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**EXTERNAL FACTORS IN PRESIDENTIAL WAR AUTHORITY**

**by**

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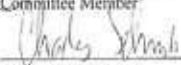
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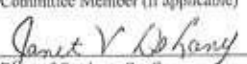
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## ABSTRACT

### EXTERNAL FACTORS IN PRESIDENTIAL WAR AUTHORITY

Scott Manning

This thesis addresses the evolution of presidential war authority and key “external factors” influencing presidential war authority, examining these factors in three recent presidential administrations. The evolution of executive war authority follows a historical pattern: the exercise of executive war power has varied from weak during America’s beginnings to very strong since the early 20<sup>th</sup> century. The thesis explores the reasons for this development and distinguishes several influential factors that fueled and sustained this growth. The thesis, however, also explores the manner in which these “external factors” can work to limit presidential war authority as well. In the final analysis, despite the existence of some limiting factors on presidential war authority, the research suggests a strong likelihood of increasing presidential power in the areas of foreign affairs and, particularly, war making.

## TABLE OF CONTENTS

1. Introduction	1
2. The Establishment of Presidential War Authority	1
3. The Evolution of Presidential War Authority	8
4. The Limits of Presidential Authority	18
5. Case Studies	28
a. George H.W. Bush (1989-1993)	29
b. George W. Bush (2001-2009)	42
c. Barack Obama (2009-Present)	56
6. Conclusion	69
Bibliography	74
Curriculum Vita	80

## **1. Introduction**

In the course of American history, the presidency has amassed a steady accumulation of war powers at Congress' expense. This paper aims to examine the evolution of presidential war powers within the context of several major external factors. For the purposes of this paper, "external factors" will be defined as factors which are not spelled out in the Constitution, but may still garner a significant influence on presidential authority in war. These factors include influences such as: public support of a president; bureaucratic resistance to a president's agenda; party machinery within Congress; the executive's relationship with media, and Court rulings. To this end, this paper will be broken down into four areas of focus: *the establishment of presidential authority*, in which it will be imperative to develop the historical picture about presidential war-making authority and its changes over time; *the evolution of presidential authority*, in which the major drivers or factors contributing to an escalation in executive power can be detailed and developed; *the limits of presidential authority*, whereby we can attempt to examine many of the same variables that contributed to the rise in presidential authority, except within the context of illustrating their limitation; and finally, *case studies*, to "test" these ideas with historical examples thus adding a more concrete framework. This paper will offer a unique perspective in that it will examine restrictions on presidential war authority, including both constitutional and extra-constitutional limits.

## **2. The Establishment of Presidential Authority**

From the framers of the Constitution to present-day, presidential authority has remained a focus of scrutiny and interest. Indeed, both history and scholarship have shown that presidential authority merits debate: "Executive power has always presented

a conundrum: how to make the executive strong enough to promote the common good, but not so strong as to risk despotism” (Yoo 2). During the Constitutional Convention of 1787, cautioned by pre-revolutionary experience and armed with the concepts and ideas of Machiavelli, Hobbes, and Locke, the founders set to address a chief problem – how to republicanize the executive?

Despite their revolutionary skepticism of executive authority, we know today that the framers created a presidency with key powers and responsibilities. But it is important to examine the framers’ original intentions and scope of the authority itself. Where were they coming from and how did we get to where we are? James Pfiffner lends weight to considering our beginnings:

This is not to argue that we must discover the original intent of the framers, but we can best understand the appropriate role of the president in the Constitutional system if we have some sense of the origins of range and limits to presidential power. One does not have to take a rigidly textual literalist or originalist approach in order to argue that the plain words of the Constitution should be our primary guide to its meaning. When there is any ambiguity, the deliberations of the Framers provide useful indications of what they intended (Pfiffner 15).

One of the hallmark debates surrounding the creation of the United States Constitution focused on the distribution of power between the federal government and individual state governments. While the broader topic of federalism dominated the agenda, it is within this context that the structure and substantive powers of the executive were deliberated. Both the Federalists (championed by Alexander Hamilton) and Anti-Federalists (championed by Thomas Jefferson) took center stage with competing viewpoints on the scope of executive power that continue to this day.

During the ratification of the Constitution, Anti-Federalists decried the “new” executive as little more than a return of monarchy and a repudiation of revolutionary

spirit. Hamilton himself characterized the Commander-in-Chief role: “[T]he commander of the fleets and armies of America . . . though not dignified with the magic name of King, he will possess more supreme power, than Great Britain allows her hereditary monarchs” (Yoo 37). The Anti-Federalist perspective highlights an important point in the powers instilled in an executive. They did not distinguish between the guise of “king” and “president.” Each label denoted a centralized figure with the potential to wield a tremendous amount of power. More importantly, one of the fundamental evolutions of executive power would be determining where that power came from. To that end, the framers drew from some of the key thinkers that came before them.

Niccolo Machiavelli would be the first to view his leader as an executive who governed rather than a monarch who reigned. In his *Discourses on Livy*, Machiavelli outlines the structure and advantages of a republic. He conceptualizes a form of government grounded in some form of popular consent and control. This was a fundamental, but essential idea for the framers. Republicanizing the executive meant justifying his power in practical, rather than divine or absolute, terms. “One of Machiavelli’s contributions to political thought was the modern idea of executive power, which entailed the usefulness of decisiveness, the importance of secrecy, and the advantages of having a single person to execute governmental policy” (Pfiffner 16). Machiavelli contributes a groundbreaking step in any analysis of the degrees of executive power. Today, we recognize the importance of swift and unitary action in response to events such as the attacks of September 11th, 2001. “Hamilton’s description of the Presidency as able to act with ‘decision, activity, secrecy, and dispatch’ echoes Machiavelli” (Yoo 4). Machiavelli breaks from the unquestioned authority of an absolute

monarch to the practicality of the powers invested in a secular mortal. Machiavelli inspires us to move from an outlook of unquestioned acceptance to one of best practice. And it is in this context that the Framers would begin to view and address the tensions between executive power and republican government.

Thomas Hobbes built on Machiavelli's invention of the modern executive. He believed as Machiavelli did in an executive that would act to execute the laws and protect the public welfare. "Thomas Hobbes saw the executive as, ideally, an institution rather than a person. Hobbes believed sovereign authority should vest in one body, either a monarch or an assembly, and did not understand the executive and legislative functions to be distinct" (Yoo 4). Although Hobbes does not seem to specify his executive as a branch of government, but rather the entirety, he embraces the fundamental concepts of Machiavelli. Hobbes' view of the executive as an institution rather than a person solidifies Machiavelli's concept of an executive whose powers derive from practical, rather than divine or unquestioned terms.

John Locke, expanding on the ideas of thinkers before him, conceived of the early notion of separation of powers in his *Second Treatise of Government*. Locke believed in a dominant legislature that worked with a sometimes independent executive. Locke's work spoke of three powers of government: legislative, executive, and federative. "The federative power (what we call foreign policy today) was 'always almost united' with the executive. Separating the executive and federative powers, Locke warned, would invite 'disorder and ruin'" (Fisher 1). But what do we make of Locke's views on unanticipated threats? In this case, Locke believes that the executive should have the prerogative to exercise authority in the name of public interest and for the greater good: "Many things



there are, which the law by no means can provide for; and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require; nay, it is fit that the laws themselves should in some cases give way to the executive power” (Locke 344). In Locke’s two branches of government and allocation of authority in times of hostility, the roots of a more modern, American political landscape become evident. Using the working blueprint of the great political thinkers before them, the framers considered the design of the Constitution of the United States, which would embody an original blend of these ideas.

Montesquieu reinforced Locke’s ideas in his *Spirit of the Laws* and became particularly famous for his addition of a third branch of government. In *The Federalist* #47 James Madison refers to Montesquieu’s ideas: “There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,” or, “if the power of judging be not separated from the legislative and executive powers” (Madison 111). While Montesquieu did not alter the main concepts of Locke, he defines the executive and legislative functions and introduces a third branch of government: “Montesquieu defined the legislative power as controlling domestic policy, taxing and spending and establishing private rules of conduct. Following Locke, he viewed the executive power as enforcing the laws and conducting foreign relations. Montesquieu added a third branch of government, the judiciary” (Yoo 6). Montesquieu’s ideas stress the importance of the separation of powers and are echoed by dueling Federalists and Anti-Federalists during the ratification debates.

In examining the evolution of presidential authority, one must look at the framers’ blending of these ideas into practice. The founders, from their experience with history

and suspicions about human nature, entrusted many aspects of war authority and national security to Congress. The executive would be vested with Commander-in-Chief authority. Commander-in-Chief authority was to be used, not to make war, or raise a military, but to repel sudden attacks. The power to send troops into, and initiate, war would be granted to Congress (at least in concept). In response to Anti-Federalist fears over a too-powerful executive, Federalist George Nicholas emphasized “that Congress’s sole control over establishing and funding the military ‘will be a powerful check here’” (Yoo 50). Despite this, Anti-Federalists were unconvinced, as the debates make clear. Indeed, we see the roots of a strong presidency begin to take shape.

The Federalist and Anti-Federalist debates reveal just how independent and how powerful the presidency could be, akin in some ways to Machiavelli’s executive. The implementation of a three-branch governmental structure and ultimate support for executive strength in times of hostility is similar to Locke’s *Second Treatise of Government*. In Article II, which gave the president the roles of Commander-in-Chief and Chief Executive, the framers’ thinking clearly hints at an increased centralization of power in times of national danger. As Hamilton states in Federalist 74: “Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand” (Hamilton). In addition, Hamilton argues against the plural executive in Federalist 70: “Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number” (Hamilton). The evolution of this position however, made many Anti-Federalists uneasy. Wary of the potential of an exceedingly powerful presidency, Patrick Henry argued that the

Constitution leans towards monarchy because the President may easily become a King.

“If your American chief be a man of ambition and abilities, how easy is it for him to render himself absolute” (Henry 17). The prospect of despotism still factored heavily into Anti-Federalist thinking.

Ultimately, the Federalist view won out. They did not share the Anti-Federalist concerns over the coming of an absolute monarchy. The “new” executive was not based on divine right or social class, but rather one of practicality and the advantages of a central figure. By the end of the ratification process, the Federalists had succeeded in enacting a constitutional plan that restored the executive’s core powers while making it directly responsible to the people as a whole. “They had republicanized the executive, or, in Harvey Mansfield’s words, they had ‘tamed the Prince.’ It would be the job of future presidents to realize the framers’ vision of an energetic and empowered executive, but one constrained by a Constitution and the political system that would grow from it” (Yoo 51). Ratifiers of the Constitution cautiously believed in a system and a citizenry that would check its leaders by calling them into question.

As this essay argues, there are also several external checks and limitations to presidential war-powers, which largely emanate from a citizenry that has become keenly aware of its ability to pursue its own interests. By weight of its public or legislative disapproval, the founders allowed the greater public to affect the executive decision-making process. However, checks on the executive remained layered. When the public fell short in performing its duty, the separation of powers remained. In terms of gaining office, even the Electoral College is evidence of the founders’ fear that a tyrant could manipulate public opinion and come to power. In *Federalist 68* Hamilton states: “It was

equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation and to a judicious combination of all the reasons and inducements which were proper to govern their choice” (Hamilton). The deck had been stacked against an overly powerful executive. It is these basic philosophies which lay the groundwork for any impact that a people may have on its executive – the ability to question its actions and react in turn. But how would the context of historical events and the individuality of future office holders impact the evolution of presidential war authority?

### **3. The Evolution of Presidential Authority**

Whereas the unwritten British Constitution based its concept of representation on the different strata of society, the United States Constitution was separated into different functions. In keeping with the founders’ claims of a restrained executive, the early years would see congressional supremacy. However, over time, presidents would begin to accumulate powers. In large part, one might argue that for nearly the first 100 years, the concept of an influential (if not controlling) Congress prevailed. Thus, arguably the next major jump in the evolution of presidential war powers worth examination comes during the Civil War.

Beginning with the Civil War, presidential authority gradually grew, culminating in the powerful 20<sup>th</sup>-century presidency. The “unity of command” argument gained momentum and manifests itself in many different forms and under varying circumstances. What are some of the factors that explain the rise of presidential authority? Some of the key themes will include: presidential access to and control of

information; the changing conditions of war; public approval; command of media attention; and party machinery in an increasingly polarized two-party system.

Abraham Lincoln's (1860-1865) broad interpretation of his Commander-in-Chief authority, it is often argued, saved the Union. The framers had entrusted future presidents with the task of realizing an energetic and powerful executive within the constraints of the Constitution and political system. But through broad interpretation, Lincoln believed that through the Chief Executive Clause, he possessed a wide array of powers if it meant the protection of national interest: "That gave Lincoln the authority to decide that secession justified military coercion, and the wide range of measures he took in response: raising an army, invasion and blockade of the South, military governance of captured territory, suspension of the writ of habeas corpus, and tough internal security measures" (Yoo 202). Clearly, Lincoln's view of executive authority was one of broad interpretation and strength.

Why was Lincoln able to take such a sweeping scope of executive empowerment during the Civil War? Lincoln often invoked the "executive prerogative: acting in the absence of the law and sometimes against it; explaining to the legislature what he had done, and why; and requesting the legislative body to authorize his actions" (Fisher 48). Lincoln's actions run contrary to Locke's views on a separation of powers and a dominant legislature that worked with an independent executive. Lincoln's actions seemed to be viewed as a case of exercising constitutional powers to resolve a conflict rather than to proactively manufacture one. But Lincoln's tenure also served as evidence of a link between broad executive powers and greatness. Does Lincoln's lofty stature hint at an approval of executive empowerment? Does his time in office shift the origins

of executive empowerment to one justified by the political landscape, rather than one exclusively constitutionally based? It is important to note that most presidents directly following Lincoln were relatively weak. It is arguable that the executives immediately following Lincoln recognized the Civil War as a singular event, rather than a precedent for institutionalized claims of broad powers. At the very least, Lincoln's broad interpretation of executive empowerment and unprecedented actions marked an influential stage in the evolutionary timeline of presidential war powers.

Woodrow Wilson's presidency (1913-1921) is another major progression in the centralization of war powers within the executive office. Following the United States' declaration of war in 1917, Congress passed numerous bills designed to accommodate the successful execution of the war effort, but which gave the executive branch some of the widest latitude and far-reaching powers since Lincoln. "The Senate supported the declaration 82 to 6; the House vote was 373 to 50" (Fisher 69). Wilson had congressional approval, but it is clear that the executive branch held the most influence in going to war. "In his history of World War I, Harvey A. Deweerd said that of all the American pressures to bring the country into war in April 1917, the greatest force was that of the President. His position, his opinions, his decisions, and his actions were decisive" (Fisher 69). Wilson's political environment differed from Lincoln's in that he was dealing largely with Germany (an outside force), rather than internal strife. But his terms in office dictated an increasing centralization of power within the presidency.

Wilson and the Congress also passed controversial wartime measures such as the Food and Fuel Control Act. In addition to creating the United States Food Administration and the Federal Fuel Administration, the act empowered the president to,

among other things, limit or prohibit the use of agricultural products and the production of alcoholic beverages. Republican Senator Henry Cabot Lodge was one of its staunchest opponents: “This is the section so stoutly opposed by Senator Lodge as giving the President ‘despotic power’” (“Lever Bill Before Senate”). In effect, President Wilson held the authority to fix food prices, oversee exports, and have significant control over the production and flow of food and fuel supplies. In addition, the act, which was implemented as an emergency wartime measure and drafted to expire at the end of World War I, continued for several years in the absence of hostilities.

The delegation of legislative authority to Wilson made him an extremely powerful executive. Beyond Wilson’s executive influence in moving from neutrality to a state of war, the Espionage Act of 1917 and Sedition Law of 1918 broadened the President’s executive influence to accommodate the war effort itself. Among other things, the Espionage Act prohibited any attempt to interfere with military recruitment and operations, while a year later the Sedition Act also targeted those who publicly criticized the government – which many felt was an infringement on First Amendment rights.

Additionally, the Wilson presidency, in conjunction with Congress, enacted a number of civil liberties suspensions. Congressional resolutions allowed Wilson to take over and operate communication lines, as well as censor communication between Americans and those in other countries. This is not to argue that Wilson’s actions conflicted with those of Congress. In fact, both he and Congress appeared to have interpreted presidential wartime prerogatives within the broadest scope of war powers; however, it is worth noting that Wilson’s executive empowerment was arguably the

strongest since Lincoln's and one that would lay the groundwork for others such as Franklin Roosevelt.

Franklin Roosevelt's presidency (1933-1945) would experience two of the greatest crises since the Civil War with the advent of the Great Depression and World War II. "To bring the nation through both crises, FDR drew deeply upon the reservoir of executive power unlike any President before or since – as demonstrated by his unique status as the only Chief Executive to break the two-term tradition" (Yoo 257).

Roosevelt's handling of the Great Depression and subsequent New Deal allowed for the federal government to coordinate and regulate many aspects of American domestic policy that would have normally been left to Congress.

Franklin Roosevelt's leadership in political environments that included the Great Depression and World War II, coupled with the arrival of radio, created for the president a powerful "bully pulpit," in which the public began to defer to executive rhetoric above all else. "FDR used every last inch of presidential power to bring the nation into war on the side of the Allies, including secretly coordinating military activities with Britain, hoping to force an incident with Germany in the North Atlantic, and pressuring Japan until it lashed out in the Pacific" (Yoo 259). As the first chief executive to take full advantage of radio to project a president's ideas and personality, command of the media evolved into an integral part of executive power. He became the country's foremost civic educator while drawing in new groups for political participation: "FDR's rousing inaugural address drew 460,000 letters; in contrast, President Taft had received only 200 letters a week. Whereas one man had been able to handle all of Hoover's mail, a staff of fifty had to be hired to take care of Franklin Roosevelt's incoming correspondence, which



averaged 5,000 letters a day” (Greenstein 19). FDR’s administration signaled a major shift in powers among the three branches of government and even brought executive empowerment on domestic issues more in line with that of foreign policy. FDR’s independent and vigorous executive is largely credited for laying the foundation for post-World War II policies and is viewed as a major contributing factor in American wartime success.

Developments such as these, a public focus on and growing affinity for presidential control in foreign policy, are now the basis for many pro-executive supporters today. The *unity of command* theory essentially believes that one individual can better keep secrets, gain access to complete information, act swiftly, and more adequately make decisions than a legislative body. It is with these pieces in place that we begin to see a functional versus a constitutional argument. The functional argument suggests that an executive is better equipped and suited to be able to make and execute decisions than a bicameral legislature. In contrast, the constitutional argument demands that executive authority derive only from the Constitution itself. Strong wartime executives like Lincoln, Wilson, and Roosevelt often sought congressional affirmation for their acts. Nevertheless their presidencies seem to hint more at the advantages of their presidential leadership, than did fears over the broadening scope of executive power. In essence, there is a public and even legislative willingness to put the Constitution aside when it is perceived to be in the best interest.

President John F. Kennedy’s (1960-1963) handling of the Cuban Missile Crisis highlights the importance of presidential access to and control of information and is one of the most notable stages of the rise of credibility for executive secrecy. Despite

American intelligence's knowledge that the Soviet Union had been placing intermediate range nuclear weapons into Cuba, Kennedy exercised the value of discretion in not immediately disclosing this information to the American people (and in turn the Soviet Union): "Robert Kennedy, Attorney General, stated that the President and his advisors worked secretly, quietly, and privately which enabled the Executive Committee of the National Security Council (EXCOMM) to decide an appropriate U.S. response" (Gopalan). EXCOMM was President Kennedy's group of advisors, hand-picked to assist in handling the Cuban Missile Crisis.

President Kennedy wanted to keep the knowledge of the newly found missiles as tight-lipped as possible, but more importantly, he advised his officials to keep especially secret how they had planned to respond. "The president knew that if the news leaked, Khrushchev might accelerate the installation of missiles in Cuba or take other action that would limit U.S. options" (White 80). The importance of confidentiality in the early stages of crisis could not be overestimated as any rush to act under public pressure may have limited response options or resulted in a catastrophic mistake. Confidentiality in the matter was not left to chance: "Importantly, the secret held – with an assist from *The Washington Post* and *The Times*, which both figured out what was going on a day or two before Kennedy was scheduled to make his address to the nation. They both agreed, after personal requests from Kennedy, not to print the story. . . . It was, given the stakes, the correct decision" (Holbrooke). Ultimately, the Soviet encounter demonstrates a key moment in which secrecy and control of information have proven an advantage, if not a necessity. From the 20<sup>th</sup> century forward we will see that effective uses of the unity of command serve to further its rising influence in presidential use.

The presidencies of Lyndon Johnson (1963-1969) and Richard Nixon (1969-1974) factored significantly in Congress' passage of the War Powers Act. In 1964, Congress passed the Gulf of Tonkin Resolution, which was a joint resolution in response to an alleged North Vietnamese attack on a U.S. destroyer at sea (though details of the event are often disputed). The resolution authorized the president to repel any future attacks. However, there was disagreement in Congress over the exact meaning of the Gulf of Tonkin Resolution. Both Johnson and Nixon leaned on the resolution as justification for later military actions and buildup.

In the case of Johnson, the resolution was used as leverage for a dramatic increase in U.S. military involvement: "The escalation began in spring of 1965 with Operation Rolling Thunder, which launched a three-year bombing campaign of North Vietnamese targets. Ground deployments began with 4,000 marines in March but quickly reached 200,000 by the end of the year, and 500,000 within two years" (Yoo 351). From the passage of the Gulf of Tonkin resolution, Congress continued to provide appropriations for military action, even as popular and congressional opinion for the war had waned.

The War Powers Act was passed when Congress believed that Johnson and Nixon had exceeded their authority in sending troops to Vietnam, without their approval. "The 1973 War Powers Resolution says the President can only deploy U.S. military forces for a maximum of 90 days without authorization from Congress" (Berman). President Nixon himself vetoed the War Powers Act, claiming it was unconstitutional and obstructed the President of his duties; however, Congress overrode the veto. The advent of "Watergate weakened the Presidency to the point where Congress changed the balance of power in its favor" (Yoo). Congress' attempt has, in fact, had little effect on the

balance of power, but its passage of the resolution is evidence of the importance of *public approval*, as it pertains to executive authority. At a time when scandal had weakened the presidency, the leverage of public support against military action emboldened Congress and offered them an important tool. It is evident that the presidency has evolved in a way that makes presidents reluctant to surrender any measure of executive authority. Executives have rarely, if ever, referenced the War Powers Act when notifying Congress (or the public) of their decisions to send troops into battle: “It looks good on paper, but presidents have generally ignored the War Powers Act, citing Article II, Section 2, as their authority to send soldiers into combat” (Koh). It is clear that the evolution of executive authority has trended heavily in the favor of a strong presidency.

While this paper will cover the current President Barack Obama (2009-present-day), as well as others (including George H.W. Bush and George W. Bush), more thoroughly in its case studies, Obama’s administration very recently highlighted the continuing tensions between the executive and Congress. As recently as June of 2011, Speaker of the House John Boehner demanded that the President provide legal justification for military operations in Libya. In a letter to President Obama, Boehner wrote: “Given the mission you have ordered to U.S. Armed Forces with respect to Libya and the text of the War Powers Resolution, the House is left to conclude the War Powers Resolution does not apply to the mission in Libya, or you have determined the War Powers Resolution is contrary to the Constitution” (Berman). Although the language in Boehner’s letter is strong, that such intensified rhetoric between the branches is needed to prompt strict compliance with the Resolution speaks to institutionalization of power within the presidency. In response, the Obama administration argued that congressional

approval was unnecessary because American intervention in Libya fell short of full-blown hostilities. The Obama case study will show that disputes over the very definition of “war” make the power struggle between the executive and legislative branches layered and complicated.

President Obama is hardly alone in his unwillingness to recognize the legitimacy of the War Powers Resolution. Executive resistance dates back to its inception during the Nixon Administration: “Every President since has refused to acknowledge the WPR’s constitutionality, and several have undertaken action in violation of its terms” (Yoo 353). The overwhelming sentiment among executives has been that the War Powers Resolution infringes on the office’s power as commander-in-chief. Still, other arguments against the resolution can be more nuanced. In the case of American participation in the North Atlantic Treaty Organization (NATO) effort in Libya, the Obama administration contended that the War Powers Resolution was moot, given that the American role was limited there. According to the Administration, U.S. activity had been limited to supportive roles such as providing equipment, surveillance, and the involvement of remotely piloted drones: “The report says that ‘because U.S. military operations [in Libya] are distinct from the kind of ‘hostilities’ contemplated by the resolution, the deadlines for congressional approval or force a withdrawal do not apply” (Wilson). Although the War Powers Resolution has never been ruled on by the Supreme Court, in 1980, the Justice Department’s Office of Legal Counsel concluded that it was within Congress’ power to impose the 60-day clock provision within the law. Nevertheless, the War Powers Resolution has struggled to endure a near half-century of creative arguments

made by the White House, raising a number of questions that may be worth further clarification.

In the post-World War II era, a firm trend of presidential war-making develops. Ultimately, we will see a growing trend, in that executive dominance through examples such as these becomes thoroughly institutionalized and the rise of presidential authority takes full shape. That this phenomenon occurs is indisputable. The question of course, is why? Arguments for presidential access to and control of information; the changing conditions of war; public approval; command of media attention; and party machinery in an increasingly polarized two-party system, have certainly contributed. Is it possible that many of the same variables that have proven to be factors in increasing executive power can also be factors in its limitation?

#### **4. The Limits of Presidential Authority**

Alarmists have long been fixated on an eroding congressional role when it comes to war powers. There are however, certain checks or limitations that have proven effective (to varying degrees) in preventing executive war power from spiraling out of control in the past. It is important to acknowledge and analyze these restrictions on a president's ability to dominate the political landscape, several of which are the very same variables responsible for the rise of presidential authority. These limitations include, but are not limited to: *Public support, relationship with the media, bureaucratic resistance, Congress, and the Courts.*

*Public support* and the correlation between power and popularity has always been a dynamic in the White House's ability to leverage its agenda. "Public standing has important practical implications for those on the political landscape: A popular president

may advance certain initiatives or take certain actions from which he would have refrained had his standing with the public been substantially lower” (Graber 209). Just as public support may help to enhance powers and supplement the Constitution, public opposition toward an executive can act as a major driver in reining in executive actions.

In some cases, a president will vet an idea or advertise their message in order to gain a pulse for public support or disapproval before taking action. While presidents are very good at telling the public what to think *about*, they are not as effective at telling them what to *think*. “Even Ronald Reagan, the ‘Great Communicator,’ had difficulty persuading the public on issues as important to him as aid to the Contras, the SDI missile defense program, and, later in his term, increases in defense spending” (Edwards 328). Moreover, presidents often “go public” and prioritize issues that are already in line with the public’s view. “The president cannot usually shift public opinion in his direction, but, when it happens to coincide with his preference, he can take advantage of this situation to put pressure on Congress to heed the public’s wishes” (Edwards 329).

Undoubtedly, a president will have an easier time taking action with public support than without it. But an alarming concern over executive power and public support seems logically flawed if presidents are, indeed, often ineffective at manipulating public opinion. In this case, it would appear more relevant to an examination of presidential war power, to consider the power of the bully pulpit to influence public opinion:

Leading models of public opinion suggest at least two reasons why presidential persuasion is marginal at best. First, most citizens are not terribly attentive to news about politics, including presidential speeches. Second, even those who are paying enough attention to hear the president’s appeals are often not open to persuasion, thanks to enhanced views about the topic at hand or about the credibility of the president himself. Indeed, highly attentive citizens are more

likely to have strongly held attitudes on issues and toward the president, and thus are among the least likely to change their minds as a result of a presidential appeal (Edwards 328).

Consequently, the argument can be made that the president is not better able to shift public opinion in his direction, but instead, able to shift the political landscape to one of his preferences and better (than Congress) at capitalizing on public opinion when it already aligns with his own views.

In making the case to use executive war powers, presidents appear to have much less influence using the “bully pulpit” as a way to advance executive priority when public opinion is not already in their favor. Just as importantly, public support does not operate as a limiting agent unto itself. Public pressure can invoke more limiting agents than merely its ability to cast a ballot or register in an opinion poll. Public pressure has the ability to inspire other limiters such as the media, bureaucracy, Congress, and The Court.

A major limiter in an executive’s authority is *the media*. White House media coverage shows that public opinion and the media often go hand in hand. “In Richard Neustadt’s classic study of the presidency, real presidential power is defined as the power to persuade, with successful presidents relying on a leadership style based on bargaining” (Han 164). The role of the rhetorical presidency has evolved with growing technologies and the incredible influence of mass media. “By the mid-1960s, the president had become a central focus of news in Washington, and hence began to have more power over shaping the national agenda by rapidly reaching, through both television and print, his national audience” (Han 4). The American people form and revise their impressions of presidential performance on evidence portrayed through news media. The same media



that has so enhanced the power of the rhetorical presidency, however, may limit it through the public's reliance on them to convey and even simplify information.

The media have also shown itself to be a limiting factor in the controversial topic of presidential secrecy and control of information. Many times over, presidents have claimed the right of executive privilege, only to have their constituents wonder if such claims are done out of national interest or individual abuse. Yet even during claims of secrecy, we find that the media supplies the public with enlightening updates quite often:

We celebrate the contributions of investigative reporters who bring us vital, often disturbing information from across the boundary of official secrecy. Hardly a day goes by without a reference in the national media to a classified document or to classified information that has been disclosed to a reporter, usually on the condition of anonymity. The astonishing fact is that our government, despite its vast secrecy apparatus, is basically susceptible to the process of investigative reporting (Aftergood 841-842).

The media's powerful means and abilities, in a free press environment, to rein in presidential authority has the potential to check executives and help inform the democratic decision-making process.

Even beyond the specific areas of secrecy, the media plays a key role in the public eye and therefore in its support or disapproval of its executive. There are "respected members of the press and a handful of other commentators who have earned the trust of at least a segment of public opinion by interpreting events that are unclear in their political meaning" (Brody 4). In short, the process of distributing information can be heavily politicized. Since voters often rely on newsmakers for interpretations as well as details, the media are armed with a powerful sword in the political game and more specifically, a useful tool in limiting executive authority.

Furthermore, the media plays a valuable role in not only its facilitation of public education but also its ability to dictate what topics have priority. They may not only dictate the nuances of public debate, but the theme of the debate itself. The media can act on behalf of their own agenda just as a politician can. If a media outlet supports a president strongly on national defense and weakly on the economy, then we are liable to hear more reporting on national defense. If a media outlet supports a president who is weak on a political issue, then we may hear about it much less. In 2006, it became clear that the Iraq War had become increasingly unpopular. “Public sentiment about the war remain(ed) negative, threatening to erode a Republican advantage on national security. Fifty-three percent said going to war was a mistake, up from 48 percent in July; 62 percent said events were going ‘somewhat or very badly,’ in the effort to bring order and stability to Iraq” (Hulse). Around this time there were noticeable differences in the time that various media outlets dedicated to covering the Iraq War. The contrasts could be seen in the story salience of Fox News, MSNBC, and CNN, the oft-debated conservative and liberal driven news organizations. The media have the power to cover what it wants. “Fox News spent half as much time covering the Iraq War than MSNBC during the first three months of the year, and considerably less than CNN, according to the Project for Excellence in Journalism. . . . The Iraq war occupied 20 percent of CNN’s daytime news hole and 18 percent of MSNBC’s. On Fox, the war was talked about only 6 percent of the time” (Bauder). In this fashion, the media is able to shape the theme of the news, and with it often, the public perception by calling attention to specific areas.

In general, the media is far from a mouthpiece for presidential policies. While presidents like FDR used the bully pulpit to their advantage through the proliferation of

radio, the evolution of mediums like cable television can be as critical as they are praising. “The rise of cable TV has changed television from a presidential megaphone into a presidential scourge” (Mallaby). The advent of pundits who compete for ratings and air time are willing to ridicule executive policies and filter presidential speeches. Executive influence over a favorable news agenda has become more difficult as more television networks and electronic mediums grow in number. “A host of vociferous interest groups, wielding polls and other data with dexterity impossible before the advent of the Internet, has sprung up to fuel the media’s second guessing of the president’s foreign policy” (Mallaby). Although presidents situationally benefit from the bully pulpit they are also the subject of relentless media criticism.

*Bureaucratic resistance* has acted as another safeguard or limiter to executive authority. During his 2004 reelection campaign, it became clear that President Bush’s opposition had extended beyond party lines and constitutionally written resistance:

At the height of the campaign, C.I.A. officials, who are supposed to serve the president and stay out of politics and policy, served up leak after leak to discredit the president’s Iraq policy. There were leaks of prewar intelligence estimates, leaks of interagency memos. In mid-September, somebody leaked a C.I.A. report predicting a gloomy or apocalyptic future for the region. Later that month, a senior C.I.A. official, Paul Pillar, reportedly made comments saying he had long felt the decision to go to war would heighten anti-American animosity in the Arab world (Brooks).

The Central Intelligence Agency proved emblematic of the impact bureaucratic resistance can have on a presidency. The C.I.A., largely through tactical leaks, demonstrated its ability to serve as a critic rather than a resource for the president. “White House officials concluded that they could no longer share important arguments and information with intelligence officials. They had to parse every syllable in internal e-mail. One White House official says it felt as if the C.I.A. had turned over its internal wastebaskets and fed

every shred of paper to the press” (Brooks). The C.I.A. in particular, played a part in a dysfunctional White House-C.I.A. relationship that showcased the ability to slow and undermine a presidential agenda.

For instance, in 2007, when it became apparent that Congress would not be able to, or was not willing to, counter President Bush’s proposed “surge” in troop escalation in Iraq, examples of bureaucratic resistance became prevalent. Although Congress may not be able or willing to make a stand, agencies and other departments vital to the implementation of the president’s plans are able to derail an agenda based on tactics or the control of information. In effect, congressional “failures” can still be backed by other layers of support. Resistance to the troop surge reared its head in the form of exaggerated force depletion reports, projected casualty counts, and even tactics as simple as stalling. Arizona Senator, John McCain stated: “There is still enormous bureaucratic resistance (to the troop surge) in the Pentagon, and it bothers me a great deal. The bureaucrats in the military are saying this is a terrible strain on the [National] Guard and the active duty forces, and it is. There is only thing worse than an over-stressed military, and that’s a defeated military” (Simon). By rendering a president’s plans irrelevant by affecting the war through public opinion via tactical leaks, through logistics such as timeliness, or even general morale, it is evident that other facets of government serve as substitute checks and balances when more “traditional” forces like Congress cannot.

Although executive authority has evolved through institutionalization, *Congress* still maintains significant political controls over American involvement in war, particularly when public opinion is unsettled or opposed to a president. While the constitutional balance of power may shift dramatically in the executive’s favor once a

war has begun, Congress has significant powers in the initiation of a war. Even as the Bush Administration argued that the president had the constitutional authority to use force abroad to defend the security and interests of the United States, the President asked for approval for American military action in the Middle East. “In both the 2001 war in Afghanistan and the 2003 invasion of Iraq, the executive branch sought and received legislation to authorize hostilities” (Rozell 132). However, it would be remiss not to acknowledge that Congress’ decision to go to war is heavily based on intelligence uniquely allocated within the presidency: “In regard to foreign affairs, Congress does not have independent sources of information but relies on information provided by the executive branch (Rozell 139). Whether a recognition of Congress’ constitutional power or merely the importance of its political backing, the executive branch has many times over appealed for congressional support when it comes to conflict.

As the institutionalization of war authority has evolved within the executive branch, functional versus constitutional arguments again square off: Are presidents inclined to obtain congressional authorization as a matter of process or merely to gain a political consensus? The argument could be made that congressional approval is layered. Congress is armed with not only the power to vote for a disapproval of military action, but also the ability to create political consensus where it is lacking.

One of the more obvious checks possessed by Congress is the power of the purse. “If Congress disagrees with presidential war making, it can refuse to approve the funds necessary to wage the war (witness that in the Persian Gulf War and the conflicts in Kosovo, Afghanistan, and Iraq, the executive branch needed supplemental appropriations to conduct hostilities)” (Rozell 142). In addition, Congress has a litany of tools at its

disposal that can skew tangible measurements of war power back in its favor. Some of these tools are as simple as administrative and procedural checks that disrupt the flow of the war effort, while others can impact entire policy initiatives. “Congress could even restructure the military to deny the president certain offensive weapons systems or large numbers of quickly deployable professional soldiers, as it did in the periods before World Wars I and II” (Rozell 143). Despite an increasing centralization of war authority within the executive branch, it is clear that Congress remains armed with valuable tools, particularly depending on the political context.

A final variable that may limit presidential authority in war is the Supreme Court’s willingness to more readily challenge a President – particularly an unpopular one. The Court’s ability to contend with executive views is particularly evident during the George W. Bush era. One major point of contention emerged over the applicability of *habeas corpus* to detainees in Guantanamo: “The problem with detainees in Guantanamo is that there is no certainty that all of the detainees were in fact enemy combatants. Yet they were confined in very harsh circumstances, subject to aggressive interrogation – what most of the world would consider torture, and there is no likely end to the war on terror or their imprisonment” (Pfiffner 93). Despite the backing of more than one lower court decision, the Supreme Court did not shy away from challenging President Bush’s authority: “In June 2004 however, the Supreme Court in *Rasul v. Bush* overturned the two lower court decisions and ruled that federal courts did have jurisdiction to hear *habeas corpus* cases from detainees in Guantanamo. The Court based its decision on the status of Guantanamo” (Pfiffner 101). Supreme Court cases such as this, demonstrate the

Court's willingness and *ability* to limit a President's influence in cases directly related to his war authority.

Referencing past Court findings such as *Katz v. United States*<sup>1</sup>, the Supreme Court has also ruled to apply the Fourth Amendment to wiretaps (electronic surveillance) and required probable cause and a warrant. There has been a popular notion that wiretaps and surveillance are clear evidence of an increasingly complex and changing nature of war – one which is presumed to favor the executive branch. Yet even under these conditions and with this in mind, the Supreme Court ruled against President Bush's wishes. The Court clearly plays a limiting role: "What is in question in the NSA eavesdropping case is whether the president has the unilateral authority to ignore the explicit dictates of the law and can undertake surveillance within the United States. The fundamental values at stake are the rule of law and constitutionalism itself, not the wisdom or necessity of specific acts of surveillance" (Pfiffner 170). Even Congress has intervened to allow for special court cases to hear requests for surveillance in foreign intelligence situations to ensure that the rights of United States' citizens will not be violated.

Supreme Court resistance to presidential authority extends well beyond the second Bush era. *Youngstown Sheet and Tube Co. v. Sawyer* remains a classic example of the Court restraining executive authority. During the Korean War, President Truman's attempts to seize the steel mills to avoid any devastating impacts on the war effort or domestic economy were struck down by the Supreme Court. The case sent an unmistakable message to the executive branch that it could not simply do what it wanted

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<sup>1</sup> A 1967 Supreme Court case which adjusted previous interpretations of the unreasonable search and seizure clause of the Fourth Amendment to count immaterial intrusion with technology as a search, overruling previous Court decisions.

– even if it was done with the intent of serving the nation’s best interests. The Supreme Court’s decision would be further referenced in *Hamdan v. Rumsfeld*, which ruled that military commissions set up by the Bush administration to try Guantanamo detainees did not uphold the Uniform Code of Military Justice and was a violation of the Geneva Convention. In both the Truman and George W. Bush presidencies it is evident that the executive branch faces restrictions in a time of war at the hands of the Court.

Even in the face of a trend towards the institutionalization of power within the presidency, or even the failure of exclusively constitutional checks designed to confine them, there are a number of external variables, often related to public opinion or presidential popularity that can limit the exercise of executive war power. The volatility of public support, importance of the media, machinations of bureaucratic resistance, controls of Congress, and Court rulings are all limiting factors in the war authority arena. With so many contributing and limiting factors at play, this paper’s final section will explore some specific presidencies whereby these arguments can be tested.

## **5. Case Studies**

George H.W. Bush’s decision to commit American troops in the Gulf War will be examined because its pre-war debate and more conventional war involving clearly defined state-actors offer a contrast to the post-September 11<sup>th</sup> era. Less than a year into his presidency, George W. Bush was faced with the attacks of September 11th. Although terrorism had long existed, the event ushered in a new era, in which non-state actors could endanger a nation on a large scale. The ongoing war on terrorism has tested presidential war powers because the threat of terrorism is interminable, complicated, and the mechanisms used to confront it are often done under claims of executive authority.



The George W. Bush and Barack Obama presidencies have been chosen for case studies because their terms have come in the post September 11th era, where the use of executive war powers has been the subject of frequent debate. What role has external factors played in that time? Have the roles of public support, relationship with media, bureaucratic resistance, Congress, and the Courts served as contributing or limiting factors?

**a. George H.W. Bush (1989-1993)**

During the presidency of George H.W. Bush the scope of American military involvement was most evident through the Persian Gulf War. It is important to examine the various uses of military force abroad because each crisis presents its own unique set of circumstances and impetus for action. George H.W. Bush and the Gulf War provide a good contrast to later case studies on George W. Bush and Barack Obama, because warfare in the post-September 11<sup>th</sup> world is more unconventional (largely because of the proliferation of terrorism) and more challenging to define. Terrorism and asymmetrical warfare, in which unconventional tactics may be used by a weaker combatant to offset the strengths of another, are particularly prevalent in the post-September 11th era. It is an evolution that informs analysis on war authority claims. It is these conflicts whereby the role of external checks on executive war authority will be examined.

President George H.W. Bush enjoyed popular *public support* during the Gulf War. The Bush administration received congressional approval for the Gulf War, but prior to approval and the conflict's favorable outcome, public opinion first needed to be earned to garner the support of Congress. American public opinion was heavily influenced by several factors: international support and funding towards the war effort;

effective persuasion from the Bush administration; deliberative congressional debate; and unprecedented media coverage.

It is clear that multilateral support had an impact on American public opinion. “In mid-November 1990, 53 percent said that, based on all they had heard or read, the United States should not go to war against Iraq over the Mideast” (Kohut 49). Multilateral condemnation of the Iraqi invasion of Kuwait as well as the United Nation’s Security Council vote, which set the deadline for Iraqi cooperation, effectively altered American public opinion. “Before that vote, majorities opposed going to war with Iraq; afterward, majorities favored it every time the question was asked” (Gallup) (Kohut 49). In this case, the international coalition backed its support with both words and deeds, in the form of direct military assistance and financial backing. Turning points such as the U.N. Security Council vote speak to the conditionality of public opinion when it comes to war.

Public opinion would also be contingent upon President Bush effectively making his case for committing U.S. military forces to action. Public backing meant justifying U.S. interest in the Middle East as well as convincing Americans the war would be a success.

In early August 1990, the public was divided over whether Bush had “explained clearly what’s at stake and why he is sending troops to Saudi Arabia”: 50 percent said yes, 41 percent no (NYT). One month later, 77 percent said they had a clear idea on the matter (WP). At no point during the military buildup and debate about military action did approval ratings for Bush fall below 55 percent on his handling of the crisis (Kohut).

It can be difficult to quantify how much of this public response speaks to President Bush’s persuasion versus the convincing merits of war itself. Both elements are important, but the executive’s ability to influence public opinion through communication, which in turn strengthens executive war authority, is a valuable mechanism.

The presidency's unitary nature and proximity to international actors offer an advantage over its congressional partner. In earning increased American support, President Bush demonstrates the executive's ability to explain complex situations. The Bush administration also displayed an advantage as the primary liaison between the U.S. and the international community when it argued that the coalition may dissolve before Iraq withdraws from Kuwait. In a speech to the U.S. Senate, Senator Sam Nunn bemoaned the administration's ability to craft the impetus for war: "Quoting Admiral Crowe, the immediate past Chairman of the Joint Chiefs, 'It is hard to understand,' he said, 'why some consider our international alliance strong enough to conduct these intense hostilities, but too fragile to hold together while we attempt a peaceful solution'" (Nunn). It is challenging to isolate deciding factors for ultimately committing military resources to the Gulf War. But the executive office's more direct involvement in foreign affairs (versus Congress' more domestic role) makes it arguable that public opinion is more likely to follow President Bush's pulse for the sustainability of the coalition and its role in the war, over that of Congress. The presidency's direct involvement with international organizations like the U.N. Security Council also offers it an advantage over Congress given its ability to define the circumstances of war. In this case, the U.N. Security Council vote implemented a timeline that effectually accelerated the impetus for war, whereas Congress does not have the luxury of close interaction with international partners. Here we see that public opinion matters and that the executive branch has greater control over a condition (multinational support) influencing that opinion.

The *media* and public opinion are interrelated since it is the medium by which events are conveyed and interpreted. Coverage of the Gulf War was groundbreaking.

During this time, live news surpassed network news coverage as the primary media format in the war. As it relates to its impact on presidential war authority, the media should be addressed in two contexts: the buildup to deciding on war and coverage of the war itself.

Media coverage of the crisis phase undoubtedly aided in public support and ultimately policymakers' decision to send U.S. troops to the Gulf region. American viewers were overwhelmed with reporting that helped launch the crisis into the nation's top priority issue: "The Tyndall Report, which tracks television news coverage, found that the amount of Persian Gulf-related news aired on the three U.S. broadcast networks in 1990, before the war began, was nearly four times more than the amount for the top story of 1989, the Tiananmen Square crackdown" (Kohut 48). It is likely that the media's extensive coverage of the pre-war phase in the Gulf served as an enhancement to President Bush's war authority. When an issue accounts for such a large percentage of the media's coverage the public needs less convincing of its importance.

Bush still needed to make the case for war and establish a domestic consensus, particularly when the military's more offensive functions became apparent. "Until the Administration makes clear whether its goal is to defend Saudi Arabia, or protect the flow of oil, or free Kuwait, or crush Saddam, or punish aggression, or all of these, the public may not be able to find much justice in the cause – or judge whether it is a goal worth dying for" (Gibbs). It is in this light that the media showcases its potential for impacting public opinion and the ability of American elites to influence the domestic opinions that allow the U.S. to engage in military operations. The Bush administration proved more adroit than Congress in making its case through the media. They were able

to define the scope of discussion in terms of U.S. interest and timelines for action and the media's role took on that of an amplifier rather than a critical watchdog. As the White House cited Saddam Hussein's human atrocities among its rationale for war, media coverage supplemented the cause. "Saddam Hussein's crimes had been well known – and underreported – for years, while Iraq was supported by the United States in its war against Iran. Journalists, suddenly outraged by Iraqi atrocities, expressed little self-criticism for letting Washington decide when Iraq's human rights records were worth reporting" (Naureckas). Left largely unquestioned, many of the Bush administration's rationales for war were filtered to the public without scrutiny.

Media coverage once the war was underway was characterized by mass viewership and by journalistic mistakes. Journalistic mistakes such as biased reporting, accessibility to events, overuse of elites as sources, and slanted coverage inspired a number of criticisms. "The Pentagon and the Bush Administration have come close to achieving their goal of forcing journalists – and the public – to rely solely on the information provided by briefers or gathered in pool interviews in the field" (Morrow). Pool interviews offered only a filtered, narrow perspective on the war's progress because their access was limited and usually granted only in the company of military escorts. "Without access to American troop units, correspondents are unable to verify statements made at press briefings in Riyadh, the Saudi capital. They cannot fully describe the ground fighting, which may soon intensify" (Apple). The media's approach limited the amount of real, uncontrolled information available. As a result, the public was inundated with favorable U.S. imagery.

Nevertheless, even attempts by the White House to gain control of media output and its effect on war powers are not a simple analysis. During the Gulf War, media control was meant to generate positive public reaction to the war. But control over the media's portrayal of the war, like tailoring coverage to an American public in awe of military technology, did not mean that the public would offer lasting support for the war. "Says a Senior White House official: 'People see a few films of a missile striking a building where it's completely precise, and they say, 'If it's going so well, why isn't the war over?'" (Morrow). During the Gulf War, the White House was able to exercise a degree of media censorship, but even the media's presentation to the public fit into a complex picture of uncertain outcomes and unrealistic public expectation. The aesthetics of military technology do not fully drown out public awareness for overarching issues like the risk of human lives and a conflict's strategic importance. In essence, the public could not be easily seduced by filtered media coverage. In attempting to control media coverage, the White House recognized it as a significant contributor or limitation on its ability to pursue the war. Ultimately, striking a balance between favorable coverage and public anticipation is a challenge, but a spotlight that the White House traditionally welcomes, and Congress aspires to have.

*Bureaucratic resistance* to executive directives can play a powerful role in reining in executive authority. Bureaucratic resistance can serve as a useful defense against policies aimed at sudden and overwhelming action. The tension between career officials more resistant to change and deliberative in process, and elected officials who tend to pursue dramatic change in time-limited terms, is a long-standing dynamic. Whether

motivated by sincere attempts to prevent disaster or the advancement of a partisan agenda this resistance serves as an influence on public and political opinion.

In the case of the Persian Gulf War the CIA had the potential to disrupt the executive agenda because the intelligence community was relied upon to monitor Iraqi troop movements and inform discussion about U.S. response options, among other things. With regard to American military involvement in the Gulf War, the CIA's guidance was arguably influenced by earlier shortcomings, when its intelligence reports failed to anticipate Saddam Hussein's invasion of Kuwait. "Having been embarrassed by its predictions on the invasion, the CIA was taking no chance. Director William Webster now argued forcefully that Saddam intended a second invasion. Together with Defense Department analysts, the agency reported that Iraq's elite troops were moving south towards the Saudi border" (Mathews). The alarming assessment left the Bush administration to weigh the event's ramifications and to mull U.S. response options. Before opting for the use of troops, President Bush persuaded the United Nations to impose economic sanctions and a naval embargo on Iraq. Diplomatic actions like this were important because they are indicative of an executive not rushing to war and because the non-military approach gave bureaucratic advisors another alternative to aggressive military action. "Toward late September, the CIA sent a secret assessment to the White House. The agency predicted that 'in the short or medium term,' sanctions would not drive the dictator from Kuwait" (Mathews). In this case bureaucratic resistance was minimal and backed President Bush's war authority in the form of CIA counsel. In many ways these CIA reports fed into a pro-war mentality where action had to be taken.

The CIA's involvement in specific U.S. response options also provides for an interesting opportunity for bureaucratic resistance. President Bush's transition from a defensive military position to an increased offensive military buildup had the potential to create dissent within the administration. On the contrary, Bush's late October decision to increase troops in the Gulf remained secret until its public unveiling until after the November elections. In addition, bureaucratic counsel was executed through a political lens. Even lobbying for U.N. authority to use force if Saddam Hussein did not comply with imposed resolutions was executed with an awareness of domestic reaction. "The NSC and Defense were worried about this tack: they feared that the United Nations might grant the authority, only to withdraw it later. But Baker (Secretary of State) pointed out that if the United Nations passed a war-powers resolution, it would make it hard for Congress not to do the same" (Mathews). Here the major bureaucrats in the President's foreign policy machine take action not to leak President Bush's plans for an offensive military buildup, as well as take conscious steps to ensure support for the President's plans at home and abroad. Had Bush's bureaucratic machine been against the offensive military buildup, they could have used the lack of a U.N. resolution as a tool for resistance to the war, rather than encouraging the President to seek it (and subsequently help to ensure domestic support as well).

Overall, the turf wars and competing agendas of domestic agencies during the buildup to the Gulf War were minimal. Key agencies and figures in the foreign policy machine achieved consensus in the Gulf War decision. Bureaucratic input to President Bush also included counsel that he wait for international support to ease possible



domestic opposition. The Gulf War also shows that bureaucratic “resistance” is unlikely when its own agenda is to err on the side of military action.

*Congress*, despite ultimately voting in favor of U.S. military action, criticized President Bush during a time of fall midterm elections and Senate Armed Services hearings. The national debate on the crisis and subsequent electoral ramifications were external checks on executive war authority that caused pause in the Bush administration’s position. Congress’ impact on the Bush administration’s war authority was twofold, since both its composition and legislative role factored into the Gulf War decision.

The approach of the 1990 fall midterm elections helped guide the political calculations of the Bush administration. Even as troop escalations and offensive military actions were privately approved no decision on an offensive troop buildup was announced publicly until after the November elections. “The president had thought the passing of the election would free him to proceed with phase two of Dessert Shield, but it also liberated congressmen to oppose him. Most polls showed that most Americans wanted to stay with economic sanctions even if they failed to prod Saddam out of Kuwait by January or February” (Mathews). Although the ability to manipulate the political environment increases presidential war power, President Bush and the Gulf War also show that executive manipulation can still produce situational results. In this case, the Democratic Party gained seven seats, which slightly increased its majority in the House. President Bush was not only hamstrung by the direct ramifications of the midterm elections, but the delay also called attention to American troop escalations near Iraq. The troop escalation signaled a more offensive American military approach. While the Bush administration could delay public disclosure of the build-up, in order to manipulate the

political environment in which they would lobby for congressional and public support, certain military preparations had to move forward. The delay afforded American citizens and their representatives the time to take measure of the cost of war and to influence a deliberate decision-making process.

After announcing his decision to escalate troop deployments in the Middle East, President Bush faced a rash of criticism from the Democratic-controlled Congress. But congressional opposition to Bush's option for war was delayed and fragmented. Congress struggled to convey a consistent message from the beginnings of the Iraq invasion to the ultimate deployment of U.S. troops. "When on August 5 President Bush announced – again with no congressional consultation, let alone approval – that Iraq's invasion of Kuwait 'will not stand,' members of Congress applauded" (Glennon). Senate Armed Services Committee hearings were the scene for a variety of doubts expressed about American use of military action. Congressional criticism played a role in forcing the Bush administration to make their case publicly and deliberatively. But congressional criticisms of the President's prospective military action were not echoed by the media and subsequently, the broader constituency. On the contrary, Congress' somewhat successful calls to debate the matter served to solidify public opinion. Congress granted approval for the Gulf War, perhaps because of its merits. But it is also apparent that Congress proved inferior in making its case to the public and was ill-equipped to refute an international coalition that had already lent its support for the war.

Congress was however, effective in arguing against the scope of the war. Just as the American public proved sympathetic to stories of Saddam Hussein's human atrocities it was also concerned over an increased offensive military buildup and the prospect of a

prolonged conflict. “George H.W. Bush won a Congressional resolution supporting his decision to oust Iraqi forces from Kuwait in 1991. At the same time, he unilaterally chose not to expand the conflict into Iraq, but even that assertion of power was seen as a bow to Congressional and public opposition to a wider war” (Dallek 36). Congress’ ability to prevent a widespread conflict is no small matter. If an executive has the ability to commit American credibility and interests in a manner that demands additional campaigns then executive authority would go virtually unchecked. A president would have the ability to leverage Congress and the public into circumstances that called for action. “The American tendency to allow campaigns with originally limited goals to morph into campaigns that have more expansive goals can turn successful drives into questionable and contested operations. The failures or defects are thus as much a consequence of mission creep as of inherent difficulties” (Etzioni). Mission creep is a complex tool whereby an executive can argue for a limited mission to be expanded in order to meet its goals. An example of mission creep occurred during 1993 in Somalia when a short-term U.S. humanitarian effort evolved into a military operation seeking long-term stability. Mission creep is noteworthy in the war powers debate because as executives incrementally commit U.S. interests, the merits for increased use of military force can take shape. There is no way of knowing for certain whether President Bush would have ultimately invaded Iraq with a mission of regime change and overthrow of Hussein. Still it seems clear that congressional resistance to an expansion of America’s original mission had some effect on limiting the campaign. In this case President Bush was unable to use “war” as an all-encompassing term or blank check.

*The Court's* impact on executive authority and the Gulf War was relatively minor. In response to the president's large military buildup in the Gulf, several congressmen submitted a joint memorandum arguing that the President may not order American armed forces to make war without first consulting with and winning the approval of Congress. "Acting on this belief – after the president's November 8 announcement – 56 members of Congress brought an action in *Dellums v. Bush* to restrain the president from war without prior congressional consent" (Glennon). The District Court denied the plaintiffs' request for preliminary injunction of President Bush's preemptive military buildup in the Middle East on the grounds that a majority of congressmen were not involved in the suit and perhaps more importantly, because the President had not yet initiated actions deemed as war. Despite its relatively minor role in the grand scheme of the Gulf War the *Dellums v. Bush* decision was compelling in the war powers debate on two fronts: its consideration of the War Powers Clause and reasoning that the dispute was not ready for adjudication at the time.

Even as presidents have traditionally rejected the War Powers Clause it has been rare to see its merits lobbied for or against in the Courts at all. In fact the Bush administration's case centered more on the case being heard than it did the administration's authority for going to war. "The administration's legal rationale for claiming sole executive power to make war was never spelled out. Its pleadings filed in *Dellums v. Bush* (1990) did not reach the merits, and argued merely that the court should not hear the case" (Glennon 89). The Court's ruling is indicative of a routine dismissal of the War Powers Clause and its lack of enforcement is a legislative weak point in the congressional-presidential power struggle.

The Court's determination that the *Dellums v. Bush* case was not ripe for adjudication at the time of its presentation speaks to a possible weak point in the Court's check on executive authority. "Ripeness relates to timing; a case is not ripe for review if its factual development would make judicial resolution premature. In war powers cases, this can mean that a case is not ripe unless actual 'adverseness' arises between Congress and the president" (Glennon). Only after military action has occurred would the Court have considered Congress' case. In essence, we can deduce that much of the Court's check on executive authority comes after the fact and that prospective checks rely on the public, media, bureaucracy, and Congress.

In the final analysis, George H.W. Bush's presidency is indicative of a marginal rise in presidential war authority. The most significant contributor was executive control and manipulation of the media. Prior to U.S. military action there was a lack of journalistic skepticism in the Bush administration's case for war. Once the war was underway the centralized filter of information through pool interviewers provided a narrow perspective for the broad public. It is also arguable that Congress' role exemplified the advantages of both the executive and legislative. The presidency's direct dealings (which Congress does not have) with international actors allowed for coalition building and support which leveraged its case for war, but Congress also prevented a possible extension of the war campaign into Iraq. It is arguable that bureaucratic resistance is temperamental, since key agencies and its figures are subject to a variety of influential agendas and circumstances (in this instance, an embarrassment over failing to predict an Iraqi invasion of Kuwait in the first place). Could the counsel of intelligence agencies that factored heavily into the Gulf War process have been different? For its

part, the Court's role in preventing war proves relatively minor and even hints at a retrospective function given its dismissive reasoning of *Dellums v. Bush*.

**b. George W. Bush (2001-2009)**

The scope of George W. Bush's use of executive war powers has taken several forms. The most controversial has been the Iraq War and the larger War on Terror. The Iraq War highlights the role of external factors because unlike U.S. involvement in Afghanistan, its undertaking was much more reliant on the Bush administration making its case for war. Additionally, the Iraq War highlights the tension between secrecy and public disclosure of information, as well as the importance of external checks to ensure that ultimate support or disapproval resulted from policymakers and citizens with an informed understanding.

*Public support* and its correlation to advancing certain initiatives is an important dynamic. The circumstances of the United States' 1991 involvement in Iraq were much different than in 2002 since the more recent crisis lacked a precipitating event. "First, the armament norm was not nearly as well established or widely accepted as that forbidding conquest and absorption of a smaller neighboring country" (Luck). It is an important point that tests George W. Bush's power of persuasion. Whereas George H.W. Bush was able to sell the previous conflict on the merits of repelling an Iraqi invasion, George W. Bush focused more on disarmament (though other concerns were also listed). It also differed from the ongoing conflict in Afghanistan in that Iraq was not as clearly linked to the War on Terror. One similarity however, was the Bush administration's decision to seek a U.N. mandate for U.S. action. "Once he decided to engage the U.N., he did manage to have some success not only in framing the issues to be addressed and defining

the political context in which they were to be considered, but also in influencing the positions of other actors” (Luck 142-143). We will see that as the President makes the case for military action, domestic public opinion follows.

In the late fall of 2002, when the Bush administration accused Iraq of delivering a flawed weapons declaration to the United Nations and began making its case to go to war in Iraq, President Bush increased dialogue with the international community and delivered a speech on the U.N. floor. Over the course of the next few months, President Bush made the public case -- both to the United Nations and the American people -- that military action was warranted.

In late August Pew found, by a 52 to 37 percent margin, that respondents believed that Bush had not "explained the reasons clearly enough." By mid-September, however, by the same 52 to 37 percent edge (a 30 percent swing), they affirmed that he had made a sufficiently clear case. By going to the U.N., in other words, it appears as if the President bolstered the credibility of his argument (Luck).

It is fair to say that domestic opinion becomes more supportive when the merits of a case are considered among the international community and when there is some measure of multilateral backing. While the President is not assured of influencing other state actors, on behalf of the country he alone possesses the luxury of an audience and direct dealings with them. It is an important distinction that exposes an executive advantage in manipulating the public and policymakers.

The Bush administration ultimately received congressional authorization for the Iraq War. “Aside from unanimous support from Republicans in both chambers, the resolution authorizing military force gained support from 39 percent of House Democrats (81 of 208 voting on the resolution) and 57 percent of Senate Democrats (29 of 51 voting on the resolution)” (Edwards 336). The White House’s ability to leverage its agenda

through international debate and subsequently win domestic support arguably led to approval from Congress.

A word regarding Bush's standing in general. At the time of his speech to the U.N., President Bush's approval rating stood at 61% in a poll taken by Gallup (Bush's Approval Rating Through the Years). In mid-February, when the Bush administration warned the time for diplomacy with Iraq was nearly over, Bush's approval rating according to Gallup was 58% (Bush's Approval Rating Through the Years). Since public support (or disapproval) often has a correlation to the advancement or resistance of certain initiatives, one might argue that President Bush's successful case for the military action in Iraq was in part the product of his public standing.

The Bush administration also reaped the benefits of issue-specific polling. Surveys taken between January and March of 2003 were indicative of an American public that supported a war with Iraq in the months leading up to the invasion. On the heels of the President's January 2003 State of the Union Address and Secretary of State Colin Powell's address to the United Nations, public support for military action in Iraq had grown. "A CNN/USA Today/Gallup Poll survey reveals that 54 percent think the United States has exhausted diplomatic efforts to disarm Iraq, and 56 percent said the White House has 'made a convincing case' for taking military action against Baghdad" (Poll: Bush Gaining Support on Invading Iraq). Public opinion almost certainly served as an enabler in the Bush administration's ultimate military action. The Bush administration benefited from the bully pulpit and their persuasion had a significant impact in swaying opinion. In turn, what effect did public opinion have on the support of Congress?



In this instance, congressional approval may have been a response to both the president's popularity and public support for military action. Scott B. Blinder's study on the effects of the Bush administration "going public" in its case for war in Iraq reasons that the President benefited. "The logic of going public suggests, however, that increasing the salience of a popular issue should have helped the president. More precisely, I suggest, it should tighten the 'electoral connection' between legislative behavior and constituency preferences" (Edwards 336). But even if the President's public support at the time leading up to the invasion of Iraq was favorable, what does that mean in terms of executive war power? The Bush presidency has instigated tremendous scrutiny over increased executive war powers; however, both congressional approval and the president's favorable public standing at the time of the War's beginning are not anomalies, but instead, consistent with what one might expect in terms of a president's ability to leverage his agenda. As it relates to public opinion, the argument that there has been an increase in presidential war powers at the time leading up to the Iraq War would have much more traction if the president's decision to go to war was made in the face of public disapproval.

President Bush's *relationship with the media* was also a major factor during the Iraq War. The media is also an influence on the public, since it serves as the primary source by which people learn about the news and interpret events. In the case of selling Congress and the public on the Iraq War, the Bush administration built the case that Saddam Hussein and Iraq were effectually tied to terrorism. The Bush administration argued that the best way to combat terrorism was to proactively pursue threats where they gathered. In President Bush's case, was the media adequately skeptical of White House

statements and the merits of going to war? Did the media serve as a medium whereby the president could market the war, or did it also serve as a healthy skeptic and safeguard to information that the President conveyed to the public?

Regarding the Bush administration's case for war in Iraq, the media had its share of enablers as well as skeptics. In February 2003, a *New York Times* op/ed piece exemplified doubt about the administration's alarming claims when it implied that the White House would invite any questionable evidence that enhanced the premise that Iraq posed an immediate threat. "Advocates of war have made herculean efforts to uncover evidence of active cooperation between Iraq and al Qaeda, and senior administration officials have put great pressure on American intelligence agencies to find convincing evidence. But these efforts have born little fruit, and we should view the latest reports of alleged links with skepticism" (Mearsheimer). It is in this manner that President Bush went about selling the war and in this context challenged media outlets to call the administration's assertions – that Iraq posed an alarming threat – into question. By targeting nuanced detail, such as the prevalence of Weapons of Mass Destruction (WMDs), or shaping arguments around alternative response strategies like containment, instead of preemptive war, the media had the potential to educate the public and question the administration.

Still, many critics of the war argue that the media failed to do its job in emphasizing flaws in the administration's case. The media can serve as a powerful external factor in presidential war power. The media has the ability to convey information to a broad public, whose support or resistance can influence its leaders. Regarding the Bush administration's case for war in Iraq, there is significant evidence

that the media failed on several fronts. Just days after the invasion, a “New York Times/CBS News poll showed that nearly half of Americans said they believed that Saddam Hussein was personally involved in the Sept. 11 attacks. A Knight Ridder poll taken in early January showed that half said they believed at least some of the 19 hijackers on Sept. 11 were Iraqi. None were” (Rutenberg). It is possible that surveys like this are emblematic of a public that is out of touch or basing its views on questionable information. Although the media were not devoid of views contrary to the Bush administration’s, it is reasonable to argue that aggregate coverage failed in its ability to serve as an educational medium.

Ultimately, the media landscape seemed to embrace administration claims, while stories challenging the administration’s perspective were secondary. A *Washington Post* media critic, Howard Kurtz stated: “From August 2002 until the war was launched in March 2003 there were about 140 front-page pieces in the *Washington Post* making the Administration’s claims for war. . . . But there was only a handful, a handful of stories that ran on the front page that made the opposite case. Or if not making the opposite case, raised questions” (Stich 385). Although some in the media asked questions and conveyed skepticism before the start of war in Iraq, Bush detractors seemed to be lacking in volume and salience.

Polling indicates that Americans were full of misperceptions about the war and that the media had a hand in these misconceptions. “What is troubling is that all citizens were significantly affected by the news media; that the media are fostering a considerable amount of misperceptions about issues of great public importance; and that these misperceptions tend to follow a particular ideological line – namely that the war in Iraq

was justified” (Fore). As false assumptions about the link between al Qaeda and Iraq and the existence of Weapons of Mass Destruction took hold we are asked to question why the media failed. More importantly, is this failure an anomaly or can it happen again? The flaws and bias of media outlets suggest that the potential is there. “If the unholy alliance between government and broadcasters is allowed to persist, if broadcast media remain unregulated and unrestrained, then the misperceptions about Iraq are only a harbinger of many more to come. The democratic experiment cannot survive for long if the citizenry is, with state approval, systematically misinformed” (Fore). There is volatility to presidential power depending on which way the media bias swings. A gap between fact and public belief may always be the product of some media bias. For President Bush, the media served to echo a pro-war message for action in Iraq. In this case media bias did not act in the interest of executive scrutiny, but instead as an amplifier for its message.

The Bush administration’s case for going to war in Iraq also highlighted the role of *bureaucratic resistance* against a president’s agenda. Bureaucratic resistance was particularly important given that President Bush’s ability to go to war may have hinged on making the case for war. The public case for going to war often involved information that was beyond public access or ability to dispute. Without knowledgeable government agencies willing to dispute White House claims, the media and public would be more willing to accept White House statements as fact. “One instance where the Bush communications team had trouble getting traction as they defended the president was on the issue of the accuracy of his statement in the 2003 State of the Union message that Saddam had sought to buy uranium in Africa” (Edwards 368). The White House battled

with agencies like the CIA over the inclusion of uncertain information that added to a public argument for war. “In the summer of 2003, memoranda began to surface casting doubt on the claim’s accuracy. Initially, George Tenet, CIA director, accepted blame for the error. He said the ‘CIA should have ensured that it was removed’. Yet the CIA also got out the message that the White House shared in the fault” (Edwards 368-369). It is arguable that bureaucratic resistance, in conjunction with the media relaying its message, had the ability to serve as the most significant resistance to the Bush administration’s case for war. But press leaks seemed to surface after the invasion began and their volume didn’t seem to increase until long after.

After Secretary of State Colin Powell’s February 2003 address to the United Nations, other U.S. agencies began to discredit evidence provided by the Bush administration that related to Iraqi weapon’s capabilities. Government agencies also disputed certain Iraqi links to al-Qaeda. While bureaucratic opposition was not timely enough to sway public opinion or the Bush administration from its support of the Iraq War by the time of the March 2003 invasion, it did force the Bush administration to make secondary justifications for the war. Secondary justifications were centered on the threat of terrorism, but were much broader. Removal of Saddam Hussein given his abhorrent record on human rights and the promotion of democracy were reasoned by the Bush administration to be of critical importance because “failed states” can serve as a breeding ground for terrorist activity.

U.S. intelligence agencies were arguably the most capable of providing bureaucratic resistance to Bush’s arguments for war, especially since so much of the reasoning for war was beyond the ability of the ordinary citizen to dispute. “Mr. Tenet

describes helping to kill a planned speech by Mr. Cheney on the eve of the invasion because its claims of links between al Qaeda and Iraq went ‘way beyond what the intelligence shows.’ . . . Mr. Cheney never delivered the remarks” (Mazetti). But for however many speeches government officials deterred the Bush administration from delivering, the White House divulged plenty of evidence that was not effectively countered, which proved enough to earn support and move ahead with the Iraqi invasion.

Bureaucratic resistance to preventing war is one thing, while opposition once it is underway is another. The Iraqi troop surge – the addition of over 20,000 U.S. soldiers to carry out a new counterinsurgency in Iraq – experienced bureaucratic pushback. “When the White House began its formal review of Iraq strategy that month, the Pentagon favored a stepped-up effort to transfer responsibility to Iraqi forces that would have facilitated American troop cuts” (Gordon). Debate in military strategy exemplifies a bureaucratic mechanism to ending, or at least scaling back, a war that is already underway. Troop reduction strategies, transfer of responsibility, and an eventual exit from Iraq were long-debated topics during the second term of Bush’s presidency. Debating the effectiveness of strategies like the troop surge is also worthy of public attention, since the potential for casualties is a sensitive issue. But judged on its bottom line, bureaucratic resistance failed to prevent the deployment of 20,000 additional troops to the region.

Although *Congress* is constitutionally linked to executive war authority, it also factors in as an external advocate or check on presidential power. Regarding Bush administration pressure and speed in moving towards action in Iraq, we see that the pressures driving congressional action are paramount. In this instance, the Bush

administration showcased an immense power to leverage its agenda. By stressing the imminence of the Iraq threat, in August of 2002, Congress was hamstrung by political pressure. “Congress had to act first. There was no constitutional requirement for Congress to wait until the Security Council met and voted, but acting in the months before the November elections placed lawmakers in a subordinate position” (Fisher 397). The timing of congressional action is suggestive of a reality that decisions are rarely made in a vacuum. The outcomes of congressional support or resistance are often rooted in a context of issue salience and electoral impact.

Measurement of executive war authority must go beyond the superficial outcome of congressional action. As it pertains to a gauge of war power, the nuances and influences behind congressional decision-making must be examined. At the time of the Iraq War vote, President Bush had to work with a Democratic-majority Senate and a Republican-majority House (each majority party held slight margins). In this case, it is arguable that presidential war power holds an advantage in its centralized structure. Conversely, the heterogeneous make-up of Congress is tested. “Democrats, unable to develop a counterstrategy, appeared to favor a prompt vote on the Iraq resolution to get that issue off the table. It was reported that Senator Daschle hoped to expedite action on the Iraq resolution ‘to focus on his party’s core message highlighting economic distress before the November midterm elections’” (Fisher 397). It is debatable that an ability to dictate the environment, in which issues are decided, is just as important as the substance of the issue itself. George H.W. Bush dictated the domestic environment of the Persian Gulf War decision through timing of the midterm elections and leverage of multinational support. In that same spirit, George W. Bush and his pressure for action in Iraq

monopolized the news cycle and dictated congressional action. The ability (or inability) to influence one's environment seems particularly relevant to defining the scope of executive war power.

For its part, the *Supreme Court* has arguably been the most aggressive challenger to President Bush's war power interpretations. Historically, the Court has been hesitant to challenge a president during wartime. "So it is extraordinary that during the Bush Administration's seven years, nearly all of them a time of war that began on Sept. 11, 2001, the court has been prompted to push back four times" (Mahler). The four instances against Bush were: *Hamdi v. Rumsfeld* (2004); *Rasul v. Bush* (2004); *Hamdan v. Rumsfeld* (2006); and *Boumediene v. Bush* (2008).

In *Hamdi v. Rumsfeld* (2004), the Supreme Court decided that the Executive Branch does not have the power to indefinitely hold a U.S. Citizen without the right of due process protections. In its decision, the Court acknowledged congressional approval and the environment of the President's actions. Writing for the majority, Justice Sandra Day O'Connor stated: "Congress passed a resolution authorizing the President to use 'all necessary and appropriate forces against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorists attacks' or 'harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States'" (*Hamdi v. Rumsfeld*, 2004). The Court's reasoning is important to an analysis of external checks on executive authority. The Court demonstrated an understanding of new and complex times, while still reining in the Bush administration's interpretation of Congressional authorization. Despite congressional authority for war, the Court stated that President Bush's authority did not include so



broad of a claim that Americans could be held without due process. The Court's decision was handed down even in spite of the many mechanisms needed to cope with the complicated War on Terror.

In *Rasul v. Bush* (2004), the Court took its view on the detainment of enemy combatants further when it ruled that the court system has the authority to determine whether foreign nationals held in Guantanamo Bay had been wrongfully imprisoned. In the case of the Bush administration, much of the criticism of its exercise of power focuses on the war on terrorism. More specifically, it focuses on certain tactics that the president claimed were needed to deal with a new kind of warfare. "The Framers vested the executive branch with a unitary design and broad authority precisely so that it could respond to the demands of war" (Yoo 420). In a fast-moving world, it is the Presidency that has been left to characterize ill-defined variables like "enemy combatants." Even as an evolving world challenges the relevance of previous documents and court cases, the Supreme Court has demonstrated ability to combat presidential interpretation that would substantially expand executive war power.

In *Hamdan v. Rumsfeld* (2006), the Supreme Court ruled that military commissions set up by the Bush administration to try Guantanamo Bay detainees violated the Geneva Convention. "Given the consistent arguments from the administration that President Bush had plenary and executive powers as commander in chief to discharge his Article II power during time of war, the Court's decision put a sizable dent in the theory of inherent executive authority" (Fisher 54-55). Again, we see that the Court's decisions have important implications for the extent of executive power. In addition, it subverted

other Bush administration contentions, such as domestic wiretapping by the National Security Agency without warrants or without Congress setting the limits of that power.

In *Boumediene v. Bush* (2008), the Supreme Court found that the constitutional guaranteed right of habeas corpus be extended to persons held in Guantanamo Bay and to those designated as enemy combatants on that territory. In this case, it is again pertinent to point out the Court's ability to rule on complex matters where creative White House arguments seek to round in favor executive authority. "Three justices in the *Boumediene* majority said in their opinions that the Guantanamo detainees have already been held too long without proper hearings" (Mahler). Given such justifications, it is arguable that the indefinite end to the conflict may have played a role in the Court's decision. The Court's imposed restrictions are important, given that the longer the conflict lasts, the greater the potential for the executive to expand its powers.

Why has the Court been more willing to challenge the president than other external checks? Moreover why has it been more willing to challenge the President during wartime than at any other time during the Court's history? "The easiest explanation for the rash of rebukes is that this administration has simply been unusually aggressive in asserting executive authority stemming from 9/11, a singularly devastating attack" (Mahler). A number of factors could be at play. On one hand, the responsibility of the Court demands that it be more deliberate, whereas other external checks like the public, media, bureaucracy, and Congress tend to operate within more narrow time frames. The Court is also far less dependent on the effects of public opinion, which has the potential to influence elected officials and media coverage. "But at the top of the American legal system, five justices on the Supreme Court don't need to convince

anybody. Instead, five human beings in black robes, each bringing his or her own experiences and agendas to the courthouse, have the raw power to simply say ‘what the law is’” (Savage 253). Of the five external factors highlighted, the Court is the most independent.

Another reason may be the changing nature of warfare. In political and international studies, theories like classic realism are argued to be increasingly outdated, because non-state actors can impact nations in ways that weren’t possible before advances in weaponry. In essence, so long as non-government entities are able to inflict harm or influence state leaders, the war against terrorism has ill-defined time tables and boundaries. “Other factors may be at work, too, for example an expectation that for the foreseeable future, military conflict may be the rule, and times of peace the exception” (Mahler). There is also something to be said for the deliberate and high-minded nature of the Court. If other external factors failed to rein in presidential authority because of the “imminence” and complicated nature of war, then surely the Court is best equipped to cope with these changes.

Finally, perhaps the Court’s willingness to rebuke many of the president’s claims speaks to the virtue of external checks on war power. Perhaps the Court’s aggressive action speaks to an unprecedented failure of previous safeguards to adequately combat executive authority. After all, the various external checks do not act simultaneously, but are layered.

Ultimately, the increase or decrease in presidential war powers is difficult to quantify. But any attempt to do so must go deep beyond the surface of congressional approval or resistance. While documented description of presidential power to make war

remains in the Constitution, it is evident that there are unwritten factors and historical circumstances which influence any written portrayal of power. President Bush's wide scope of authority emanates largely from national reaction to a singular event, the 9/11 attacks. But the ramifications of the event are everlasting. The Bush presidency highlights the importance of information and its conveyance to the public. Bureaucrats, who have access to information and are responsible for carrying out the administration's orders, were in the best position to combat the case the Bush administration made for war, but failed to do so in a prompt manner that inspired public skepticism. Information leaks and the dissent of officials at the Pentagon and various intelligence agencies are an essential part of bureaucracy's check on its executive. Once the message is out, it is up to the media and Congress to take part in debate and let public opinion take shape. Bush's considerable war authority results from a number of faulty assumptions made by the American public, in lieu of full access to information. Bush's war authority also stems from a public willing to defer to the President on an issue as complex as adapting to fight terrorism.

**c. Barack Obama (2009-Present)**

The scope of President Barack Obama's international conflicts to date entails inheriting the war on terrorism and initiating U.S. involvement in Libya. Obama's continuation of the war on terror will be examined in the contexts of an expansive definition of "war." An examination of U.S. intervention in Libya offers a different and more thorough perspective since those hostilities were not inherited, but rather initiated by President Obama. President Obama's use of military force will be surveyed against the backdrop of external checks on executive authority.

It is important to note that any U.S. intervention in Libya came in the shadows of lengthy military involvement in Iraq and Afghanistan. Wary of war, Americans were not likely to cast the weight of their *public support* without careful consideration and only under certain conditions. President Obama professed U.S. military engagement in Libya as limited. “The public is divided over the possibility of enforcing a no-fly zone – 44% favor this action while 45% are opposed. Yet just 16% favor bombing Libyan air defenses – 77% oppose bombing the sites. And large majorities reject providing arms to anti-government groups (69%) and sending troops into Libya (82%)” (“Public Wary of Military Intervention in Libya”). But the initiation of military force in Libya did not require public backing. Commencement of U.S. airstrikes came without prospective congressional approval. The Obama administration argued that “U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve U.S. ground troops” (Savage). Even as U.S. action in Libya faced majority opposition, the intensity of that opposition was not significant enough to deter President Obama from initiating military action.

Previous examples have evidenced the conditionality of public opinion when it comes to U.S. engagement in war. In the case of George H.W. Bush, multinational coalitions were a variable that solidified domestic support and thus enhanced the war power leverage of the executive branch. In the case of Libya, one such variable increasing executive authority is the continuing advances in technology. Since by and large the most opposed measure of war-time operations is the use of ground troops, unmanned aerial systems (UAS) offer an alternative to President Obama that does not put American lives at risk and changes what we think of as war. “DOD’s inventory of

unmanned aircraft increased from 167 to nearly 7,500 from 2002 to 2010. . . . Further, the use of UAS in a variety of roles, but particularly as platforms for delivering lethal force, raise a number of legal issues of interest to Congress” (Gertler 2-3). As the trends of war and how the public thinks about war and its costs change, so too have public opinion and its check (or lack thereof) on executive authority:

And now we possess a technology that removes the last political barriers to war. The strongest appeal of unmanned systems is that we don’t have to send someone’s son or daughter into harm’s way. But when politicians can avoid the political consequences of the condolence letter – and the impact that military casualties have on voters and on the news media – they no longer treat the previously weighty matters of war and peace the same way (Singer).

Public response varies in approval and intensity given the specifics of the military use.

America maintained a relatively limited role in Libya and paid little cost in terms of mortality rates.

The increase in executive authority appears imminent, if not already evident.

While Libya offers an example of low casualty rates, to which public resistance to war is most closely tied, what would happen if UAS’s prove insufficient? What will happen if a President’s use of unmanned technology has the unintended effect of later committing U.S. interests and ground troops into the equation? As recently as November 8, 2012, an Iranian jet fired on U.S. drones conducting surveillance off the Iranian coast. It can be argued that the unmanned concept is creating a more cavalier approach to hostile exchanges such as this. As top government officials of nations around the world struggle to adapt and define “war,” the public’s job in casting its support or resistance to warfare – even “limited” – becomes even more challenging.

The *media* had the ability to check U.S. intervention in Libya by promoting issue salience for the broader public to consider and to challenge the merits of American

engagement. The American media's coverage of U.S. action in Libya had two distinct shortcomings. The first was the narrow range of debate, which did not adequately address the scope of American military involvement, as well as its impact on executive authority. The second was an emphasis on the "infallible" precision of U.S. weapons in a campaign more reliant on technology than it was manpower.

The media is tasked with educating the broader public on the scope of American military involvement in Libya. This education includes everything from human and financial costs to time-commitments and global fallout. As it pertains to the war powers debate, the media has failed to call into question a fundamental point. "The first hazard is that if war can be waged without apparent human cost to the attacker, it is clearly more likely to be undertaken. . . . But another moral hazard is that such attacks could easily become the first option of indecisive leaders, exactly as cruise missiles have also been in the recent past" (Rothkopf). Left unchallenged, the U.S. drone campaigns in Libya represent a significant increase to executive war authority and set dangerous precedents as executive acts become more and more institutionalized. Not only do unmanned drones remove the greatest political barrier (risk of American lives) to executive war authority, but they may also encourage executives to err on the side of military action in the future, where in the past they may have shown restraint. The media has struggled to provide transparency on key issues that are imperative to informing public opinion. Media limitations pose a challenge to a public trying to make light of military conflict a half a world away.

The second media shortcoming has been the "infallible" precision of U.S. drone planes. For its part, coverage has been slanted. When it has covered the use of

unmanned drones, the media has focused more on the glorification of technology than it has the comprehensive ramifications of their use. “Launching air strikes is the easiest, most exciting, and most dependably successful stage of a modern war, from the US/Western perspective. TV coverage is wall-to-wall and awestruck. The tech advantages are all on our side. Few Americans, or none at all, are hurt. It takes a while to see who is hurt on the ground” (Fallows). Drone strikes have the potential to inflict significant structural damages and a number of civilian casualties. Both in Libya and in the larger War on Terror the fallibility of drones is a necessary and missing piece to informing public opinions on intervention in Libya and elsewhere.

More than anything, advancements in technology and the complexities of war demand more critical thinking from the media and American public than ever before. The intensity of public and media resistance to evolving forms of war seem to have waned because it is viewed as an alternative to risking American lives and its consequences are not immediate. But as the addictive alternative of American drone strikes spreads beyond Libya there is growing evidence to suggest that their use creates more enemies than they eliminate. “Drones have replaced Guantanamo as the recruiting tool of choice for militants; in his 2010 guilty plea, Faisal Shahzad, who had tried to set off a car bomb in Times Square, justified targeting civilians by telling the judges, ‘When the drones hit, they don’t see children’” (Becker). The Columbia Law School’s Human Rights Clinic recently released a report, *Counting Drone Strike Deaths*, which challenged the Obama administration’s overall drone campaign’s casualty estimates while targeting terrorist figures in Pakistan. “The report warns that low civilian casualty estimates may provide false assurance to the public and policymakers that drone strikes do not harm



civilians” (Counting Drone Strike Deaths). It is clear that the advancements of war have outpaced the public’s understanding of it. To date, the media has not been up to the task of equipping the American public with this knowledge. The evolution of technology and growing means of asymmetric warfare challenge media coverage like never before. Now media coverage must offer accurate reporting that fact checks its government and just as importantly, provide insight on how these actions fit into a larger strategic picture.

*Bureaucratic resistance* was most prevalent through the opposition of Department heads like the Secretary of Defense, in disclosing details on the realities of drone warfare, thereby undermining the Obama administration’s position. Resistance could also be seen through anonymous officials challenging the executive’s ability to filter out unfavorable information. These government representatives voiced opposition through congressional testimony and by using the media as an amplifier for their message.

With rumor of U.S. airstrikes to support the cause of Libyan rebels looming, Secretary of Defense Robert Gates spoke to the totality of U.S. action in the region in congressional briefings. “Let’s just call a spade a spade. . . . A no-fly zone begins with an attack on Libya to destroy the air defenses. That’s the way you do a no-fly zone. And then you can fly planes around the country and not worry about our guys being shot down. But that’s the way it starts” (Sanger). In an age of heightened political awareness and media polish, where the White House takes pains to discern “war” from “kinetic airstrikes,” Gates’ candor is meaningful. In his testimony Gates also voices concern over mission creep – the concern that any military action in Libya could lead to a more expansive mission requiring additional time, manpower, and resources. “Mr. Gates, the most prominent Republican in the administration, was even blunter than usual as he

approaches the end of his time in office. His testimony came days after he gave a speech warning that America should avoid another big intractable land war like those under way in Iraq and Afghanistan” (Sanger). Mr. Gates’ linkage to a prolonged conflict and sensitive buzz words like “Iraq” and “Afghanistan” came at a time when the American public is wary of war. The notion of another Middle East conflict also had the potential to create a political problem for Obama, who campaigned in part on ending the inherited wars in Iraq and Afghanistan.

The peripheral effects of limited involvement in Libya and its potential to lead to deeper military intervention inspired further bureaucratic pushback once the Libyan campaign was underway. In a March 31, 2011 appearance before the Armed Services Committee, Gates provided further testimony about the ongoing operations in Libya. Gates’ concerns centered on mission creep as well as the Department of Defense’s difficulties in operating without a budget. “Gates said Congress must also consider the financial realities. . . . Besides operations in Iraq and Afghanistan, Gates noted there are 19 ships and 18,000 service members deployed on a humanitarian mission in Japan” (Daniel). Essentially, we see that the executive branch is reliant on government agencies to accomplish its goals – both politically and logistically. Top administration officials can help an executive to sell a war, or contest it.

Bureaucratic resistance has also been one of the only avenues for the media and public to get access to information about the drone program’s nuances. Administration leaks account for the bulk of the casualty figures from U.S. drone campaigns that have reached the public eye, as well as the expansive list of names they are intended to target. The Obama administration has frequently guarded the negative aspects of its drone use,

even going so far as to embrace controversial counting methods that reduce the tally of civilian deaths. “It in effect counts all military-age males in a strike zone as combatants, according to several administration officials, unless there is explicit intelligence posthumously proving them innocent” (Becker). Often, it is only through knowledgeable insiders that the media and public attain information that challenges executive control.

But in interviews, three former senior intelligence officials expressed disbelief that the number could be so low. The C.I.A. accounting has so troubled some administration officials outside the agency that they have brought their concerns to the White House. One called it “guilt by association” that has led to deceptive estimates of civilian casualties (Becker).

The matter of civilian casualties is a nuanced but important one. Bureaucratic leaks serve to create an informed citizenry that is better armed to weigh in on complex matters that may not have the immediate consequence of American lives. Without these challenges to executive authority, the Obama Administration is able to brushstroke its policy in a favorable light.

Nevertheless bureaucratic disclosures have become a complicated ordeal that can benefit executive policy as well as hinder it. The Obama administration has been repeatedly accused of tactical leaks that substantiate its policies and harsh treatment for those leaks that challenge them. “The Obama administration has charged more people under the Espionage Act for the alleged mishandling of classified information than all past presidencies combined” (Van Buren). There is no way to quantify how many officials have been deterred from coming forward with information as a result of the increased crackdown on bureaucratic leaks. But it is a point worth noting when coupled with the growing amount of material that has been restricted to public access. “When everything is classified -- according to the Information Security Oversight Office, in 2011

American officials classified more than 92,000 documents -- any attempt to report on anything threatens to become a crime” (Van Buren). Although bureaucratic leaks have proved effective at times, Obama’s Presidency also exemplifies a measure of executive pushback.

Determining the effectiveness of bureaucratic resistance to the Obama administration’s use of airstrikes in Libya and in the War on Terror depends on its goals to begin with. Was its purpose to ensure a deliberative process and congressional consent? Was its mission to prevent U.S. intervention entirely? Or was its objective a matter of issue salience and holding the presidency accountable for a limited campaign? Resistance to Obama’s foreign policy in Libya exemplifies bureaucracy’s many angles to guarding against an overly powerful executive. Forms of resistance include numerous tactics, namely, a disclosure of uncensored military logistics, figures hinting at stretched troop deployments and resources, and steep financial costs. But its real power is its access to information. Bureaucratic resistance exposes critical information to the media and public that remains otherwise confidential. As a result, policymakers and the public become more informed and less reliant on information filtered through administration elites.

For its part, *Congress* has certainly made attempts to call American action in Libya into question. The semantics of armed conflict and ill-defined terms like “war” have contributed to the layered debate over executive war power. History shows us that presidents will avoid boxing themselves in whenever possible. For Obama and his predecessors war is not simply defined by its use of force, but also its scope. When in doubt, executives have rounded in their favor. In Libya, the Obama administration

argued that U.S. engagement fell short of constituting a war. Deputy National Security Advisor Ben Rhodes conveyed the Obama administration's position: "I think what we are doing is setting up a resolution that has a very clear set of goals, which is protecting the Libya people, averting a humanitarian crisis, and setting up a no-fly zone. . . .

Obviously that involves kinetic military action on the front end. But again, the nature of our commitment is that we are not getting into an open-ended war, a land invasion in Libya" (Allen). In effect, executive authority has risen with the proliferation of technology and made congressional claims to a say in war more cumbersome. Although many Congresses have been subjected to creative White House interpretations, arguing that their actions do not constitute war, the proliferation of technology has further detracted from Congress' influence in matters of war.

President Obama has also been challenged by the forces of party machinery in an increasingly polarized two-party system. House Republicans sparred routinely with Obama during the first term of his presidency. In May 2011, Democrats maintained a small Senate majority, while the House of Representatives had the largest number of Republicans in over 60 years. Congress urged President Obama to inform them of U.S. involvement in Libya, per the War Powers Resolution. In this case, the War Powers Resolution states President Obama must terminate the mission in Libya 60 or 90 days after notifying Congress that troops have been deployed into hostilities. "House Speaker John Boehner threatened to cut off funding for U.S. involvement in Libya if he's not satisfied with further White House explanation about the NATO-led military campaign" (Sherman). But all Congress' actions did were prompt the White House to inform them

that U.S. military action was limited. In this case, Congress' public claims to power of the purse proved relatively ineffective.

The Libyan approach, reliant on air supremacy, rather than foot soldiers, is also more likely to deprive Congress of duration arguments. "Aside from the important but obvious advantage of low casualties and low costs, 'boots off the ground' has one major merit that is not so readily apparent. It is much less alienating to the population and makes disengagement - the exit strategy - much easier to achieve" (Etzioni). It stands to reason that Congress' arguments against centralized war powers hold more weight when the public can be mobilized against casualty rates, high costs, and lengthy involvement. Without these consequences, it is difficult for Congress to leverage its share of the war-making power.

The opposition of party machinery has been a frequent theme in the years leading up to Obama's re-election. Obama and the Republican-controlled House have failed to reach agreement on a laundry list of domestic and foreign policy. Disagreement between both sides was significant enough to make it a focal point of the election campaigns in 2012. "One Saturday last fall, President Obama interrupted a White House strategy meeting to raise an issue not on the agenda. He declared, aides recalled, that the administration needed to more aggressively use executive power to govern in the face of Congressional obstructionism" (Savage). Although the context of Obama's remarks was not specific to matters of foreign policy, it speaks to the working relationship between the two sides. For Obama, like so many presidents, executive power has been a strategic way of doing things without the burden of Congressional approval. The party make-up of the President and Congress poses an intriguing dynamic. "Jack L. Goldsmith, a Harvard law

professor[,] . . . said the Obama administration’s pattern reflects how presidents usually behave, especially during divided government” (Savage). By this logic it seems that the executive branch holds a consistent advantage over its legislative counterpart. In a case where one party controls the presidency and Congress, then it is likely that an executive will win favor for its many initiatives. In circumstances of divided government, it seems that presidents are more readily compelled to invoke executive authority.

The *Court’s* role during Obama’s presidency is worth examination in two main ways: Indefinite detention and targeted killings. Indefinite detention has spilled over from the Bush administration while targeted killings have become a subject of debate with the increased use of drones. Both are mechanisms of coping with terrorism and have implications on executive authority for the foreseeable future.

The practice of indefinite detention as a counter-terrorism device began shortly after the 9/11 attacks. In the 2012 National Defense Authorization Act<sup>2</sup> (NDAA) bill, broad military detention language was inserted into the bill. Among other things, the NDAA permits the U.S. government to indefinitely detain individuals who support terrorist forces engaged in hostilities against the United States. “The indefinite detention provision in the version of the annual National Defense Authorization Act enacted last year was contentious because lawmakers did not make clear whether American citizens could also be held without trial as wartime prisoners” (Savage). The provision has recently been challenged within the legal system.

The decision in *Hedges v. Obama* ruled against the indefinite detention facet of the NDAA. “The executive branch has long relied upon the authorization to use military

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<sup>2</sup> A United States federal law which specifies the fiscal budget and expenditures for the Department of Defense. <<http://www.gpo.gov/fdsys/pkg/BILLS-112hr1540enr/pdf/BILLS-112hr1540enr.pdf>>

force against the perpetrators of the Sept. 11 attacks, and those who harbored them, as the basis for its ability to detain people” (Savage). The plaintiffs alleged that the NDAA’s language was so vague in its definitions that it could be interpreted to include outspoken critics and certain media activity as providing “support” to terrorist organizations or associated groups. It is worth noting that the NDAA’s indefinite detention provision has only been ruled on by a Federal District Court and by the Second Circuit Court of Appeals and may still be subject to further appeal and court proceedings before a final decision is rendered.

The Obama administration has also embraced targeting killing as part of its counterterrorism policy. While the use of drones in Libya is not significantly challenged by the courts, it raises substantial questions in the covert war on terrorism. In September 2011, Anwar al-Awlaki, an American citizen and high-ranking member of al Qaeda, was targeted and killed in an American drone strike. “The decision to make Mr. Awlaki a priority to be sought and killed was controversial, given his American citizenship. The American Civil Liberties Union, which fought unsuccessfully in the American court system to challenge the decision to target Mr. Awlaki, condemned the killing” (Mazzetti). While few dispute the danger that Awlaki posed to the American public, his execution raises more questions about the executive branch’s ability to circumnavigate external checks like the court system. Indeed, any ruling against the indefinite detention of American citizens is bound to lose its meaning if they can simply be targeted and killed instead.

In sum, the Obama presidency has posed a significant challenge for external checks. Public opinion has failed to provide stark opposition to ongoing U.S. drone



strikes in the war against terrorism. In addition, the media hasn't provided much issue salience on the matter. It is possible that the public, fatigued from the wars in Afghanistan and Iraq, and wary of further "boots on the ground" engagements, are simply willing to permit drone use out of fear for other alternatives. But the complicated nature of the war on terrorism has outpaced the media's ability to inform public opinion. The bureaucracy would appear to be in the best position to combat executive authority. Pentagon officials and intelligence agencies are equipped with unique knowledge and perspective that both the public and media lack. For instance, the replacement of drones (over Guantanamo detention) as the most effective terrorist recruiting tool, is a ramification that may not be well known, and could shift public opinion. While Obama has certainly been subject to the opposition of party machinery, Congress has been the victim of a number of creative White House arguments - such as distinctions between kinetic military action and war - that have hampered its involvement in the war-making process. Fundamentally, the trends of asymmetric warfare and the proliferation of technology have proven to be an enhancement of presidential war authority.

## **6. Conclusion**

Executive war authority, within the context of public support, media, bureaucratic resistance, Congress, and the Court, has increased exponentially over time and particularly in the post September 11 era. The enhancement can be largely attributed to an increased emphasis on secrecy, evolutions in warfare, and the proliferation of technology. Machiavelli's unitary executive, comprised of decisiveness, the importance of secrecy, and the advantages of swift, uniform action, has in many ways prevailed.

Public opinion is perhaps the most significant external factor on presidential war power, because of the link between public officials and the electorate. The case studies show public opinion is conditioned upon several factors (most of which favor the presidency): multinational coalitions, the varying complexities of war, and the specifics of military engagement. George H.W. Bush's actions during the Persian Gulf War exemplify the presidency's closer alignment than Congress to the international community. Although successful coalition building is not a guarantee, it is a means by which a president can also leverage public support at home. The complexities of warfare and the threat of terrorism have also contributed to a public struggling to define conflict with non-state actors and indefinite timetables. As threats of non-state actors has increased so too has the military technology designed to cope with them. The Obama presidency's increased use of unmanned drones has effectually removed barriers to war, such as human risk, and changed the public threshold for engagement. Public opinion serves as a more thorough check on executive authority in cases where American lives are at more obvious risk and military technology now offers a situational alternative.

The media has also been inconsistent in an important role whereby the broader public relies on it to convey information and interpret events. Shortcomings include providing issue salience, the glorification of technology, and accountability for public misconceptions. Issue salience is a challenge for the media. During the Persian Gulf War, George H.W. Bush benefitted from the media's prominent coverage of the conflict. Coverage meant that Bush needed to do less convincing of the topic's importance. The media has also struggled to offer transparency on the fallibility and consequences of advancing military technologies, namely the increased use of unmanned drones. And in

the case of George W. Bush, polling indicates there were a number of public misconceptions that led to public support for the Iraq War. Although the media does not bear sole responsibility, false assumptions such as links between al Qaeda and Iraq were at the time viewed as justifications for the conflict.

Bureaucracy has arguably been in the best position to combat the rise in executive war authority. Bureaucratic officials are an important external factor since so much of the executive reasoning for war is beyond the ability of the ordinary citizen to dispute. Nevertheless, case studies show that the transparency offered by various government agencies has produced mixed results. On one hand, agencies like the CIA have showcased an ability to dispute George W. Bush's 2003 State of the Union claims as a justification for war and to shed light on the grim realities of Obama's drone warfare; however, their oppositions failed to prevent the Iraq War and the Obama administration has charged more people for mishandling of classified information under the Espionage Act than all past presidencies combined. Essentially, presidential power has grown amidst a struggle to reconcile operational secrecyes versus public debate.

Congress has especially grappled to rein in presidential authority. The complexities of modern warfare and proliferation of technology have left it vulnerable to the unitary advantages of the executive as well as creative White House interpretations of war. Circumstantial demands for secrecy, particularly since the attacks of September 11<sup>th</sup>, have caused information and power to become even more centralized within the presidency. Even in cases of divided government and the party machinations of Congress at work, claims of executive authority have allowed presidents to strategically limit the hurdle of Congress. The changing nature of war has also left Congress struggling to keep

pace. The availability of new technologies have inspired fundamental debates as to what constitutes war (and subsequently, congressional involvement). Moreover, military alternatives like unmanned drones (which remove human risk and complicated exit strategies) may make it more challenging for Congress to rally intense constituency opposition.

The Court, particularly during the George W. Bush administration, has demonstrated a significant willingness to combat executive authority. The case studies show that the Supreme Court rebuked the executive claims of President George W. Bush during wartime more than any other in history. It is arguable that this is because the Court is far more independent than other external factors. In contrast, bureaucratic resistance is reliant on the media to carry out its message, the public to receive it, and then lobby its representatives. The responsibility of the Court demands that it be more deliberate, whereas other external checks tend to operate within more narrow time frames. If other external factors were outpaced by the complexities of war, then surely the Court's highly deliberate and intellectual nature is best suited to cope with these changes. The Court's rebukes, particularly on matters such as indefinite detention of suspects, are especially important given the open-ended nature of the war on terrorism, which offers significant potential for the executive to expand its powers. Nevertheless, the Court's role has been to rule on wartime issues, rather than preventing a war in the first place.

In the final analysis, while constitutional limits on war powers have remained relatively unchanged, the context of historical events and individuality of office holders are fluid. Therefore, any increase or decrease in executive war authority can be primarily

examined through a lens of unwritten checks. The public, media, bureaucracy, Congress, and the Court have been inconsistent in their ability to limit presidential authority, particularly post September 11<sup>th</sup>. External checks have yielded to executive war power claims in large part due to circumstantial demands for secrecy, the evolving nature of warfare, and the proliferations of military technologies.

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