
RECENT ADMINISTRATIVE INTERPRETATION

SEPARATION OF POWERS — WAR POWERS RESOLUTION — OBAMA ADMINISTRATION ARGUES THAT U.S. MILITARY ACTION IN LIBYA DOES NOT CONSTITUTE “HOSTILITIES.” — *Libya and War Powers: Hearing Before the Senate Committee on Foreign Relations*, 112th Cong. 7–40 (2011) (statement of Harold Koh, Legal Adviser, U.S. Department of State).

The War Powers Resolution¹ (“WPR” or “Resolution”) requires the President to obtain congressional authorization for the use of military force “in any case in which United States Armed Forces are introduced . . . into hostilities.”² If Congress has not declared war or otherwise authorized the deployment of U.S. forces within sixty days of the WPR’s activation, the President must withdraw them from use.³ While purporting to clarify the allocation of war powers, the Resolution has generated nearly four decades of dispute.⁴ Recently, the Obama Administration denied the Resolution’s applicability to U.S. support of an international military action in Libya that persisted for over sixty days. On June 28, 2011, Harold Koh, Legal Adviser of the Department of State, appeared before Congress to defend the Administration’s continued use of U.S. forces.⁵ Relying on previous administrations’ interpretations of the WPR, Koh argued that U.S. activity in Libya did not constitute “hostilities” and thus did not trigger the WPR’s sixty-day withdrawal rule.⁶ Koh properly relied on historical interpretations of the WPR, but his testimony illustrates the ambiguity that these precedents allow. While Koh construed the precedents narrowly, Congress’s failure in this and other war powers disputes to contemporaneously oppose executive constructions of the WPR has invited increasingly narrow interpretations of it. This episode thus suggests limitations on the Resolution’s ability to function as an ex ante time limit on executive action and further demonstrates the need for congressional participation in the Resolution’s construction and application.

¹ 50 U.S.C. §§ 1541–1548 (2006).

² *Id.* § 1543(a).

³ *See id.* § 1544(b). Additionally, the “sixty-day period shall be extended for not more than an additional thirty days if . . . unavoidable military necessity . . . requires [it].” *Id.*

⁴ *See generally* RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R41199, THE WAR POWERS RESOLUTION: AFTER THIRTY-SIX YEARS (2010) (providing a history of the WPR).

⁵ *See Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 7–40 (2011) (statement of Harold Koh, Legal Adviser, U.S. Dep’t of State) [hereinafter Koh Statement].

⁶ *Id.* at 9–10, 13–17.

In February 2011, Libya erupted in a series of protests inspired by antigovernment uprisings in Egypt and Tunisia.⁷ Violence steadily increased over the following weeks as then-Libyan leader Muammar Qadhafi struck back at the protesters, vowing to root them out “house by house, room by room . . . [with] no mercy and no pity.”⁸ On March 17, aiming to avert what the international community feared would become a humanitarian catastrophe, the United Nations Security Council voted to authorize military action against Qadhafi’s forces in Libya.⁹ U.S. and European forces began a broad campaign of airstrikes against Libyan targets two days later.¹⁰

The Obama Administration reported the activity to Congress within forty-eight hours of the coalition intervention.¹¹ While the United States took an early lead in disabling Libyan military targets, the North Atlantic Treaty Organization (NATO) assumed command in early April, and U.S. forces shifted into a “supporting role.”¹² The Administration consulted with Congress throughout the operation,¹³ but Congress did not authorize the use of military force.¹⁴ As the engagement continued into its sixtieth day, the legality of the Administration’s activity in Libya catapulted into the public consciousness.¹⁵

⁷ See Jeffery Delviscio et al., *Timeline: Col. Muammar el-Qaddafi*, N.Y. TIMES, https://www.nytimes.com/interactive/2011/02/24/world/middleeast/20110224_qaddafi_timeline.html?ref=libya (last visited Feb. 25, 2012) (providing an interactive timeline of events).

⁸ Koh Statement, *supra* note 5, at 12 n.5.

⁹ See S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011); Dan Bilefsky & Mark Landler, *Military Action Against Qaddafi Is Backed by U.N.*, N.Y. TIMES, Mar. 18, 2011, at A1.

¹⁰ David D. Kirkpatrick et al., *Allies Open Air Assault on Qaddafi’s Forces*, N.Y. TIMES, Mar. 20, 2011, at A1.

¹¹ See Letter from the President Regarding the Commencement of Operations in Libya (Mar. 21, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>.

¹² DEP’T OF DEF. & DEP’T OF STATE, REPORT FROM THE ADMINISTRATION TO CONGRESS: UNITED STATES ACTIVITIES IN LIBYA 5 (2011), available at <http://s3.documentcloud.org/documents/204673/united-states-activities-in-libya-6-15-11.pdf>. After the transition, U.S. forces conducted one-quarter of the 10,000 sorties flown by NATO and provided intelligence capabilities and a majority of the coalition’s refueling assets. *Id.* at 8–9. The United States did not deploy ground troops to Libya. *Id.* at 11; see also Koh Statement, *supra* note 5, at 15.

¹³ See Koh Statement, *supra* note 5, at 12; Auth. to Use Military Force in Libya, 2011 WL (OLC) 1459998, at *5 (Apr. 1, 2011).

¹⁴ See Auth. to Use Military Force in Libya, *supra* note 13, at *6 (justifying the initial use of force without congressional authorization).

¹⁵ See, e.g., Jack Goldsmith, *Problems with the Obama Administration’s War Powers Resolution Theory*, LAWFARE (June 16, 2011, 8:38 AM), <http://www.lawfareblog.com/2011/06/problems-with-the-obama-administration%E2%80%99s-war-powers-resolution-theory-2/> (criticizing the Administration’s argument that the WPR did not apply to its activity in Libya); Stephen M. Walt, *Obama, We’re at War. Stop Insulting Us.*, FOREIGN POL’Y (June 16, 2011, 1:20 PM), http://walt.foreignpolicy.com/posts/2011/06/16/obama_were_at_war_stop_insulting_us (same). Some also criticized the Administration’s internal deliberative process. See generally, e.g., Trevor W. Morrison, *Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62 (2011).

On June 28, in response to repeated congressional inquiries, Legal Adviser Koh appeared before the Senate Foreign Relations Committee to elaborate on and defend the Administration's position.¹⁶ Koh's testimony focused on the scope of the term "hostilities,"¹⁷ which he argued "is an ambiguous term of art that is defined nowhere in the statute."¹⁸ The WPR's legislative history indicated that "there was no fixed view on exactly what the term 'hostilities' would encompass" at the time the Resolution was adopted,¹⁹ and no court or Congress had subsequently defined it.²⁰ Instead, the drafters of the WPR "declined to give ['hostilities'] a more concrete meaning,"²¹ intending, Koh argued, "to leave the matter for subsequent executive practice."²² In light of the drafters' deliberate vagueness, "the political branches have worked together to flesh out the law's meaning over time."²³

Koh then turned to the history of the WPR's application, beginning with the evacuation of U.S. citizens from Southeast Asia at the close of the Vietnam War, shortly after the Resolution's passage.²⁴ Citing a 1975 letter from the Departments of State and Defense to Congress,²⁵ Koh argued that the executive branch had always considered "hostili-

¹⁶ See Koh Statement, *supra* note 5.

¹⁷ See *id.* at 12-16.

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 13. In addition to other legislative history, Koh cited statements by one of the Resolution's sponsors, Senator Jacob K. Javits, in support of his reading. *Id.* at 13 n.6 ("[T]he bill . . . seeks to proceed in the kind of language which accepts a whole body of experience and precedent without endeavoring specifically to define it." (omission in original) (quoting *War Powers Legislation: Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59 Before the Comm. on Foreign Relations*, 92d Cong. 28 (1971)) (internal quotation marks omitted)); see also *Lowry v. Reagan*, 676 F. Supp. 333, 340 n.53 (D.D.C. 1987) (inferring that "fixed legal standards were deliberately omitted from this statutory scheme"); Allan Ides, *Congress, Constitutional Responsibility and the War Power*, 17 LOY. L.A. L. REV. 599, 627 (1984) ("Neither the key terms, 'consult,' and 'hostilities,' nor the phrase, 'in every possible instance,' are defined, leaving the application of [the WPR's consultation requirement] to the vagaries of political circumstance and presidential creativity."); Note, *Realism, Liberalism, and the War Powers Resolution*, 102 HARV. L. REV. 637, 649 (1989) (describing the "legalistic hairsplitting" that has resulted from ambiguity in the WPR's text).

²⁰ Koh Statement, *supra* note 5, at 13; see also *infra* note 38 and accompanying text.

²¹ Koh Statement, *supra* note 5, at 13.

²² *Id.* at 31.

²³ *Id.* at 13; see also *id.* ("[W]hether a particular set of facts constitutes 'hostilities' for purposes of the resolution has been determined more by interbranch practice than by a narrow parsing of dictionary definitions.")

²⁴ See *id.* at 11 n.1, 13. For a description of events precipitating the 1975 dispute, see GRIMMETT, *supra* note 4, at 10; and Clement J. Zablocki, *War Powers Resolution: Its Past Record and Future Promise*, 17 LOY. L.A. L. REV. 579, 580-84 (1984).

²⁵ Letter from Monroe Leigh, Legal Adviser, U.S. Dep't of State, and Martin R. Hoffmann, General Counsel, U.S. Dep't of Def., to Clement J. Zablocki, Chairman, Subcomm. on Int'l Sec. and Scientific Affairs of the H. Comm. on Int'l Relations (June 3, 1975), in *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the Subcomm. on Int'l Sec. and Scientific Affairs of the H. Comm. on Int'l Relations*, 94th Cong. 38-40 (1975) [hereinafter 1975 Letter].

ties” “definable in a meaningful way only in the context of an actual set of facts.”²⁶ Koh referred to a series of executive interpretations of the term that reaffirmed the 1975 letter,²⁷ claiming that “the term should not necessarily be read to include situations where the nature of the mission is limited[,] . . . the exposure of U.S. forces is limited[,] . . . and . . . the risk of escalation is therefore limited.”²⁸ Koh’s argument then proceeded by analogy, comparing the U.S. intervention in Libya to, among others, past engagements in Lebanon,²⁹ Grenada,³⁰ and Somalia,³¹ in which previous administrations had not found the WPR’s sixty-day pullout rule to apply.³² Koh hewed closely to the facts of these historical precedents and found the Libya intervention similarly limited in its mission, military means, exposure of U.S. forces, and risk of escalation.³³ Thus, while a different set of facts might have produced a different legal conclusion, the “unusual confluence” of variables in Libya³⁴ led the Administration to conclude that it did not “constitute the kind of ‘hostilities’ envisioned by the [WPR].”³⁵

²⁶ Koh Statement, *supra* note 5, at 13 (quoting 1975 Letter, *supra* note 25, at 38).

²⁷ These interpretations adopted the Ford Administration’s understanding, which distinguished “full” from “intermittent” military engagements and argued that the latter fell below the level of “hostilities.” *See id.* at 14 & nn.10–12.

²⁸ *Id.* at 14. Koh later added a fourth factor in the course of his analysis. *See id.* at 15 (“[T]he military means we are using are limited . . .”).

²⁹ Over roughly a two-year period between 1982 and 1984, President Ronald Reagan deployed over 1000 Marines to Lebanon in support of a multinational peacekeeping force following the 1982 Lebanon War. *See* GRIMMETT, *supra* note 4, at 13–15. U.S. forces suffered a number of casualties. *Id.* Numerous legislators demanded that President Reagan invoke the WPR, but he refused, denying that isolated attacks on U.S. forces constituted hostilities. *See* Martin Wald, Note, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1424 (1984).

³⁰ In 1983, President Reagan deployed 1900 U.S. forces to Grenada to protect American citizens in the country following the overthrow of Grenada’s government and the subsequent development of “anarchic conditions.” GRIMMETT, *supra* note 4, at 15; *see also* Wald, *supra* note 29, at 1427–28. Eighteen U.S. soldiers were killed and more than one hundred wounded. *Id.*, *supra* note 19, at 632. President Reagan again failed to invoke the WPR, and Congress did not pass legislation opposing the President’s refusal to do so. *See* Wald, *supra* note 29, at 1428–29.

³¹ President George H.W. Bush deployed thousands of troops to Somalia in late 1992 to provide humanitarian relief following an outbreak of sectarian violence. *See* GRIMMETT, *supra* note 4, at 26–27. As fighting intensified over the following year, members of Congress demanded that the Administration — then under President Bill Clinton, who had since assumed office — invoke the WPR. *Id.* at 27–28. The White House refused, arguing that the WPR applied only to “sustained” hostilities and that “intermittent” military engagements did not trigger the Resolution’s sixty-day clock. *Id.*

³² *See* Koh Statement, *supra* note 5, at 14–16.

³³ *See id.*

³⁴ *Id.* at 16.

³⁵ *Id.* at 14. Koh added in conclusion that the Administration’s interpretation did not contravene the “spirit” of the WPR either. *Id.* at 16. The drafters “were concerned there about no more Vietnams.” *Id.* at 10. Thus, the Libya intervention fell “far from the core case that most Members of Congress had in mind when they passed the [WPR].” *Id.*; *see also* Crockett v. Reagan, 558 F. Supp. 893, 899 (D.D.C. 1982).

Although Koh's definition of "hostilities" strains the term's everyday meaning,³⁶ the vehemence of commentators' responses belies the issue's complexity. Legislative history³⁷ and four decades of the WPR's operation indicate that not every military engagement triggers the Resolution's sixty-day clock. As courts have largely dismissed WPR litigation on prudential grounds,³⁸ historical practice has become law in the Resolution's regard, guiding its application.³⁹ Koh properly sought to locate Libya amidst the universe of WPR precedents,⁴⁰ but his analysis illustrates the indeterminacy inherent in a statutory structure with only contested, historical practice to fill textual silence. This ambiguity has weakened the WPR's ability to function as a general, ex ante time limit on executive action. Rather, Congress must actively participate in enforcing the Resolution's letter if it wishes to deny the executive the flexibility on which Koh's argument relied.

While Koh emphasized the narrowness of his analysis as one of its virtues,⁴¹ the fact-specificity of his reasoning sets a methodological precedent that risks loosening the constraining effect WPR precedents can provide. The interpretation of precedent requires selecting a level of generality at which to analogize a present case to past cases. In describing past cases with greater specificity, one increases the grounds on which one can distinguish them.⁴² In contrast to interpretations

³⁶ See, e.g., Koh Statement, *supra* note 5, at 34 (statement of Sen. Christopher Coons) ("[O]ur constituents are finding very real tension between a commonsense understanding of hostilities and the exercise of statutory construction in which you are engaged . . ."); Walt, *supra* note 15.

³⁷ See *supra* note 19.

³⁸ See, e.g., *Campbell v. Clinton*, 203 F.3d 19, 19 (D.C. Cir. 2000) (dismissing for lack of standing a suit against the President by congressmen seeking to invoke the WPR regarding the conflict in Kosovo); *Crockett v. Reagan*, 720 F.2d 1355, 1356–57 (D.C. Cir. 1983) (dismissing as presenting a nonjusticiable political question a similar suit regarding a conflict in El Salvador); *Kucinich v. Obama*, No. 11-1096(RBW), 2011 WL 5005303, at *12 (D.D.C. Oct. 20, 2011) (dismissing for lack of standing a similar suit regarding the Libya incident).

³⁹ See Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. REV. 1338, 1340 (1993) (book review) ("Most of the law here consists not of judicial precedents but of historical ones . . ."). As then-Professor Koh argued with regard to foreign affairs generally, "[t]o fill the textual silences, the President and Congress have invariably turned to judicial precedent and quasi-constitutional 'custom' [of the political branches] to find support for their claims of constitutional right." Harold Hongju Koh, *Focus: Foreign Affairs Under the United States Constitution*, 13 YALE J. INT'L L. 1, 3 (1988) (footnote omitted).

⁴⁰ In making use of the WPR precedents, Koh implies that historical practice indeed delimits the boundaries of permissible executive action. This comment does not address whether, and to what extent, past practice in fact constrains the executive. Rather, it takes Koh's analysis at face value and seeks to demonstrate how Koh's method still generates such extensive interpretive flexibility that it undermines the WPR precedents' restrictive potential.

⁴¹ See Koh Statement, *supra* note 5, at 11 ("Our position is carefully limited to the facts of the present operation . . ."); *id.* at 22 ("Now, I agree that there have been cases in which the executive branch has overreached. I have written about this in my academic work for many years, which is precisely why the precedent here we think has been narrowly drawn.")

⁴² Cf. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 594–95 (1987) ("Although it will always be possible to distinguish a precedent, this becomes comparatively harder if we describe

justifying the WPR precedents on the basis that they involved the rescue of U.S. citizens,⁴³ an attack on U.S. forces or persons already abroad,⁴⁴ or the express invitation of a country in which the United States intervened⁴⁵ — broad categories that more bluntly constrain the flexibility of future interpretations — Koh distilled a highly variable and fact-specific rule: “hostilities” does not encompass limited missions of limited military means with limited exposure to U.S. forces and a limited risk of escalation.⁴⁶ While this “unusual confluence”⁴⁷ of variables might indeed recur infrequently, Koh’s test provides little prescriptive content. Its operative term, “limited,” demands a fact-intensive inquiry into the number of sorties flown by U.S. aircraft, the exact risk to U.S. forces, or the precise U.S. contributions to a relevant military objective.⁴⁸ The test thus shifts the ambiguity of the term “hostilities” to the ambiguity of the term “limited,” committing the WPR’s application not to broad, normatively restrictive categories but to the minute operational details of a given engagement.

Compounding the challenges of such fact-specific analysis, war powers disputes generate uniquely unstable fact contexts. In traditional legal disputes, a given factual pattern does not evolve during a court’s consideration of it. Here, however, the status of the Libya operation continued to change as Koh interpreted it. For example, in supposing the engagement’s limited “risk of possible escalation,” Koh highlighted the absence of U.S. ground troops.⁴⁹ Yet, the humanitarian and diplomatic costs of withdrawal — which Koh emphasized elsewhere⁵⁰ and which could increase with a conflict’s duration and severity — might otherwise limit the United States’ ability to withdraw support. Koh’s analysis does not then distinguish this case, in which the conflict shortly resolved, from a future case, in which it might not. Likewise, even when referring to facts that had already transpired, Koh’s analysis did not specifically address the operational

and use the precedents of the past in general terms. . . . [T]he breadth of the description in the first case substantially limits possible distinguishing factors in subsequent cases.”)

⁴³ See MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 96 (1990) (describing the Grenada operation and the 1975 engagements in Southeast Asia as “rescue missions”).

⁴⁴ See Auth. to Use U.S. Military Forces in Somalia, 16 Op. O.L.C. 6, 10 (1992) (justifying the initial intervention in Somalia “to protect the American citizens already [there]”); Goldsmith, *supra* note 15 (describing the 1983 incidents in Lebanon as “not offensive”).

⁴⁵ See, e.g., Deployment of U.S. Armed Forces to Haiti, 2004 WL (OLC) 5743940, at *5 (Mar. 17, 2004) (“[I]t is surely relevant to the question whether ‘involvement in hostilities’ is ‘imminent’ that the deployment is at the express invitation of the government of Haiti.”).

⁴⁶ See *supra* note 28 and accompanying text.

⁴⁷ Koh Statement, *supra* note 5, at 10.

⁴⁸ See *id.* at 14–16.

⁴⁹ See *id.* at 12, 15.

⁵⁰ See, e.g., *id.* at 14 n.13 (noting the “international condemnation and strained relationships with key allies” that would result from withdrawing U.S. forces prematurely).

details it made relevant: the number of U.S. sorties, the exact U.S. contributions to NATO, the continuousness of the air strikes, or the risk from enemy fire. Koh's legal analysis thus occurred largely in a factual vacuum,⁵¹ limiting its ability to distinguish Libya, for example, from the NATO-led bombing campaign in Kosovo, in which the Clinton Administration seemed to assume the occasion of "hostilities."⁵²

Lastly, WPR precedents arise from highly disputed interbranch interactions, undermining their normative legitimacy. When it has relied on historical practice, the Supreme Court has presumed congressional consent based on hundreds of instances of a relevant practice over many decades⁵³ or Congress's repeated reenactment of statutes allowing a practice to occur.⁵⁴ Yet, in each of the examples Koh cited, the executive and Congress actively disputed the WPR's application, or events resolved too quickly for the sixty-day clock to expire.⁵⁵ Congress has formally invoked the WPR only once,⁵⁶ when, over a year

⁵¹ Cf. *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) (emphasizing the difficulty of determining whether the WPR applies when unable to "actually discover[] the necessary information to answer the question, when such information may be unavailable to the U.S. or its allies, or unavailable to courts due to its sensitivity").

⁵² The President found implied congressional authorization for the Kosovo operation in appropriations statutes. See *Authorization for Continuing Hostilities in Kosovo*, 2000 WL (OLC) 33716980, at *13-25 (Dec. 19, 2000). That the Administration sought to find authorization indicates that it believed the WPR applied. See *id.* (further stating that "[t]he 'clock' established in section 5(b) of the WPR began running," *id.* at *13); *U.S. Policy and NATO Military Operations in Kosovo: Hearing Before the S. Comm. on Armed Servs.*, 106th Cong. 157 (1999) (statement of William S. Cohen, Sec'y of Def.) ("We are certainly engaged in hostilities. We are engaged in combat."). Koh highlighted potential differences with Kosovo, see Koh Statement, *supra* note 5, at 16 n.21 (noting that in Kosovo NATO set broader goals for the mission and U.S. planes endured anti-aircraft fire and contributed more heavily to the coalition effort), but Koh did not provide the specific operational details of the Libya engagement that might distinguish it from Kosovo. Furthermore, if the risk to U.S. planes by anti-aircraft fire distinguishes the cases, future wars involving unmanned technology will increasingly fall outside the WPR's reach.

⁵³ See *United States v. Midwest Oil Co.*, 236 U.S. 459, 469-74 (1915) (stating that a "long-continued [executive] practice, known to and acquiesced in by Congress, would raise a presumption . . . of [congressional] consent," *id.* at 474).

⁵⁴ See *Dames & Moore v. Regan*, 453 U.S. 654, 678-86 (1981); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, . . . may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II."); Note, *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1928 & n.76 (2007) ("In [*Midwest Oil* and *Dames & Moore*], longstanding practice was used not so much to interpret constitutional limits as to deduce whether Congress had authorized the executive action at issue.").

⁵⁵ The engagement underlying the 1975 Letter, *supra* note 25, for example, resolved in less than forty-eight hours. See GLENNON, *supra* note 43, at 115 n.243 ("[D]isagreements concerning the legal underpinnings of the Resolution . . . have not been forced to the surface by events." (quoting Michael J. Glennon, *Strengthening the War Powers Resolution: The Case for Pursuing Restrictions*, 60 MINN. L. REV. 1, 38 (1975)) (internal quotation marks omitted)).

⁵⁶ See DOUGLAS L. KRINER, *AFTER THE RUBICON* 41 (2010).

into the Lebanon incident, it retroactively declared the sixty-day time limit in effect as to fighting that had already occurred.⁵⁷ Congress, however, authorized the deployment of troops to Lebanon for an additional eighteen months in the same bill, simultaneously disapproving of the President's action while ensuring that the WPR's condition — the withdrawal of troops — would not occur.⁵⁸ Events overtook passage of a WPR resolution with regard to Libya as well when a dispute over the U.S. debt ceiling distracted congressional attention from the operation⁵⁹ and Qadhafi's government later fell.⁶⁰ As scholars have noted, "when members of Congress do rise up against the president's policies they consistently fail to write their preferences into law."⁶¹

Congress has never, then, enacted legislation contemporaneously challenging a President's use of force under the WPR. Congress did ultimately act in Lebanon and Somalia, and events resolved so quickly in Grenada and Libya that the incidents did not compel congressional action. But Congress's inaction between the initiation of force and its authorization or end — whether indicative of acquiescence or Congress's inability to overcome institutional limitations⁶² — has allowed a body of historical precedents to accrue that reads "hostilities" narrowly and defines the relevance of past cases based on highly fact-specific details that remain unknown to the public or that continue to evolve as the executive applies them. While the WPR has arguably succeeded in forcing interbranch dialogue and in compelling the executive to conceive of its actions as limited,⁶³ Libya illustrates the evolution of an interpretive pattern that has weakened the Resolution's ability to function in certain cases as a general, *ex ante* time limit. As such, this episode demonstrates the continued importance of direct, conflict-specific legislation if Congress wishes to deny the President the Resolution's flexibility.

⁵⁷ See Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, § 2(b), 97 Stat. 805, 805 (1983); Michael J. Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law*, 78 AM. J. INT'L L. 571, 572 (1984). Conversely, Congress ultimately voted to de-fund the Somalia operation, but it did not invoke the WPR in doing so. See GRIMMETT, *supra* note 4, at 28.

⁵⁸ See Multinational Force in Lebanon Resolution § 6, 97 Stat. at 807; Glennon, *supra* note 57, at 572 ("Because a new 18-month time limit was set by that Act, however, the declaration [that "hostilities" had commenced] was only an academic assertion . . .").

⁵⁹ See Press Release, Statement by Senator John McCain on Delay in Libya Debate (July 5, 2011), available at http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=FBF4D320-B84A-D5FD-5877-FA37AB01E6B7.

⁶⁰ See Delviscio et al., *supra* note 7.

⁶¹ KRINER, *supra* note 56, at 41.

⁶² See *id.* at 41-42 (noting that problems of collective action, partisan incentives, transaction costs, and supermajority requirements often prevent Congress from "chart[ing] a military course independent of the president").

⁶³ See Peter M. Shane, *Learning McNamara's Lessons: How the War Powers Resolution Advances the Rule of Law*, 47 CASE W. RES. L. REV. 1281, 1299-1303 (1997).