

Accountability Without Deliberation? Separation of Powers in Times of War

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Abstract

Much prior scholarship on war powers has articulated something of a false dichotomy: either Congress possesses the exclusive power to initiate war and therefore presidents who fail to respect this legislative prerogative act unconstitutionally; or presidents possess independent constitutional authority to initiate hostilities as they see fit, with or without congressional sanction and input. Mariah Zeisberg's *War Powers* and Stephen Griffin's *Long Wars and the Constitution* offer more nuanced frameworks for assessing the constitutional fidelity of both branches' exercise of the war powers. The books share an emphasis on interbranch deliberation as a defining feature of the constitutional exercise of war authority; however, both paint a rather dour picture of interbranch deliberation in the post-1945 era. Rather than reliably engaging the executive in sustained debate, Congress has often, in President Obama's words, chosen to "sit on the sidelines" and "snipe" if politically advantageous. I argue that while normatively suboptimal, Congress' reactive stance best matches the incentives facing individual members. When Congress engaged military policy debates, its contributions rarely meet the deliberative norms articulated by Griffin and Zeisberg. Nevertheless, I argue that even patently politically-motivated congressional challenges to the president's conduct of military policy may nonetheless, in some political climates, achieve much of the democratic accountability that Griffin envisions as the ultimate end of an interbranch deliberation. Congressional challenges impose tangible political costs on the president; in many cases, these are significant enough to encourage an administration to alter its preferred policy course. Finally, the paper explores how the strength of this congressional constraint and the measure of accountability it brings varies significantly from case to case and over time. While partisanship was the dominant factor driving interbranch conflict for much of the post-1945 era, growing ideological cleavages with respect to foreign policy *within* both parties may weaken the partisan dynamic to these interbranch wartime politics in the future.

Breaking Through a False War Powers Dichotomy

The terrorist attacks of September 11, 2001, did more than destroy two icons of American economic and military might and rattle the sense of inviolable security dear to most Americans in a post-Cold War world. It also sent shock waves that long reverberated through our separation of powers system. To meet the exigent threat, Congress delegated sweeping power to the president with the Authorization to Use Military Force of October 2001 (AUMF), a legal instrument still used by President Obama thirteen years later to justify a new war against the Islamic State of Iraq and the Levant absent new congressional authorization for military action.

Moreover, when AUMF and subsequent legislation has not granted sufficient authority, post-9/11 presidents have claimed they possess the requisite power anyway under Article II. For example, while AUMF is often described as a blank check, it is important to remember that Congress actually amended the Bush administration's proposed draft, circumscribing the scope of the authorization by striking language that would empower the president not only to "to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, harbored, committed, or aided in the planning or commission of the attacks against the United States that occurred on September 11, 2001, but also *"to deter and pre-empt any future acts of terrorism or aggression against the United States."*¹ Undeterred by such congressional efforts to limit presidential war powers, President Bush turned to John Yoo at the Office of Legal Counsel for a broader assessment of the presidency's inherent powers to address the national emergency. Yoo obliged, concluding that Congress could not narrow the presidency's all but plenary inherent constitutional power to address the emergency militarily: "Neither statute (AUMF or the War Powers Resolution), however, can place any limits on the

¹ Richard Grimmett. "Authorization for Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History." *CRS Report RS22357*, January 16, 2007. Emphasis added.

President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. *These decisions, under our Constitution, are for the President alone to make.*"² Given such brazen assertions that seem to shake the very foundations of the constitutional order, it comes as little surprise that many pundits and scholars alike have decried the return of the "imperial presidency."³

The conception of an imperial presidency rests on the thesis that the Constitution establishes, if not a precise division of war powers between the branches, plain limits on unilateral presidential war-making. While late 18th and earliest 19th century precedents point to congressional dominance in the war powers arena, presidents were quick to transgress these limits.⁴ By 1846, President Polk's machinations to provoke a war with Mexico and present Congress with a *fait accompli* prompted his fellow Democrat John C. Calhoun to lament, "it sets the example, which will enable all future Presidents to bring about a state of things, in which Congress shall be forced, without deliberation, or reflection, to declare war, however opposed to its convictions of justice or expediency."⁵ The balance of interbranch war powers had obviously shifted quite far from Jefferson's deference to congressional prerogatives during the Tripolitan War.⁶ After considerable interbranch jockeying in the decades following the Civil War, the

² John Yoo. "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them." September 25, 2001. <http://fas.org/irp/agency/doj/olc092501.html#> (accessed October 6, 2014). Emphasis added.

³ For example, see Charlie Savage. 2007. *Takeover: The Return of the Imperial Presidency*. Boston, MA: Little, Brown; Andrew Rudalevige. 2005. *The New Imperial Presidency: Renewing Presidential Power after Watergate*. Ann Arbor: University of Michigan Press. For the original articulation of the emergence of an imperial presidency during the Johnson and Nixon administrations, see Arthur Schlesinger, Jr. 1973. *The Imperial Presidency*. Boston, MA: Houghton Mifflin Company.

⁴ For a review of early practice and jurisprudence confirming Congress' lead role, see David Gray Adler. 1996. "The Constitution and Presidential Warmaking." In *The Constitution and the Conduct of American Foreign Policy*, eds. David Gray Adler and Larry George, Lawrence: University of Kansas Press.

⁵ John Schroeder. 1973. *Mr. Polk's War: American Opposition and Dissent, 1846-1848*. Madison: University of Wisconsin Press, p. 24.

⁶ See Schlesinger, *The Imperial Presidency*, pp. 22-23 (But, as Jefferson instructed Congress, its commander was "unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense," so the enemy vessel, having been "disabled from committing further hostilities, was liberated with its crew." Jefferson went on to

pendulum of power once again swung overwhelming to the commander in chief after Pearl Harbor, culminating in the imperial presidencies of Johnson and Nixon.

The very concept of an imperial presidency is built on one strand – perhaps the dominant strand – of legal war powers scholarship. This research contends that a reading of the plain meaning of the constitutional text and convention and ratification debates, as well as an assessment of early practice, leaves little ambiguity on one key issue: presidents cannot constitutionally initiate military action independently of Congress.⁷ From this perspective, presidents have routinely violated a fundamental tenet of the constitutional order from President Truman’s claim of unilateral presidential power to initiate American armed intervention in Korea in 1950 through President Obama’s assertions that he possesses independent authority to order military actions in Libya and Syria absent any congressional authorization.

A revisionist school of thought challenges this dominant view, arguing instead that the constitutional distribution of war powers is shrouded in considerable ambiguity. The various grants of war-making authority in Articles I and II are sufficient to enable both Congress and the president to initiate military action in the course of performing their constitutional duties and responsibilities to defend the national welfare. The most extreme articulations of this view – such as that captured in Yoo’s memo of October 2001 quoted above – interpret executive war powers under the vesting clause of Article II so broadly as to question the legislature’s capacity to check the commander in chief’s decisions and actions at all. Such legislative assertion is

ask Congress to consider “whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries.”).

⁷ Among many others, see: Charles Lofgren. 1972. “War-Making Under the Constitution: The Original Understanding.” *The Yale Law Journal* 81: 672-702. Michael Glennon. 1990. *Constitutional Diplomacy*. Princeton, NJ: Princeton University Press; Louis Henkin. 1990. *Constitutionalism, Democracy, and Foreign Affairs*. New York: Columbia University Press; Louis Fisher. 1995. *Presidential War Power*. Lawrence, KS: University of Kansas Press.

transformed into an unconstitutional incursion into a sphere of presidential constitutional authority.⁸

The end result is that much of the existing literature presents analysts with something of a false dichotomy. Either the power to initiate military action – and, presumably, despite the literature’s strong focus on conflict initiation ultimate authority over the course of military actions (whether they are to be “continued or concluded” in Madison’s phrase) – resides solely with Congress.⁹ Or presidents possess independent constitutional authority to unilaterally use force abroad that the separation of powers appears all but irrelevant to questions of war powers.

Perhaps the core contribution of both Mariah Zeisberg’s *War Powers: The Politics of Constitutional Authority* and Stephen Griffin’s *Long Wars and the Constitution* is to free scholarship from this dichotomous paradigm and to propose more nuanced metrics on which we can assess the constitutional fidelity and authority of interbranch politics in a new era. Despite their common objective and core contribution, important differences separate the two approaches.

Griffin’s sympathies plainly lie closer to those of the congressionalists. He notes that while even antebellum presidents made bold assertions of executive war powers, they did not claim the unilateral authority to initiate war. Consider Polk’s machinations of 1846. He provoked a Mexican attack in disputed territory as a means of presenting Congress with something of a *fait accompli*. Sensing significant congressional opposition to war, Polk took no chances and cleverly attached a declaration of war as a preamble to an appropriations bill to

⁸ Among others, see: Eugene Rostow. 1971. “Great Cases Make Bad Law: The War Powers Act.” *Texas. Law Review* 50: 833-900; Philip Bobbitt. 1994. “War Powers: An Essay on John Hart Ely’s *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*.” *Michigan Law Review* 92: 1364-1400; John Yoo. 2005. *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*. Chicago: University of Chicago Press.

⁹ Madison writing as Helvidius, quoted in Edward Corwin. 1917. *The President’s Control of Foreign Relations*. Princeton, NJ: Princeton University Press. p. 19.

provide additional resources for General Taylor's forces along the Rio Grande. The administration then aggressively whipped fellow Democrats to beat back the Whigs' effort to sever the preamble, which might well fail on its own, from the larger appropriation for the troops in the field. These stratagems clearly pushed the limits of presidential war power as understood in the mid 19th century; yet, they also revealed the importance that the administration attached to securing congressional approval for an expanded war against Mexico.¹⁰

Perhaps nowhere is the divide between the old constitutional order and the new order that arose in the shadow of the Cold War more apparent than in the stark contrast between Roosevelt's delicate politicking in the years leading up to World War II and Truman's unilateral decision to plunge the United States into the Korean War. Whereas Roosevelt spent years cajoling Congress and the American people laying the groundwork for America's eventual entry into World War II, which would only come with the surprise attack on Pearl Harbor, Truman rebuffed congressional calls to seek a declaration of war against North Korea and instead argued that the presidency possessed the requisite inherent authority to order the military action absent formal congressional sanction.

Rather than simply rejecting the new constitutional order as incompatible with the plain meaning of the text as many congressionalists do, Griffin acknowledges that the unique challenges posed by the Cold War and the emerging national security state all but required a fundamental reordering of constitutional powers. However, in contrast to revisionists, Griffin argues the ascendant role of the executive in the new order is "inconsistent with the historical meaning of the Constitution," even as "it has an eminently defensible policy rationale."¹¹ New realities and original intent are inherently in tension. In so doing, Griffin moves the debate

¹⁰ This interpretation of Polk's efforts to secure authorization is in contrast to Zeisberg's. Mariah Zeisberg. 2013. *War Powers: The Politics of Constitutional Authority*. Princeton, NJ: Princeton University Press. p. 78-84.

¹¹ Stephen Griffin. 2013. *Long Wars and the Constitution*. Cambridge, MA: Harvard University Press. p. 7.

forward, arguing that contemporary analysts must embrace this new order and think about how it might be better managed to serve a higher goal that was the ultimate aim of the Framers themselves: harnessing the judgment and wisdom of multiple actors when guiding the ship of state in wartime.

The fundamental problem with the new constitutional order, according to Griffin, is “the absence of interbranch deliberation over time on matters of foreign policy and national security strategy.”¹² Perhaps the most prominent fear raised by the Framers in Philadelphia was that of concentrating the powers of war and peace in too few hands. Re-energizing interbranch deliberation would address this foundational concern. When viewing contemporary war powers debates through this lens, congressional authorization for the use of force, or the lack thereof, is not in and of itself what is needed – rather, genuine interbranch deliberation is the key desideratum.

Zeisberg offers a different interpretation of the constitutional distribution of war powers, one that is less in line with dominant congress-centric interpretations than that advanced by Griffin. For example, Zeisberg describes considerable ambiguity in the constitutional text, including over the meaning of the word “war” itself that all but preclude analysts from drawing firm demarcations of authority across the branches. While Congress has the power to declare war and issue letters of marque and reprisal, the debates of the Constitutional Convention plainly considered a presidential responsibility to repel attacks and invasions. The president takes an oath of office to defend the nation, and the vesting clause encompasses a general grant of executive power, including in the martial sphere, to the presidency. Given such ambiguity, Zeisberg argues that we cannot simply endeavor to assess the constitutional fidelity of a branch’s

¹² Griffin, *Long Wars and the Constitution*, p. 8.

actions in a given case to a determinate legal text. Rather, we must assess the fidelity of such actions to the politics that the constitutional text creates.

To aid in making such assessments, Zeisberg articulates a “relational conception” through which we are to evaluate each branch’s actions with respect to the normative substantive and “processual” standards created by the Constitution. Regarding the former, Zeisberg identifies a substantive standard that independent presidential military action must be for defensive purposes. In terms of process, the Constitution creates norms favoring each branch constructing its own independent judgment through the exercise of its distinctive capacities, resources, and perspectives. Yet, at the same time, Zeisberg argues that the politics envisioned by the Framers demands that each branch enter into relationship with the other by making their constitutional assertions and policy judgments open to judgment by the other and, more generally, to “use their powers in ways that are more rather than less responsive to the positions of their rivals.”¹³

The end product of such a process is much the same goal articulated by Griffin: interbranch deliberation. “When the branches review one another’s political behavior, including their interpretive claims, according to the perspectives conditioned by their various distinctive capacities, they embark on a process of interbranch deliberation that, I argue, creates constitutional authority for the war powers system as a whole.”¹⁴ In contrast to much of the war powers debate, which focuses on whether specific presidential actions accord or conflict with the specific reading of the constitutional provisions on offer, both Zeisberg and Griffin suggest a fruitful new direction: examining whether presidential or congressional actions in a specific instance facilitate or thwart the productive, interbranch deliberation and even conflict that gives the resulting policy outputs constitutional weight.

¹³ Zeisberg, *War Powers*, 38.

¹⁴ Zeisberg, *War Powers*, 41.

Why Our System Fails to Produce Quality Deliberation

How well has our politics fared in producing the interbranch deliberation needed to satisfy the constitutional requirements for war-making and to produce well-reasoned policy outputs? More often than not, particularly since the conclusion of World War II and the emergence of the new security order that has characterized both the Cold War and post-9/11 eras, rather than genuine interbranch deliberation, the executive has assumed the lead role in military affairs. Congress, by contrast, has embraced a more reactive posture, preferring to concentrate its energies on attacking the president and his policies when they fail to unfold according to plan.

This characterization largely matches Griffin's assessment. While Congress occasionally plays meaningful roles in his account, more often than not it embraces a passive role, ceding initiative to an executive branch that is eager to seize it. Zeisberg's longer historical sweep includes instances when presidents exposed their policy arguments and claims for presidential constitutional authority to legislative rebuff, such as Franklin Roosevelt's laborious coalition building in the years leading up to Pearl Harbor. However, since 1945 Zeisberg also paints a rather dour picture of interbranch deliberation, both over the initiation of military action and over its conduct once begun.

For example, Zeisberg argues that President Nixon's clandestine invasion of Cambodia violated both substantive standards of defense and process-oriented standards of deliberation. President Kennedy's handling of the Cuban Missile Crisis, in Zeisberg's assessment, had greater constitutional authority under the relational conception. But on the key question of deliberation, Kennedy failed. His insistence on secrecy, which all but precluded interbranch deliberation, is justified as essential in this context to producing an independent judgment grounded on the

executive branch's unique perspective into the crisis.¹⁵ While perhaps necessary, it is hard to square Kennedy's decision process in the Missile Crisis with the Founders' desire to avoid concentrating the powers of war and peace in few hands. Zeisberg only briefly alludes to the war in Iraq, arguing at one point that President Bush was "notably sensitive to legislative prerogatives in war" when he requested congressional authorization.¹⁶ While Bush did seek congressional authorization, it is important to remember that, like his father, George W. Bush insisted in his signing statement that he possessed the independent constitutional authority to go to war against Iraq absent any legislative sanction.¹⁷ Yet, later Zeisberg implies that the relational conception can provide support for "the common intuition that legislative processes [perhaps including the vote on the Iraq War resolution, which was rushed to Congress in the immediate lead up to the midterm elections] may sometimes be so deficient as to actually impair the constitutional authority of legislative assent."¹⁸ Similarly, in her assessment of the Iran-Contra affair, Zeisberg readily identifies Congress' failure to engage in genuine interbranch deliberation over both the scope of executive war powers and America's policy toward Central America more generally.¹⁹

Instead of actively engaging political and policy debates over major questions of foreign and military policy, in the contemporary era Congress has largely recused itself from sustained engagement over questions concerning the initiation of military action, ceding the authority to and responsibility of employing American military might abroad to the president. Instead,

¹⁵ Zeisberg, *War Powers*, 179.

¹⁶ Zeisberg, *War Powers*, p. 7.

¹⁷ "While I appreciate receiving that support, my request for it did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use force to deter, prevent, or respond to aggression or other threats to U.S. interests." George W. Bush. "Statement on Signing the Authorization for Use of Military Force Against Iraq Resolution of 2002." October 16, 2002. *Public Papers of the President*, <http://www.presidency.ucsb.edu/ws/?pid=64386> (accessed October 6, 2014).

¹⁸ Zeisberg, *War Powers*, p. 47.

¹⁹ Zeisberg, *War Powers*, pp. 196-202.

Congress has often preferred, in President Obama's words, to "sit on the sidelines" and "snipe" if challenging the commander in chief becomes politically advantageous.²⁰

Why has Congress embraced such a reactive position? One interpretation is to focus the blame primarily on the president; maximalist assertions of presidential unilateral authority over war initiation have effectively cut Congress out of such decisions altogether since 1945. However, Congress' reactive posture – while contra the Framers' hopes and expectations as enshrined in Federalist 51 – also appears perfectly rational when we consider the political incentives members face when deciding whether and how to respond to major foreign policy developments.

Somewhat paradoxically, presidents often have greater incentives to seek congressional authorization than members of Congress have to engage the debate over war initiation and to have their input. Since Truman, all presidents have asserted the office's unilateral authority to order American military forces abroad absent explicit congressional authorization to pursue a wide range of policy goals. Even President Obama, a former law professor who as Senator maintained "the president does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation," changed tune once in office.²¹ For example, in 2011 President Obama, backed by the Office of Legal Counsel, argued that he possessed independent constitutional authority to intervene militarily in Libya without congressional approval because the mission was tied to the national interest, even if the crisis in Libya plainly did not involve an actual or imminent threat to

²⁰ Barack Obama. "The President's News Conference with Prime Minister John Fredrik Reinfeldt of Sweden in Stockholm, Sweden." September 4, 2013. *Public Papers of the President*, <http://www.presidency.ucsb.edu/ws/?pid=104040> (accessed October 6, 2014).

²¹ Obama quoted in David Fahrenthold. "On Debt and Libya, It's President Obama vs. Senator Obama." June 22, 2011. *Washington Post*. http://www.washingtonpost.com/politics/on-debt-and-libya-its-president-obama-vs-senator-obama/2011/06/22/AGhK4AjH_story.html (accessed October 6, 2014).

the United States itself.²² Similarly, when contemplating military strikes against the Assad regime in Syria for its use of chemical weapons, the Obama administration articulated a legal justification for unilateral intervention in Syria because of vital national interests in enforcing international norms against the use of chemical weapons.²³ President Obama ultimately decided to first seek congressional authorization before a military strike for *political* not *legal* purposes.²⁴

While contemporary presidents have embraced Truman's constitutional logic articulating a unilateral presidential power to use force, many have also drawn an important lesson from his failure to secure a congressional vote backing intervention in Korea: when possible, securing congressional authorization and tying members of Congress politically to a foreign venture and its ultimate success can pay significant dividends.²⁵ Congressional authorizations can bolster public support for the president and his military policies, and they can make it more difficult for members who previously voted for the authorization to criticize the administration's subsequent conduct of the military mission should it fail to unfold according to plan.²⁶ As anecdotal evidence of the latter dynamics, consider the plight of both John Kerry in 2004 and Hillary Clinton in 2008 as they struggled to distance themselves from their 2002 votes to authorize the war in Iraq; both were plagued by unshakeable and politically damning charges of having flip-flopped on the war. Only when we view presidents as seeking congressional authorization for political cover rather than legal sanction can we make sense of presidents routinely asking for

²² Caroline D. Krass. "Authority to Use Military Force in Libya." April 1, 2011. http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf (accessed October 7, 2014).

²³ Charlie Savage. "Obama Tests Limits of Power in Syrian Conflict." September 9, 2013. *New York Times*. <http://www.nytimes.com/2013/09/09/world/middleeast/obama-tests-limits-of-power-in-syrian-conflict.html?pagewanted=all#> (accessed October 7, 2014).

²⁴ For an extended discussion of the politics involved, see Douglas Kriner. 2014. "Obama's Authorization Paradox: Syria and Congress's Continued Relevance in Military Affairs." *Presidential Studies Quarterly* 44: 309-327.

²⁵ See for example, Griffin's discussion of the Gulf of Tonkin Resolution: "The purpose of the resolution was to put Congress on the record politically in supporting the administration's response to the Tonkin Gulf attacks and its general policy of resisting communist aggression in Vietnam." Griffin, *Long Wars*, p. 123.

²⁶ Douglas Kriner, "Obama's Authorization Paradox." Pp. 315-324.

congressional authorization, while assiduously maintaining that they possess independent authority to act unilaterally and that congressional authorization, while welcome, is superfluous.

Members of Congress, however, often logically prefer not to tie their political fates to those of the president and his military endeavors. The Framers hoped that the political interests of members of Congress would be intimately tied to those of the institution itself, and that they would therefore protect it by aggressively combating any and all usurpations of power by the executive. However, partisan and electoral incentives often swamp the institutional.²⁷ Members of Congress, particularly members of the opposition party, stand to gain little by considering, debating, and ultimately voting for a congressional authorization that would lend the commander in chief valuable political cover should the mission go wrong. Instead, they stand to gain much more by remaining silent at the outset and waiting for windows of opportunity to arise during the course of a military operation to attack the president for political gain. As a result, the stronger the ranks of the opposition party, the more unlikely Congress will be to engage the president in constructive, deliberative dialogue with the ultimate aim of exercising its constitutional authority to give legislative sanction to the use of force.

Even presidential co-partisans may often possess strong incentives to avoid engaging in the politics of war initiation and instead leave the initiative to the president. If a war succeeds, these members stand to reap electoral gains on the president's coattails. If a military venture proves more costly than anticipated, their reticence to tie themselves politically to the conflict *ex ante* may help insulate them from political fallout and direct the public's animus instead at the commander in chief.

²⁷ Among many others, see David Mayhew. 1974. *Congress: The Electoral Connection*. New Haven, CT: Yale University Press. Daryl Levinson and Richard Pildes. 2006. "Separation of Parties, Not Powers." *Harvard Law Review* 119: 2311-2386.

While members of Congress may rationally prefer to be silent in the lead up to a use of force, once military action begins members of Congress have routinely used an array of tools at its disposal in an endeavor to influence the course of military policy, and perhaps more directly to inflict political damage on the commander in chief. Since 1945, members of Congress have introduced dozens of legislative instruments that would in some way hamstring the president's flexibility in the military arena, from efforts to cut off funding for military operations to those that would establish timetables for the withdrawal of American forces. Between 1945 and 2004, Congress's committees held hundreds of days of hearings alleging presidential misconduct of military actions from the Korean War to the invasion of the Dominican Republic to the invasion of Grenada to peacekeeping missions in the Balkans and the war in Iraq. More informally, members of Congress have engaged the debate in the public sphere and generated considerable media coverage sharply criticizing administration policies.²⁸

Of course, Congress does not always use the various tools available to it to engage in political battle with the president over the conduct of military affairs. Rather, partisan politics, fluctuations in public opinion, and changes in the situation on the ground all influence Congress' willingness to use the legislative and investigative weapons in its arsenal.²⁹ Yet, when partisan incentives and windows of opportunity align, Congress does spur to life and has routinely throughout the post-World War II era engaged major questions of foreign policy, battling the executive for leadership over the course and conduct of military affairs.

This active congressional engagement, however, only rarely resembles the deliberative norms prized by both Zeisberg and Griffin. For example, Zeisberg's deliberative norm for Congress demands that legislators link their arguments about Congress and its constitutional

²⁸ See Douglas Kriner. 2010. *After the Rubicon: Congress, Presidents, and the Politics of Waging War*. Chicago, IL: University of Chicago Press. Pp. 152-166.

²⁹ See Kriner, *After the Rubicon*, p. 243.

authority to their own, independent substantive agenda for national security policymaking.³⁰ To be sure, when challenging presidential policies some members of Congress often make constitutional claims about congressional prerogatives in war powers that have been violated by a unilateral executive. Similarly, some members will offer substantive critiques of administration policy and strive to articulate viable alternative policy courses.

However, a great deal of congressional criticism of presidential foreign policy is better designed to score political points than to engage in genuine deliberation with the executive branch. Rather than reshape policy, most congressional challenges seem crafted with an eye toward assigning blame and inflicting political pain. Given Congress' institutional weakness in questions of war powers, this approach makes sense. Presidents enjoy significant first mover advantages.³¹ By taking the initiative and acting unilaterally to dispatch troops abroad, they put other actors on the defensive and compel them to take affirmative action to undo policies that the executive branch has already put in motion. In most cases, Congress' institutional limitations – collective action dilemmas, super-majoritarian requirements, and a legislative process riddled with transaction costs – render it exceedingly unlikely that Congress can legislatively compel the president to abandon his preferred policy course.³² Moreover, as the failed efforts in the 110th Congress to use the power of the purse to compel a drawdown in Iraq show, even when Congress overcomes these internal hurdles, they face the all but insurmountable barrier of a president

³⁰ Zeisberg, *War Powers*, p. 33.

³¹ On the president's institutional advantages when acting unilaterally see, Terry Moe and William Howell. 1999a. "The Presidential Power of Unilateral Action." *Journal of Law, Economics and Organization* 15: 132-179; Kenneth Mayer. 2001. *With the Stroke of a Pen: Executive Orders and Presidential Power*. Princeton: Princeton University Press; William Howell. 2003. *Power Without Persuasion: The Politics of Direct Presidential Action*. Princeton: Princeton University Press.

³² On collective action dilemmas, see Terry Moe. 1994. "The Presidency and the Bureaucracy: The Presidential Advantage." In *The Presidency and the Political System*, ed. Michael Nelson. Washington, D.C.: CQ Press. On super-majoritarian requirements, see Keith Krehbiel. 1998. *Pivotal Politics: A Theory of U.S. Lawmaking*. Chicago: University of Chicago Press. On transaction costs, see Terry Moe and Scott Wilson. 1994. "Presidents and the Politics of Structure." *Law and Contemporary Problems* 57: 1-44.

wielding a veto pen. All but precluded from effecting major policy change legislatively, congressional opponents have sought political advantage as well as policy influence through more informal means: by seeking to maximize the political costs the president must pay to pursue military policies that diverge from congressional preferences.

Accountability Without Deliberation?

Congressional challenges to presidential military policies are more often calculated to score political points than to engage in ardent interbranch deliberation. Nevertheless, is it possible that Congress' engagement through these means, while perhaps suboptimal normatively, nonetheless provides a measure of democratic accountability? While both Zeisberg and Griffin emphasize interbranch deliberation, Griffin is also explicit in stating that accountability is the ultimate aim: "Yet this requirement [to seek authorization] is in service of a larger vision of separation of powers designed to encourage interbranch deliberation and, through such deliberation, a democratic exchange with the people with the creation of a cycle of accountability being the ultimate end in view."³³

Can this accountability be achieved without genuine interbranch deliberation? At several points, Griffin seems to suggest no. After describing the absence of deliberation in key historical cases, Griffin notes that as a result a cycle of accountability is never initiated.³⁴ However, when Congress breaks its silence, engages in policy debates and criticizes the president's military policies when windows of opportunity arise, does this behavior – while imperfect and often

³³ Griffin, *Long Wars*, p. 50.

³⁴ For example, Griffin notes that Nixon's invasion of Cambodia and other escalations of the Vietnam War helped obtain a modest concession from North Korea. However, "because the cycle of accountability never began, Congress and the public never had the chance to decide [whether it was worth the cost]." Griffin, *Long Wars*, p. 148. An alternative assessment of the politics of the era is that the tremendous congressional criticism Nixon weathered did provide some measure of accountability, which forced Nixon to pursue different policies than he would have in the absence of this criticism, including ultimately withdrawal itself.

decidedly non-deliberative – induce a tangible measure of accountability? There are strong reasons to believe that it does. For example, while Griffin laments the lack of accountability on Vietnam policy in the Nixon era, he also notes that while Nixon unilaterally expanded the war into Cambodia, “it was not a permanent expansion of the war, as Nixon shortly withdrew American forces, albeit under tremendous political pressure.” The absence of interbranch dialogue may have resulted in a costly policy blunder that did little to further American objectives. However, the political pressure generated by Congressional opposition had concrete policy consequences. The question, then, is how much accountability such political dynamics can generate.

Moving beyond the isolated case of Nixon’s Cambodia policy during the Vietnam War, there is substantial empirical evidence across a range of military missions that even politically-motivated congressional challenges to the president’s conduct of military policy have considerable ramifications for policy outcomes. One reason that such congressional challenges are politically potent is that the public still believes Congress has an important constitutional role to play in questions of war powers. For example, in a September 2013 poll, 61% of Americans said that Congress should have the final say over whether the United States conducted military strikes against Syria in response to the Assad regime’s use of chemical weapons, versus only 30% saying that such authority rested with President Obama.³⁵ Similarly, in an August 2002 poll – despite President Bush’s lofty 68% job approval rating – a full three quarters of Americans said that President Bush should obtain congressional approval before invading Iraq.³⁶ As a result,

³⁵ Pew Research Center for the People & the Press/USA Today Poll, Sep, 2013. Retrieved Oct-7-2014 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html

³⁶ For the public’s belief that Bush should seek congressional authorization, see: ABC News/Washington Post Poll, Aug, 2002. Retrieved Oct-7-2014 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html. For Bush’s 68%

there is an expectation for most Americans that Congress, despite its institutional limitations and dismal public standing, has an important constitutional role to play in military affairs. And when Congress speaks, its voice seems to resonate with the public. A long literature in political science has demonstrated that congressional criticism undermines public support for the president and his military policies.³⁷ Sensitive to the political costs of diminished public support, presidents appear to adjust the scale, scope, and duration of their military policies in response to real or anticipated objections from Congress.³⁸

Moreover, there is also considerable empirical evidence that the threat of costly congressional criticism should the president pursue costly military policies of which the legislature will disapprove also serve as a powerful constraint on the presidential initiation of military action, even though Congress often is reluctant to engage political debates concerning the initiation of military action.³⁹ Such dynamics in which congressional actions (or the anticipation of them), while not legally binding, nonetheless compel presidential policy shifts, reinforce one of Griffin's main themes: "that the Constitution can influence policy even when it is not enforced by the courts."⁴⁰ The process through which Congress generates this constraint bears little resemblance to the reasoned argument among philosopher kings with different

approval rating, see: Gallup Poll, Aug, 2002. Retrieved Oct-7-2014 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html

³⁷ e.g. Richard Brody. 1991. *Assessing the President: The Media, Elite Opinion, and Public Support*. Stanford: Stanford University Press; John Zaller. 1992. *The Nature and Origins of Mass Opinion*. New York: Cambridge University Press; Adam Berinsky. 2009. *In Time of War: Understanding American Public Opinion from World War II to Iraq*. Chicago: University of Chicago Press; William Howell and Jon Pevehouse. 2007. *While Dangers Gather: Congressional Checks on Presidential War Powers*. Princeton, Princeton University Press; Douglas Kriner, and Francis Shen. 2014. "Responding to War on Capitol Hill: Battlefield Casualties, Congressional Response, and Public Support for the War in Iraq." *American Journal of Political Science* 58: 157-174.

³⁸ David Clark. 2000. "Agreeing to Disagree: Domestic Institutional Congruence and U.S. Dispute Behavior." *Political Research Quarterly* 53: 375-401; Kriner, *After the Rubicon*; Kevin Wang. 1996. "Presidential Responses to Foreign Policy Crises: Rational Choice and Domestic Politics." *Journal of Conflict Resolution* 40: 68-97.

³⁹ Howell and Pevehouse, *While Dangers Gather*.

⁴⁰ Griffin, *Long Wars*, p. 4.

institutional vantage points and insights. However, it may nonetheless produce many features of democratic accountability.

Partisanship and the Strength of the Congressional Constraint on Presidential War Power

Under certain conditions Congress may well provide a significant measure of democratic accountability to presidential military policymaking, despite the general absence of sophisticated interbranch deliberation. However, the accountability that Congress creates through these mechanisms is far from constant. There is considerable variation in Congress' willingness to use the tools at its disposal to combat the commander in chief, both over time, and even within the course of individual conflicts themselves.

Partisanship is one of the most oft-cited explanations for these varying interbranch dynamics.⁴¹ As the ranks of the opposition party in Congress grow, institutional and partisan incentives come into greater alignment and legislative challenges to presidential foreign policies become more likely. Both Griffin and Zeisberg acknowledge and address the importance of partisanship in shaping interbranch wartime politics. However, they reach somewhat different conclusions. Griffin traces the evolution of the two parties' foreign policy ideological stances over the course of the Cold War to the point that Republicans generally became champions of a strong, unilateral presidency, whereas Democrats remained more skeptical and attached to Congress' traditional prerogatives in war powers.

⁴¹ Howell and Pevehouse, *While Dangers Gather*; Kriner, *After the Rubicon*; Clark, "Agreeing to Disagree"; David Brule. 2006. "Congressional opposition, the economy, and US dispute initiation, 1946-2000." *Journal of Conflict Resolution* 50: 463-483. For cross-national evidence of such a dynamic, see Michael Koch 2009. "Governments, Partisanship, and Foreign Policy: The Case of Dispute Duration." *Journal of Peace Research* 46: 799-817.

Zeisberg argues that while partisanship undoubtedly matters, its influence is variable and far from unidirectional.⁴² For example, Zeisberg notes that partisan ties provided few barriers to the Nye Committee when it investigated the role of the munitions industry in spurring American intervention in World War I and in assessing the United States' defense posture more generally. Rather, isolationists and other like-minded members from across the political spectrum joined together in critically examining presidential policymaking and articulating a different vision for American foreign policy. In the context of the Iran-Contra investigation, partisanship significantly hampered the effectiveness of the congressional challenge to President Reagan's policies. Republicans intensely rallied around their party leader, and in so doing all but denied that Congress had any role to play in the matter at all. Democrats, by contrast, Zeisberg suggests failed to be partisan enough. In their efforts to avoid having the inquest cast as a partisan crusade, they failed to push their case aggressively and undermined its ultimate effect. Of course, it is perhaps unsurprising that partisan forces affected interbranch politics differently during the 1930s, an era of low polarization and considerable intra-partisan ideological heterogeneity, than in the much more polarized era of the 1980s.⁴³ Moreover, despite Democrats' reticence to be tagged with charges of being soft on defense which may have blunted the force of the Iran-Contra hearings, partisanship almost certainly played a dominant role; it is highly unlikely that there would have been an inquest at all – let alone one that does appear to have damaged the president politically – if Republicans had controlled Congress.

For much of the post-1945 era – even during the alleged Cold War consensus – partisanship was frequently a main driver of interbranch conflict in war powers. Partisan attacks

⁴² “Partisanship is organized differently in different times, implies different goals to different officials within a particular context, and often embraces multiple, not one, security ideologies.” Zeisberg, *War Powers*, p. 249.

⁴³ On changes in partisan polarization over time, see, Noland McCarty, Keith Poole, and Howard Rosenthal. 2006. *Polarized America: The Dance of Ideology and Unequal Riches*. Cambridge, MA: MIT Press. Pp. 25-30.

began almost immediately after the Japanese surrender on the decks of the *U.S.S. Missouri* with Republican inquests into the loss of China and Truman's conduct of the Korean War. To be sure, congressional challenges to presidential war-making can and did arise in periods of unified government. For example, Senator Fulbright commenced a series of Senate Foreign Relations Committees investigations into President Johnson's foreign policy, first in the Dominican Republic and then in Vietnam. However, even this congressional inquest increased considerably in scope and intensity once Nixon replaced Johnson in the Oval Office. Congressional Democrats continued to combat President Ford aggressively in the foreign policy arena, and interbranch tensions in foreign policy erupted again in the 1980s with battles between Democrats and President Reagan over administration policies in Central America, Grenada, Lebanon and elsewhere.

Most of the major interbranch battles of the mid to late Cold War era pitted a Democratic Congress against a Republican president. However, with the fall of the Soviet Union and the election of a Democratic president more willing to use force abroad than Carter, Republicans largely abandoned their support for unilateral presidential power in military affairs and instead assailed Clinton's use of force for peacekeeping missions in Haiti and the Balkans. Most Democrats, by contrast, who had erstwhile lamented presidential usurpations of war powers, rallied behind Clinton and blocked legislative efforts to undo Clinton policies.⁴⁴

After 9/11, both parties willingly delegated considerable legislative authority and political leeway to President Bush in waging the war on terror as he saw fit. However, partisan divisions reemerged quickly. Virtually all of the opposition to the Iraq War in 2002 was provided by Democrats. As the war progressed and its failures mounted – from high casualties,

⁴⁴ For an empirical analysis of legislative roll call voting behavior on bills to constrain the president's freedom of action in foreign affairs during the Reagan and Clinton administrations, see Kriner, *After the Rubicon*, pp. 251-266.

to a disastrous and costly occupation, to Abu Ghraib – Democrats charged the administration with misconduct, while Republicans did all in their power to squelch efforts to challenge the administration from ever reaching the floor or having a hearing in committee. For example, the House Armed Services committee held only five hours of hearings into allegations of prisoner abuse at Abu Ghraib, versus over 140 hours of House testimony on whether President Bill Clinton improperly used the White House Christmas card list in the 1990s.⁴⁵ The Democratic victories in the 2006 midterms, by contrast, opened a floodgate of congressional challenges to the administration’s unilateral conduct of the Iraq War, including embarrassing revelations about pre-war intelligence, body armor shortages, and even failures to provide adequate care to wounded veterans at Walter Reed Army Medical Center. These Democratically-led inquests derailed administration efforts to capitalize on the seeming success of the surge and dramatic decreases in violence and American casualties in the waning months of the Bush presidency.

Empirical analysis of congressional activity supports the contention that partisanship has indeed been the most important engine driving variation in interbranch conflict in the military policy arena in recent decades. For example, an analysis of 22 major uses of force involving ground troops or the sustained use of firepower between 1945 and 2004 shows that the strength of the opposition party in Congress is the strongest predictor of the intensity and timing of legislative and investigative challenges to presidential discretion in the conduct of military affairs.⁴⁶

However, partisanship may not always be the dominant factor determining whether Congress can impose some sort of imperfect, though meaningful accountability on the commander in chief. Growing ideological cleavages with respect to foreign policy *within* both

⁴⁵ Henry Waxman, *Congressional Record*, June 21, 2005, H4829, Vol. 151, No. 83.

⁴⁶ Kriner, *After the Rubicon*, pp. 242-250.

parties holds the potential to weaken the partisan dynamic underlying interbranch wartime politics in the future.

As Zeisberg's discussion of the Nye Committee shows, the United States has experienced periods of considerable intra-party ideological heterogeneity before. There are clear signs that significant intra-partisan cleavages on foreign policy are re-emerging in the contemporary period. For example, the most vocal critics of President Obama's 2009 troop surge in Afghanistan were not Republicans; they were Democrats who had grown skeptical of the United States' capacity to transform Central Asia through military might. In May 2009, it was Massachusetts Democrat Jim McGovern who introduced legislation (HR 2404) demanding that the President present the Congress with a detailed exit strategy for Afghanistan. A majority of Democrats backed the bill. Only Republican support saved the day for the administration, though some like conservative California Congressman Dana Rohrabacher publicly joined forces with the liberal Democrats to oppose the troop surge.⁴⁷ In 2011, a curious alliance of Democrats and Republicans attacked the President's intervention in Libya on both constitutional and policy grounds. For example, whereas President Obama and his lawyers maintained that the Libyan mission should not trigger the automatic withdrawal clock of the War Powers Resolutions because American forces were not engaged in "hostilities," House Speaker John Boehner, perhaps unsurprisingly, quipped: "It just doesn't pass the straight-face test in my view." More interestingly, the Speaker was joined in his assessment by California Democrat Brad Sherman, a senior Democrat on the House Foreign Affairs Committee, who argued, "You're

⁴⁷ Richard Simon. "Opposite Minds Think Alike: A Republican and a Democrat, Both Against Sending More U.S. Troops, Become Surprising Allies." *Los Angeles Times*, October 19, 2009, A8. As of 2012, Congressman Rohrabacher had earned a lifetime 95% conservative rating from the American Conservative Union. <http://votesmart.org/interest-group/1481/rating/6734#.VDVLpfldWck> (accessed October 8, 2014).

flying over Libya, participating in bombing Libya. It seems hostile to me.”⁴⁸ Three years later, Virginia Democrat and ardent Obama supporter Tim Kaine and Tea Party favorite Justin Amash stood united in voting against the White House’s bill to arm moderate Syrian rebels and calling for the President to seek congressional authorization for airstrikes against ISIS.⁴⁹

If these intra-partisan foreign policy cleavages continue to widen, it has the potential to ease the boom-bust cycle in congressional engagement in interbranch war politics that has hampered democratic accountability for much of the post-World War II era.

Conclusion

While the Constitution endeavored to ensure interbranch dialogue and the building of consensus across institutions before the nation reached the most fateful policy decision it can make – to go to war – our polity has long failed to live up to this ideal. However, the basic mechanism of democratic accountability remains: the ballot box. Moreover, Congress continues to play an important role in providing this accountability by using its institutional leverage points to ratchet up the political costs to presidents of pursuing costly military policies. Presidents, attentive to their historical legacies and continuation in office, often adjust their conduct of military policy accordingly.

Such accountability, obtained not through genuine interbranch deliberation but more informally by political-motivated interbranch conflict and anticipatory reactions, is admittedly imperfect. It does not forestall the policy blunders that in an ideal world might have been avoided if administration policies were submitted *ex ante* to full scrutiny through an open and

⁴⁸ David Fahrenthold and Felicia Sonmez. “Congressmen Criticize Obama’s Stand on Libya.” June 16, 2011. *Washington Post*. http://www.washingtonpost.com/politics/congressmen-criticize-obamas-stand-on-libya/2011/06/16/AGuvhdXH_story.html (accessed October 8, 2014).

⁴⁹ Deirdre Walsh. “Most Positive Reaction to Syria Airstrikes Comes from Obama’s Critics.” September 23, 2014. *CNN.com*. <http://www.cnn.com/2014/09/23/politics/syria-airstrikes-congress-reaction/> (accessed October 8, 2014).

reasoned debate engaging actors with multiple institutional view points and sources of expertise. However, presidents do pay costs for policy blunders, costs that are often heightened by Congress. In many cases, the resulting political costs are steep enough to compel presidents to abandon their preferred policy course, even though Congress is patently unable to compel them to do so legislatively.

As a result, the president – while certainly *primus inter pares* in the military arena – is not imperial. Political reality is considerably more complex than a simple dichotomy between an all powerful, imperial president and a commander in chief fully dependent on Congress for initiative in the military arena. Rather, as both Griffin and Zeisberg show, the true balance of power lies somewhere between these extremes, and it varies over time as interbranch politics unfold.