) (discussing the absence of international support for President Obama's desired approach toward Syria).

236. President Barack Obama, Statement by the President on Syria (Aug. 31, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria>.

237. See, e.g., Michael Rubin, *President Obama Has Big Choices on Syria but Endgame is Crucial as Opposition Radicalizes*, N.Y. DAILY NEWS (Aug. 28, 2013, 9:49 PM), <http://www.nydailynews.com/news/world/rubin-president-obama-big-choices-syria-article-1.1439968>; Glenn Thrush & Jennifer Epstein, *The Lonely President*, POLITICO (Aug. 29, 2013, 10:49 PM), <http://www.politico.com/story/2013/08/barack-obama-the-lonely-president-96064.html>.

238. See, e.g., Karen Tumulty, *Syria Presents New Challenge as Obama, Congress Wrangle Over War Powers*, WASH. POST (Aug. 30, 2013), [http://www.washingtonpost.com/politics/syria-presents-new-challenge-as-obama-congress-wrangle-over-war-powers/2013/08/30/9bf0e85a-11a8-11e3-85b6-d27422650fd5\\_story.html](http://www.washingtonpost.com/politics/syria-presents-new-challenge-as-obama-congress-wrangle-over-war-powers/2013/08/30/9bf0e85a-11a8-11e3-85b6-d27422650fd5_story.html).

239. See discussion *supra* Part II.D.

240. See, e.g., Ernesto Londoño, *Obama Says U.S. Will Take Military Action Against Syria*,

King (R-NY) argued, “President Obama is abdicating his responsibility as Commander-in-Chief and undermining the authority of future Presidents. . . . The President doesn’t need 535 members of Congress to enforce his own red line.”<sup>241</sup> As an internationally negotiated resolution regarding Syria’s possession of chemical weapons began emerging in early September 2013, President Obama requested time to pursue a Russian proposal.<sup>242</sup> Members seized the promise of diplomacy, relieved that, at least temporarily, they were dodging a tough floor vote.<sup>243</sup> Even members typically skeptical of delegating decisions to international bodies embraced the potential international solution.<sup>244</sup>

### VIII. LOOKING AHEAD

Since 1973, presidential initiatives to use force have almost always aroused congressional interest in the WPR broadly, and the consultation requirement in particular. The norm is for members concerned about institutional prerogatives, and/or a policy’s substance, to protest presidential violations, and to employ legislative and non-legislative mechanisms to rebuke the executive. Yet during the 2011 Libya mission, the confluence of four influences contributed to Congress’s muted response to inadequate consultation. In contrast to the Libya case, Syria presented the classic congressional reaction, with lawmakers criticizing President Obama for failing to consult. Although the congressional recess, the political climate, and the nature and characteristics of the consultation obligation probably served as disincentives to members highlighting President Obama’s evasion of Section 3 in regards to Syria, features of both the Syria situation and the context of a U.S. response to it overrode the constraining influences. More generally, then, even with a combination of deterring factors coalescing, if a significant cross-pressure exists, the restraining variables may not repress or

---

*Pending Congress’s Approval*, WASH. POST (Aug. 31, 2013), [http://www.washingtonpost.com/world/national-security/obama-set-to-speak-on-syria-in-rose-garden/2013/08/31/65aea210-125b-11e3-85b6-d27422650fd5\\_story.html](http://www.washingtonpost.com/world/national-security/obama-set-to-speak-on-syria-in-rose-garden/2013/08/31/65aea210-125b-11e3-85b6-d27422650fd5_story.html).

241. Max Fisher, *Member of Congress Berates Obama for Consulting Congress on Syria*, WASH. POST (Aug. 31, 2013, 3:31 PM), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/08/31/member-of-congress-berates-obama-for-consulting-congress-on-syria/>.

242. President Barack Obama, Remarks by the President in Address to the Nation on Syria (Sept. 10, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>.

243. Emily Cadei, *Debate on Syria Action Delayed*, CQ WKLY., Sept. 16, 2013, at 1514–15. Members of the Senate Foreign Relations Committee, however, did not avoid the issue, passing S.J. Res. 21 on Sept. 4, 2013, which authorized U.S. strikes against the Syrian regime. S.J. Res. 21, 113th Cong. (2013).

244. Emily Cadei, *Syria Debate Scrambled the Hill’s Political Landscape*, CQ WKLY., Sept. 16, 2013, at 1501.

stymie the congressional response to a White House disregarding the consultation mandate.

What does this tell us about potential congressional reactions in the coming years to inevitable presidential circumvention of Section 3? Clearly, identical factors to those constraining Congress in the Libya case will never recur. But in a subsequent military initiative, it is conceivable that similar elements, or even a different combination of variables, may coincide and inhibit legislators from challenging executive failure to consult. At a minimum, the political environment and the characteristics of the consultation requirement will continue, for the foreseeable future, to limit members' responses. First, Congress likely will remain highly partisan with the permanent campaign mentality prevailing. Most political observers agree that in terms of Congress's polarization and paralysis, "the worst is probably yet to come."<sup>245</sup> Second, it is axiomatic that the consultation obligation itself will persist as a constraining influence, because real consultation would entail members acting counter to inherent political incentives. This disincentive to demanding faithful consultation may become more significant over time; fewer legislators will have the requisite historical perspective and understanding of a 1973 law—and presidential reinterpretations of it—or a more personal investment in its enforcement and survival. On the other hand, as we observed with Congress's outcry when the Obama administration initially sidestepped Congress on Syria, cross-pressures generating congressional interest in advocating compliance with the consultation requirement may emerge. It seems likely that such cross-pressures will continue to develop, prodding members into using legislative and non-legislative devices to rebuke presidential circumvention of the consultation mandate. The pattern of congressional behavior since 1973 is undeniable; members assert their prerogatives and criticize executive disregard for Section 3. The congressional reaction regarding executive consultation violations in Libya thus appears to be an anomaly in what was, in 2011, an almost forty-year-old law. Despite the potential pitfalls of admonishing White House evasions of Section 3, scrutinizing presidential non-adherence in a reactive fashion still presents members with a convenient political tool to attack a policy's substance and showcase their own institutional powers.

But to move beyond reactive congressional protests to actually ensuring meaningful consultation, thereby reaffirming the WPR's objective of collective judgment, Congress must act in a proactive manner. Precedents offer no indication that the Supreme Court will weigh in, and Presidents, generally with little motivation to consult, will continue to narrowly interpret

---

245. Klein, *supra* note 203.

the consultation obligation except in isolated situations.<sup>246</sup> Congress, though, could alter the dynamic in all instances when Presidents are deciding whether and how to engage militarily; through statutory change, Congress could directly tie funding to the President truly consulting before launching a military operation. Such a law also would need to prohibit the President from transferring and utilizing pre-existing dollars to act militarily without consultation.

Yet legislating on consultation will not be easy. During a military entanglement Congress cannot address Section 3's fundamental shortcomings because the immediate crisis—not structural or statutory reform—requires attention. And when a crisis situation is not consuming legislators and they could assume a proactive approach, other pressing problems dominate their radar screens. As a Senate staffer described, “Legislating on War Powers is a catch-22. When nothing is happening—when there is not ongoing use of force—there’s no urge to do something. When something is happening, there’s a feeling that action must be taken—later.”<sup>247</sup> Moreover, the current venomous partisanship and an inevitable presidential veto on a structural war powers matter (that would be perceived by the executive as an encroachment on presidential prerogatives), present additional obstacles. In a time of unified government, the majority party’s incentive is to work with its President; legislating on consultation would be viewed as confrontational and as potentially weakening the President, and therefore would be seen as undesirable. Action thus is more likely with divided government. Enacting reform on consultation undoubtedly would provoke a presidential veto, however, and Congress only has mustered the requisite two-thirds super-majority to override two foreign policy vetoes (one to pass the WPR).<sup>248</sup> A significant precipitating event, such as an egregious presidential war powers violation with dire consequences, may be required for reform legislation to garner sufficient support from a President’s party to override a veto. Consequently, for the time being, we can expect that the WPR consultation requirement will remain on life support; Presidents will not faithfully consult and Congress will chastise executive non-compliance, but will not take binding legislative action to ensure future, legitimate co-determination.

---

246. In the case of Syria, for instance, President Obama had obvious motivation to engage in at least some consultation and to seek a congressional vote. See Rubin, *supra* note 237; Thrush & Epstein, *supra* note 237.

247. Burgin, *supra* note 19, at 228–29.

248. The other foreign policy veto override occurred in 1986. See Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086.