



ARE CONGRESSIONALLY AUTHORIZED
WARS PERVERSE?

Jide Nzelibe

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In the contemporary debate over the allocation of war powers, the standard account assumes that prior congressional authorization for the use of force will produce unambiguous deliberative effects because it channels the war-making decision through multiple political actors with varying points of view. Contrary to the received wisdom, this experimental Article advances the empirically plausible but counterintuitive assumption that congressional authorization of the use of force might actually have a perverse effect. Thus, rather than create a drag effect that minimizes the impulse to rush into imprudent wars, congressional authorization might actually do the opposite: because such authorization allows the President to spread the potential political costs of military failure or stalemate to other elected officials, it will lead the President to select into more high-risk wars than he would otherwise choose if he were acting unilaterally. In other words, since congressional authorization acts as a political “insurance policy” that partially protects the President against the possible political fallout from failed military engagements, such authorization is more likely to make the President willing to engage in wars where the expected outcome is uncertain. Indeed, the moral hazard effect is likely to be acute because the political insurance benefits that the President receives are likely to far exceed any ex ante costs he incurs from seeking congressional authorization. More importantly, not only is the President likely to use congressional authorization as a hedge against the loss of political dominance when a war goes bad, he is also likely to use it to prevent the political opposition from exploiting the electoral vulnerabilities of members of Congress from his own party. Finally, because of the short-term electoral risks associated with voting against a presidential request to use force, members of Congress are likely to approve the President’s war agenda, especially if the President requests such authorization shortly before a national election. As the political fallout from the ongoing Iraqi occupation mounts, this Article uses foreign policy debates in Congress and the executive branch

* Assistant Professor of Law, Northwestern University Law School. I am grateful to Kenworthy Bilz, Curtis Bradley, Steven Calabresi, Erwin Chemerinsky, Tom Ginsburg, John McGinnis, Richard Pildes, Eric Posner, Louis Michael Seidman, Neil Siegel, Carlos Manuel Vazquez, Abraham Wickelgren, John Yoo, and others for helpful comments and advice. This Article also benefited from the comments of participants at workshops at Northwestern, Georgetown, and Duke University Law Schools. I would also like to thank Caleb Durling and Jean Lu for their excellent research assistance.

regarding both the costs of the occupation and a possible withdrawal plan to test these theoretical hypotheses.

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INTRODUCTION

One of the most exhaustively discussed topics in the discourse of the separation of war powers is the role of ex ante congressional authorization on the use of force.¹ Almost without exception, this literature assumes that prior congressional authorization will likely lead to a “slow down” effect in the build

1. See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 81 (1990); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 109 (1990); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 158-61 (1990); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 *HARV. L. REV.* 2047, 2057-66 (2005); Michael D. Ramsey, *Textualism and War Powers*, 69 *U. CHI. L. REV.* 1543 (2002); J. Gregory Sidak, *To Declare War*, 41 *DUKE L.J.* 27, 99 (1991); Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 *GEO. L.J.* 597 (1993); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 *CORNELL L. REV.* 695, 700 (1997); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *CAL. L. REV.* 167, 188-296 (1996).

up to an international confrontation and thus will make the United States less likely to embark on foreign wars. To pro-Congress commentators, this effect is unquestionably benign because in a constitutional system purportedly biased against foreign military adventures, *ex ante* congressional authorization ensures that any decision to use force is vetted against the views of a broad range of politically accountable actors.² To its detractors, congressional authorization is undesirable because it clogs up the President's war-making prerogative and compromises the United States's ability to confront unpredictable foreign military threats.³ Nonetheless, both sides of the debate assume that congressional authorization will generally create a drag effect on the President's ability to use force.⁴

If the 2002-2003 foreign policy debate about whether to use force in Iraq is any guide, however, congressional authorization will often fall short of both the "slow down" and deliberative functions. Hardly less than one month after he first requested congressional authorization for the use of force in the fall of 2002, President Bush received an open-ended endorsement from Congress to use force to "defend the national security of the United States against the continuing threat posed by Iraq," and to "enforce all relevant United Nations Security Council resolutions regarding Iraq."⁵ Other "make weight" efforts at congressional authorization for the use of force in the post-World War II era abound.⁶ Nonetheless, various commentators, especially pro-Congress scholars, seem to hold out hope that the tide of congressional indifference will turn and

2. See, e.g., ELY, *supra* note 1, at 4 ("[T]he point was not to exclude the executive from the decision—if the president's not on board we're not going to have much of a war—but rather to 'clog' the road to combat by requiring the concurrence of a number of people of various points of view.").

3. See, e.g., Robert H. Bork, *Foreword* to THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH, at ix (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989); Robert H. Bork, *Erosion of the President's Power in Foreign Affairs*, 68 WASH. U. L.Q. 693, 698 (1990); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527 (1999); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002). The pro-President scholars also argue that the constitutional text and structure does not require a congressional resolution before the President can commence the use of force. See ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 80-96 (1991) (arguing that the President has the authority to initiate hostilities without congressional authorization); Yoo, *supra* note 1, at 170-75 (same).

4. *But see* Jide Nzelibe & John C. Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2518-19 (2006) (suggesting that the empirical basis for this assumption has not yet been demonstrated).

5. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, 1501.

6. These include the Gulf of Tonkin Resolution, *see* Joint Resolution of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384, the Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, 97 Stat. 805 (1983), the Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991), and the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

Congress will become more proactive in war powers. Nonetheless, there is a gaping hole in the literature as to whether congressional authorization could plausibly serve any significant political functions for the President or the ruling party. In other words, if as Presidents routinely insist, Congress has no clear constitutional role to play in initiating conflicts,⁷ why do Presidents nonetheless seem to seek out congressional resolutions before they use force? More importantly, as the political fallout over the current Iraqi occupation mounts and critics call for a concrete timetable for withdrawing troops, does the President and/or the Republican Party stand to reap any benefits from the 2002 congressional authorization?

Contrary to the received wisdom, this experimental Article advances the empirically plausible assumption that congressional authorization of the use of force might actually have a perverse effect. Thus, rather than create a drag effect that minimizes the impulse to rush into imprudent wars, congressional authorization might actually do the opposite: because such authorization allows the President to spread the potential political costs of military failure or stalemate to other elected officials, it will lead the President to select into more high-risk wars than he would otherwise choose if he were acting unilaterally. In other words, since congressional authorization acts as a political “insurance policy” that partially protects the President against the possible political fallout from a military misadventure, he is likely to be more willing to engage in wars where the expected outcome is uncertain. More importantly, not only is the President likely to use congressional authorization as a hedge to prevent future political opponents from exploiting his misfortunes, he is also likely to use it to protect members of his party in Congress who are more likely to be electorally vulnerable in the absence of such authorization.

While this notion of congressional authorization as political insurance might appear puzzling, it makes sense when understood as a cheap mechanism designed to protect a vulnerable President or ruling party from the insecure political atmosphere that is likely to exist in the aftermath of a high-risk conflict. Significantly, two factors operate in tandem to ensure that the initial presidential decision to seek congressional authorization will not be particularly costly from a political perspective. First, since a member of Congress is likely to have less information than the President about the likely outcome of a high-risk conflict, he or she is likely to defer to the President’s judgment that the conflict will have a positive outcome and hope to ride the President’s electoral coattails as voters rally around the flag. Thus, the purported institutional benefit of deliberation by multiple voices that congressional authorization is supposed to confer is likely to be trivial, if not nonexistent. Second, since the electoral consequences of voting against a successful war are likely to be dearer than voting for a losing war, the President is relatively assured of getting a favorable

7. See, e.g., Mike Allen & Juliet Eilperin, *Bush Aides Say Iraq War Needs No Hill Vote: Some See Such Support as Politically Helpful*, WASH. POST, Aug. 26, 2002, at A1.

vote to use force from those members of Congress who are elected from swing districts. In sum, seeking congressional authorization for the use of force becomes a tradeoff in which Presidents are willing to accept the relatively low short-term costs of involving other elected officials in the war decision-making process in exchange for long-term political security.

This Article proceeds as follows: Part I critically examines the underlying assumptions that motivate the conventional wisdom regarding the benefits of congressional participation in initiating wars. Part II lays out the theoretical framework for the political insurance model used in the rest of this Article. Recognizing the political uncertainty inherent in high-risk wars, this framework proposes that the President will often attempt to diffuse the political costs of such wars by soliciting the participation of other political actors, especially that of his political opponents. Part III explains why this quest for political insurance is likely to create a moral hazard effect which unintentionally encourages the President to engage in more high-risk conflicts than he would without congressional authorization. This Part also teases out this moral hazard effect by focusing on the public's tendency to rally around the flag at the initiation of an international conflict and by showing why congressional authorization for the use of force is unlike most forms of congressional action. Most significantly, the electoral consequences of deciding on whether to go to war seem to be both very significant and asymmetric: members of Congress who vote against winning wars stand to lose more than members of Congress who vote for losing wars. Part IV illustrates some of the empirical challenges involved in demonstrating whether the deliberative effects of congressional authorization outweigh its moral hazard effects. This Part concludes by examining two episodes involving the President's interaction with Congress to show that presidential efforts to seek political insurance are not only theoretically possible but actually do occur. The first involves Horace Binney's famous defense of Lincoln's suspension of the writ of habeas corpus during the Civil War in 1861. The second involves President Bush's interaction with Congress before and after the 2003 invasion of Iraq. A brief conclusion follows.

I. CONGRESSIONAL AUTHORIZATION AS AN INSTITUTIONAL CONSTRAINT ON WAR

This Part explores some of the central assumptions that motivate the claim that congressional authorization of the use of force will lead to fewer high-risk wars by the United States. An argument will be made that those assumptions are logically questionable or highly contentious, raising serious questions about the purported utility of congressional authorization.

One might reduce the purported benefits of congressional authorization of the use of force to two distinct claims: (1) it acts as a procedural constraint that will slow down the war-making process and thus make it more difficult for the

United States to embark on foreign military ventures⁸; and (2) it promotes the democratic marketplace of ideas by ensuring that the use of force is vetted by multiple political actors.⁹ The first claim assumes that congressional authorization will act as a procedural barrier on the President's foreign policy discretion and hence limit the range of possible wars engaged in by the United States, even if it only does so marginally. Thus, even if members of Congress tend not to object strenuously to the President's foreign policy initiatives, involving them in the process should at least make the President wary of embarking on high-risk conflicts for which there is little public support. The second claim assumes that the existence of some debate and deliberation by multiple institutional actors with different points of view might help weed out any unfounded or self-serving foreign rationales for going to war because all such rationales will be subject to scrutiny by other democratically accountable actors. In sum, these procedural features assume that congressional authorization would likely reduce the overall number of wars and make it less likely that the President will embark on imprudent wars.

These assumptions are all questionable. As a preliminary matter, there is not much causal evidence that supports the institutional constraints logic. As various commentators have noted, Congress's bark with respect to war powers is often much greater than its bite. Significantly, skeptics like Barbara Hinckley suggest that any notion of an activist Congress in war powers is a myth and members of Congress will often use the smokescreen of "symbolic resolutions, increase in roll calls and lengthy hearings, [and] addition of reporting requirements" to create the illusion of congressional participation in foreign policy.¹⁰ Indeed, even those commentators who support a more aggressive role for Congress in initiating conflicts acknowledge this problem,¹¹ but suggest

8. See, e.g., ELY, *supra* note 1, at 4.

9. See, e.g., KOH, *supra* note 1, at 205-06 (suggesting that a stronger framework statute that encourages Congress to be more active in war powers would serve as a check on tyranny and discourage overreaching by the executive branch); W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH?* 72 (1981) (observing that one of the goals of the separation of war powers was to ensure "democratic control" over the war-making process); Treanor, *supra* note 1, at 758 ("[T]he Founders gave Congress, rather than the Executive, the power to decide whether to start wars because they wanted the warmaking decision to be disinterested, and they feared that Presidents would lead the nation into war in order to achieve a place in history."). Of course, pro-President commentators have argued that the Constitution does not mandate any specific process for initiating wars but instead anticipates significant flexibility in the roles of the political branches in war powers. See John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 *LAW & CONTEMP. PROBS.* 293, 323-24 (1993); Yoo, *supra* note 3, at 1643.

10. BARBARA HINCKLEY, *LESS THAN MEETS THE EYE: FOREIGN POLICY MAKING AND THE MYTH OF THE ASSERTIVE CONGRESS* 174 (1994).

11. See, e.g., Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *YALE L.J.* 1255, 1297 (1988); see also KOH, *supra* note 1, at 117-33 (arguing that the President always wins in foreign affairs because he

that it could be fixed by having Congress enact more specific legislation about conflict objectives and implement new tools for monitoring executive behavior during wartime.¹²

Yet, even if Congress were equipped with better institutional tools to constrain and monitor the President's military initiatives, it is not clear that it would significantly alter the current war powers landscape. As Horn and Shepsle have argued elsewhere: "[N]either specificity in enabling legislation . . . nor participation by interested parties is necessarily optimal or self-fulfilling; therefore, they do not ensure agent compliance. Ultimately, there must be some enforcement feature—a credible commitment to punish . . ." ¹³ Thus, no matter how much well-intentioned and specific legislation Congress passes to increase congressional oversight of the President's military initiatives, it will come to naught if members of Congress lack institutional incentives to monitor and constrain the President's behavior in an international crisis.

Various congressional observers have highlighted electoral disincentives that members of Congress might face in constraining the President's military initiatives.¹⁴ Others have pointed to more institutional obstacles to congressional assertiveness in foreign relations, such as collective action problems.¹⁵ Generally, lawmaking is a demanding and grueling exercise. If one

seizes the initiative and that Congress is unable to stop him because of poor and inadequate legislative tools).

12. See, e.g., KOH, *supra* note 1, at 185-207 (arguing that while adopting a broad national security charter that would empower Congress would be difficult to achieve, it would not be impossible if one could cultivate the necessary political will in Congress); see also Paul F. Diehl & Tom Ginsburg, *Irrational War and Constitutional Design: A Reply to Professors Nzelibe and Yoo*, 27 MICH. J. INT'L L. 1239, 1246 (2006) ("[A] case could be made for improving the independent fact-gathering abilities of Congress so as to reduce the information asymmetry vis-à-vis the executive."). Of course, not all commentators think that the perceived problem of presidential overreaching should be cured by greater congressional oversight. Indeed, some pro-President commentators have suggested institutional innovations that would increase the ability of a president to signal credibility to a skeptical domestic audience. See Eric A. Posner & Adrian Vermeule, *The Credible Executive* (Harvard Public Law Working Paper No. 132, 2006), available at <http://ssrn.com/abstract=931501>.

13. Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 502 (1989).

14. See, e.g., Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 950-53 (2005) (observing that electoral incentives of members of Congress often conflict with empire-building concerns); Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 1000 (2006) (same).

15. See Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 144-45 (1999) (observing that constituent commitments often prevent members of Congress from acting collectively to advance their institutional interests); see also Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 35 (1995) (arguing that Congress's collective action problems support the argument for a unitary executive).

assumes that members of Congress are often obsessed with the prospect of reelection,¹⁶ then such members will tend to focus their scarce resources on district-level concerns and hesitate to second-guess the President's response in an international crisis.¹⁷ Even if members of Congress could marshal the resources to challenge the President's agenda on national issues, the payoff in electoral terms might be trivial or non-existent. Indeed, in the case of the President's military initiatives where the median voter is likely to defer to the executive branch's judgment, the electoral payoff for members of Congress of constraining such initiatives might actually be negative. In other words, regardless of how explicit the grant of a constitutional role to Congress in foreign affairs might be, few members of Congress are willing to make the personal sacrifice for the greater institutional goal. Thus, unless a grand reformer is able to tweak the system and make congressional assertiveness an electorally palatable option in war powers, calls for greater congressional participation in war powers are likely to fall on deaf ears.

Indeed, Congress's experience toying with the War Powers Resolution of 1973 (WPR) suggests that any serious reform geared towards a greater congressional role in war powers is unlikely. Despite repeated suggestions from many of the leading foreign relations scholars in the country to strengthen the WPR, including detailed recommendations on how to do so,¹⁸ no member of Congress has been willing to take the bait. Indeed, to the contrary, members of Congress have responded with a slew of bills intended to repeal the WPR altogether and give the President even broader latitude in initiating conflicts. One such proposal—introduced by Henry Hyde in 1995—almost passed despite the fact that it was introduced by a Republican member of Congress under a Democratic President. Remarkably, in imploring his colleagues to support Hyde's measure, the Republican Speaker Newt Gingrich observed that the President did not deserve to be “undermined and cluttered and weakened” by members of Congress in his role as commander-in-chief.¹⁹

But the observation that Congress might be unwilling to constrain the President's war-making initiatives does not imply that effective constraints on the President's war-making discretion do not exist. At bottom, the proponents of a greater congressional role in war powers tend to underestimate the extent to which both unilateral and joint processes for initiating war are ultimately

16. *See, e.g.*, DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 13 (1974) (“United States congressmen are interested in getting reelected—indeed, in their role here as abstractions, interested in nothing else.”).

17. *See* Nzelibe, *supra* note 14, at 1008-09.

18. *See* ELY, *supra* note 1, at 115-31 (recommending changes to WPR that would increase the likeliness of congressional assertiveness in war powers); *see also* KOH, *supra* note 1, at 185-207 (recommending a framework statute that would empower Congress to be more assertive in war powers).

19. 141 CONG. REC. H5673 (daily ed. June 7, 1995). The proposal failed in the House by a vote of 217-201. *Id.*

subject to democratic controls. In other words, pro-Congress scholars tend to overestimate the effect of procedural constraints on the decision to go to war and underestimate other non-procedural constraints that might actually be quite effective. Significantly, as discussed in Part IV below, the constraints likely to have the greatest effect on the President's ability to initiate conflicts, such as differences in party composition between the Executive and the legislature, will tend to operate regardless as to whether the President initiates a war unilaterally or not.

In any event, despite widespread skepticism over Congress's role in foreign policy, various commentators nonetheless continue to put much stock in Congress's practice of pre-authorizing the President's use of force.²⁰ Perhaps these commentators assume that at worst this congressional practice might be futile, and at best it might yield marginal accountability benefits. Alternatively, maybe proponents of a greater congressional role hope that such pre-authorization will eventually embolden Congress to assert its proper institutional prerogatives in war powers; in other words, Congress's authorization role might crystallize into a blunter instrument to counter the executive branch's military adventurism.

In the balance of this Article, I will sketch the outlines of an argument that shows that prior congressional authorization of the use of force might actually be perverse. In other words, rather than merely being a futile congressional mechanism for constraining the President's foreign policy discretion, requiring prior congressional authorization of the use of force might actually increase the overall number of dangerous wars entered into by the United States. The perversity claim advanced here rests on the related dynamic of political insurance and moral hazard, which I spell out in detail in the next two Parts of the Article.

II. THE THEORETICAL FRAMEWORK FOR POLITICAL INSURANCE

This Part introduces the theoretical framework that motivates the claim that congressional authorization of the use of force is likely to have a perverse effect. Subpart A argues that given the political uncertainty inherent in high-risk conflicts, the President has an incentive to seek congressional authorization as political insurance to shield him from the possible political fallout of military failure or stalemate. Subpart B turns from inter-branch dynamics to the President's political insurance audience and suggests that a President who seeks congressional approval for the use of force not only has to consider his personal electoral future, but also how such authorization affects the electoral future of members of his party. As a general matter, once a presidential decision to use

20. See ELY, *supra* note 1, at 115-31; see also KOH, *supra* note 1, at 166-207 (proposing a comprehensive legislative charter that would promote greater congressional accountability in national security issues).

force becomes politically unpopular, the President will not only find it more difficult to advance his broader political agenda in Congress but elected members of his party will also tend to become more electorally vulnerable. These latter considerations suggest that even a second-term President is likely to be sensitive to the political costs of a high-risk military engagement.

A. Political Uncertainty and the Need to Diffuse Political Blame for High-Risk Conflicts

Let me begin by stating the obvious: institutional arrangements like the separation of powers serve as mechanisms that constrain the ability of elected officials to initiate and implement their preferred policy outcomes. Indeed, the Founders hoped the mechanism of inter-branch competition would help unleash a political equilibrium in which “[a]mbition [would] be made to counteract ambition.”²¹ In hindsight, subsequent developments such as the emergence of political parties have challenged the framers’ core assumption about the role of inter-branch rivalry in foreign policy and other contexts.²² Nonetheless, their fundamental insight that political competition is the key to political accountability still remains. Thus, scholars who study the ascendancy of political parties in the United States have observed that such parties tend to serve as a desirable corrective to the incentives of elected officials to amass power and suppress dissent.²³

Regardless of one’s preference for political parties or political branches as the relevant institutional framework for channeling political competition, the bottom line is that any such framework tends to create opportunities and constrain political actors. Thus, in a party-dominated framework, the President and/or his political party will seek to use any available institutional resources to maintain themselves in power. By contrast, members of the political opposition will use all the institutional leverage they have to minimize the ruling party’s zone of political discretion and achieve their own ambitions to obtain power.

Of course, the extent to which either the opposition or the ruling party achieves its goals depends on their expectations about the future distribution of political power. If, for instance, the ruling party believes there is a significant enough chance that the opposition can win a future election, it will have an incentive to use the available institutional resources to frustrate the opposition’s opportunities to obtain victory. Moreover, in the face of political uncertainty, the ruling party or the President might want to take steps to ensure that, in the event it loses power, the opposition does not undermine or roll back its key

21. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

22. See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

23. See *id.* at 2344 (“Especially during periods of ideologically polarized, internally cohesive parties, divided government should create the kind of conflict between the branches that motivates aggressive monitoring and checking.”).

policy achievements. By contrast, the opposition will try to use all available institutional resources to dislodge the President and his party from power.

Applying this framework to war powers, it is obvious that while the President might have an incentive to maximize his current discretion to select and conduct wars, he also has an incentive to protect his political future and that of his political party. Indeed, the presence of political uncertainty will very likely shape the President's decision-making calculus about how and when to go to war.²⁴ Should the President foresee that the conflict is likely to be a high-risk engagement, it is in his interest to make sure that his political opponents will not be able to exploit fully the potential political fallout of military failure or stalemate. In such a scenario, it makes sense for the President to secure as much political support as possible from members of Congress, especially those members from the opposition party.

High-risk wars are particularly likely to trigger the kind of political uncertainty that will lead Presidents to seek political insurance.²⁵ Although the decision to initiate wars will usually create a positive "rally around the flag" effect for the President in the short-term,²⁶ empirical evidence suggests that this rally tends to disappear as casualties mount and the economic costs of the war escalate.²⁷ If the President is able to prosecute the war successfully within a couple of months, however, he may be able to capture fully the political benefits of the rally around the flag effect.²⁸ But if the war drags on, or if it results in military failure or stalemate, then we would expect the public to punish the President and/or the ruling party at the electoral box. Since by definition high-risk wars involve uses of force where the expected outcome of the conflict is uncertain, we should expect the President to be more politically cautious about embarking on such military engagements without support from other political coalitions.

24. For a general discussion about how the domestic opposition affects the use of force in democracies, see Bruce Bueno de Mesquita & David Lalman, *Domestic Opposition and Foreign War*, 84 AM. POL. SCI. REV. 747 (1990).

25. I originally sketched out the idea of congressional authorization as a form of political insurance in an earlier piece. See Nzelibe, *supra* note 14, at 1012-14. Commentators have also used notions of political insurance or mutual constraint to illustrate why elected politicians might desire independent courts. See TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 25-30 (2003); Matthew C. Stephenson, "When the Devil Turns . . .": *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 59-62 (2003).

26. For a concise analysis of the literature on the rally around the flag effect, see Bradley Lian & John R. Oneal, *Presidents, the Use of Military Force, and Public Opinion*, 37 J. CONFLICT RESOL. 277, 279-83 (1993). See also *infra* text accompanying notes 72-73.

27. See BRUCE RUSSETT, CONTROLLING THE SWORD: THE DEMOCRATIC GOVERNANCE OF NATIONAL SECURITY 35 (1990) (suggesting that rallies might last only a few months after a conflict).

28. For instance, Mueller shows that public support remained relatively high during the duration of the 1991 Persian Gulf War because there were few casualties and the war was relatively short. See JOHN MUELLER, POLICY AND OPINION IN THE GULF WAR 69-79 (1994).

The flip side of the political uncertainty associated with high-risk wars is that they provide the political opposition with a significant opportunity to exploit the potential political fallout if there is military failure or stalemate. Here, the dynamic suggests that when there is a dramatic and continuous decline in public support for the use of force, the political opposition will smell blood and try to mobilize the public against the President and the ruling party. Indeed, the political science literature suggests that failed military engagements tend to increase significantly the political opposition's willingness to challenge incumbents from the ruling party.²⁹ To the extent that the opposition has the flexibility to heap blame exclusively on the President and his party, it expands the possible scope of political opportunities it can reap from a failed military engagement.

Studies of the effects of military stalemates or failures on presidential popularity suggest that Presidents have reason to be especially concerned in high-risk conflicts. For instance, in his well-known study of public opinion during both the Korean and Vietnam wars, Mueller showed that a ten-fold increase in the number of casualties resulted in a fifteen percent drop in support for these wars.³⁰ The unpopularity of these wars ultimately damaged the reputations of Presidents Truman and Johnson and hurt the electoral prospects of Democratic Party candidates.³¹ Unsurprisingly, both Truman and Johnson decided not to run for reelection in the midst of divisive and unpopular wars. Extending the analysis more broadly to a wider range of wars, Timothy Cotton has shown that high-stake wars have had a generally detrimental effect on the electoral prospects of candidates of parties that occupied the White House when the war started.³² Indeed, Cotton's evidence suggests that war tended to have a negative effect on the electoral prospects of the war party, regardless of whether the war was popular or not.³³ In the end, the evidence bears out Bruce Russett's observation that "[g]overnments lose popularity in proportion to [a] war's cost in blood and money."³⁴

In any event, the President should be able to hedge against the political opposition's ability to fully exploit potential military failure by inviting them to participate formally in the decision to initiate conflict. In this picture, distributing the costs of the decision to initiate a high-risk war among multiple

29. See Bruce Bueno de Mesquita & Randolph M. Siverson, *War and the Survival of Political Leaders: A Comparative Study of Regime Types and Political Accountability*, 89 AM. POL. SCI. REV. 841, 842-43 (1995); see also Paul K. Huth & Todd L. Allee, *Domestic Political Accountability and the Escalation and Settlement of International Disputes*, 46 J. CONFLICT RESOL. 754, 758-59 (2002).

30. JOHN E. MUELLER, *WAR, PRESIDENTS AND PUBLIC OPINION* 60 (1973).

31. See Timothy Y. C. Cotton, *War and American Democracy: Electoral Costs of the Last Five Wars*, 30 J. CONFLICT RESOL. 616, 618 (1986) (citing STEVEN J. ROSENSTONE, *FORECASTING PRESIDENTIAL ELECTIONS* 84-86 (1983)).

32. See *id.* at 619.

33. *Id.* at 619, 632.

34. RUSSETT, *supra* note 27, at 46.

political participants removes from the opposition a key issue they could use against the President in the event of military failure or stalemate. This assumption is consistent with the analysis by certain commentators that elected officials have an incentive to delegate authority in order to shift political blame to other actors.³⁵ Unsurprisingly, despite repeated claims by Presidents that Congress has no formal constitutional role to play in initiating conflicts, Presidents have routinely sought congressional authorization for high-risk conflicts. Indeed, in a previous project, I suggested that Presidents generally seek congressional authorization in conflicts involving the deployment of more than twenty thousand ground troops for over three months.³⁶

At a certain level, however, the dynamic of how the President protects himself from political blame in the midst of a high-risk international crisis is quite complex. Significantly, when the President seeks congressional authorization for the use of force, he cannot simply shift the bulk of the political risks of military failure to members of Congress. Since the public is likely to identify the President as the primary agenda setter for war, he is likely to receive the lion's share of the blame for any military failure, even if he successfully seeks prior congressional authorization for the use of force.³⁷ As a result of this dynamic,³⁸ the President is likely going to use congressional authorization only as a shield rather than a sword; in other words, he is likely to use it defensively against members of the opposition who might want to use the fact of military failure opportunistically to exploit the President's vulnerability. In this picture, members of Congress who are on record for supporting the conflict cannot credibly claim once the war becomes unpopular that the President had no good rationale for going into war; they can usually quarrel with the manner in which the war was prosecuted but not the objectives.³⁹ Moreover, switching support for the war will usually be politically costly for members of Congress, although such switches do sometimes occur

35. See Alberto Alesina & Guido Tabellini, *Why Do Politicians Delegate?* (Harvard Inst. of Econ. Research Discussion Paper No. 2079, 2005), available at <http://ssrn.com/abstract=764430>.

36. See Nzelibe, *supra* note 14, at 1012.

37. This observation accords with the empirical evidence regarding the electoral costs of wars. See Cotton, *supra* note 31, at 630-31 (observing that voters punished Democratic presidential candidates more than they punished Democratic members of Congress during the Vietnam and Korean wars).

38. Observe that this does not stop Presidents from trying. When Congress eventually forced Reagan's hand on Lebanon in 1983 and instigated the withdrawal of troops from Beirut, Reagan attempted to blame the Democratic leadership in Congress for the military failure. See Nzelibe, *supra* note 14, at 1033-35.

39. Indeed, members of Congress might often argue that they were deceived by the President in procuring the authorization to use force. For instance, Senator Fulbright accused President Johnson of such deceit during the Tonkin Gulf incident that precipitated the Vietnam War. See J. WILLIAM FULBRIGHT, *Foreword* to MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY*, at ix, xiii (1990).

when the casualties become significant enough and the war seems to have reached a stalemate.⁴⁰

In sum, congressional authorization for high-risk conflicts will likely serve as a political insurance policy. For the President, such authorization enables him to spread some of the risks of a potentially unfavorable military outcome to other political actors, especially congressional members of the opposition party. Like any insurance policy, however, seeking congressional authorization requires that the President incur some up-front costs for downstream political benefits. In this case, the President incurs some costs when he tries to convince members of Congress, including those from the political opposition, to provide ex ante support for his military initiatives. But as discussed in Part III, these ex ante costs for the President are likely to be trivial; in any event, such costs are likely to be significantly less than the ex post benefits that the President reaps from obtaining congressional authorization.

B. The Second-Term President's Political Insurance Audience

The significant electoral dangers that Presidents face in high-risk conflicts undermine claims made by pro-Congress scholars that Presidents will have an incentive to embark on military initiatives merely for glory-seeking purposes.⁴¹ While Presidents do enjoy short-term rally effects at the beginning of a war, the evidence suggests generally that this rally effect gradually dissipates as the costs of the war mount.⁴² Thus a more complete understanding of the presidential decision to initiate conflicts would have to include the expectation that military failure or stalemate will undermine the President's electoral fortunes.

But one might argue that while first-term Presidents might be sensitive to the electoral costs of wars and have an incentive to seek the political insurance afforded by congressional authorization, second-term Presidents are hardly susceptible to similar political constraints. In other words, the obvious political insurance audience for the first-term President will be the voting public. But why should a President care about political insurance when the ambition to remain in office ceases to be a factor? Put differently, does a second-term President have a political insurance audience?

One potential political insurance audience for either a first- or second-term President would be the public at large. As Ostrom and Simon have observed, "the [President's] need for public support never abates."⁴³ Other than simply

40. See Scott Sigmund Gartner et al., *War Casualties, Policy Positions, and the Fate of Legislators*, 57 POL. RES. Q. 467, 469 (2004) (discussing members of Congress who switched positions during the Vietnam War).

41. See, e.g., Treanor, *supra* note 1, at 758 (suggesting that the President is likely to seek out wars in order to secure a place in history).

42. See *infra* text accompanying note 74.

43. Charles W. Ostrom, Jr. & Dennis M. Simon, *Promise and Performance: A*

seeking reelection, Presidents have strong incentives to achieve a variety of policy objectives for legacy purposes. Indeed, most second-term Presidents seem to focus their energies on trying to advance their final legacy policy programs, which they hope Congress will endorse before their terms expire. But empirical evidence suggests that Congress's tendency to approve the President's policy proposals tends to increase with the President's public opinion polls.⁴⁴ Indeed, second-term Presidents who face declining levels of public support are particularly susceptible to significant loss of both personal and institutional influence,⁴⁵ which may ultimately result in what some commentators have called the "throwaway President."⁴⁶ Likewise, Morgenthau and Thompson have suggested that popularity is a key element of presidential influence in foreign affairs: "In the form of public opinion, it provides an intangible factor without whose support no government . . . is able to pursue its policies with full effectiveness, if it is able to pursue them at all."⁴⁷ Thus, it is reasonable to assume that Presidents will be fairly sensitive to public opinion polls even during their second term in office. More importantly, Presidents will seek to minimize the political opposition's ability to derail the legacy policy programs they seek to accomplish before they leave office.

The other obvious political insurance audience for a second-term President would be other elected officials from his party. As Alesina and Spear have discussed elsewhere, one of the core ambitions of a second-term President is to secure the reelection of his party during his second term in office.⁴⁸ To the extent that giving the opposition more leeway to blame the President for military failure affects the electoral fortunes of members of the President's party, the President has an incentive to seek political cover for such members. Moreover, since the President's public image is intricately bundled up with the electoral fortunes of members of his party, he has an incentive to safeguard those fortunes⁴⁹; similarly, elected officials from the President's party also have an incentive to make sure that the President does not dissipate his political capital during his second term in office.

Dynamic Model of Presidential Popularity, 79 AM. POL. SCI. REV. 334, 335 (1985).

44. Douglas Rivers & Nancy L. Rose, *Passing the President's Program: Public Opinion and Presidential Influence in Congress*, 29 AM. J. POL. SCI. 183, 185 (1985).

45. The literature on how presidential popularity affects congressional responsiveness to the President's agenda is quite extensive. See, e.g., Robin F. Marra et al., *Foreign Policy and Presidential Popularity: Creating Windows of Opportunity in the Perpetual Election*, 34 J. CONFLICT RESOL. 588, 589-91 (summarizing such literature).

46. Ostrom & Simon, *supra* note 43, at 335, 353.

47. HANS J. MORGENTHAU & KENNETH W. THOMPSON, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 153 (6th ed. 1985).

48. Alberto Alesina & Stephen E. Spear, *An Overlapping Generations Model of Electoral Competition*, 37 J. PUB. ECON. 359, 361 (1988).

49. Indeed, some of the political science literature suggests that the President might initiate the use of force to bolster his support among members of his party. See T. Clifton Morgan & Kenneth N. Bickers, *Domestic Discontent and the External Use of Force*, 36 J. CONFLICT RESOL. 25 (1992).

The most common source of a second-term President's influence on the electoral fortunes of his party members is the coattail effect. As numerous studies on congressional elections attest, members of the President's party gain electorally from presidential popularity.⁵⁰ Conversely, when the President faces a public backlash because of unpopular policy decisions the electoral prospects of members of his party suffer. Apparently, this dynamic plays out with significant results when Presidents embark on high-risk military engagements that ultimately become unpopular. For instance, Democrats suffered considerable electoral setbacks in national elections after the Vietnam War.⁵¹ Even though that war was largely of President Johnson's making, voters apparently blamed candidates from the Democratic Party for the war's unpopular outcome.⁵² Cotton has also shown that there is a voter backlash effect against the ruling party across a wide range of high-risk wars.⁵³ More recently, the outcome of the 2006 mid-term elections illustrates the risks that initiating wars poses to congressional members of the party that occupies the White House. As the public perception that the Iraqi occupation was failing increased, voters went to the polls and cast out the Republican majority in both houses of Congress. While the rally around the flag effect might have initially boosted Republican electoral fortunes earlier in 2002 and 2004, an increasingly war-weary public seemed to have turned to the Democrats in 2006 hoping for an alternative approach for ending the crisis.⁵⁴

Aside from the indirect effects of the coattail effect, the President has more direct reasons to be concerned about the electoral welfare of his party members.⁵⁵ Significantly, the party machinery is most responsible for choosing presidential candidates in the first place; a presidential candidate is likely to be selected for both his partisan loyalty and his ability to promote his party's electoral goals in other races. Conversely, a President who champions his

50. See James E. Campbell & Joe A. Sumners, *Presidential Coattails in Senate Elections*, 84 AM. POL. SCI. REV. 513 (1990); Franco Mattei & Joshua Glasgow, *Presidential Coattails, Incumbency Advantage, and Open Seats: A District-Level Analysis of the 1976-2000 U.S. House Elections*, 24 ELECTORAL STUD. 619 (2005); Jeffery J. Mondak, *Presidential Coattails and Open Seats: The District-Level Impact of Heuristic Processing*, 21 AM. POL. Q. 307 (1993).

51. See STEVEN J. ROSENSTONE, *FORECASTING PRESIDENTIAL ELECTIONS* 84-85 (1983).

52. See Cotton, *supra* note 31, at 631-33.

53. See *id.*

54. See Susan Page, *Election '06: Lessons Learned by Dissecting Votes*, USA TODAY, Nov. 27, 2006, at 6A ("Anxious about the Iraq war and the direction of the country, voters gave Democrats their biggest congressional victory in a generation.").

55. Most recently, Levinson and Pildes have elaborated on this dynamic in the context of President Bush's vulnerabilities in the wake of the unpopular war on terror:

Weak second-term Presidents pursuing unpopular policies may become a political liability for members of their party in Congress. Outgoing presidents may also provide a foil for members of their party who aspire to replace them in the White House. With the President barred from further office, prominent politicians from the President's party, particularly in the Senate, have electoral incentives to position themselves as potential successors.

Levinson & Pildes, *supra* note 22, at 2352 n.177.

party's electoral goals is likely to be rewarded with undivided loyalty and support in pursuing his policy agenda. Significantly, studies show that those Presidents who have significant majorities in Congress succeed most often in getting their policy proposals approved.⁵⁶

Given the vulnerability faced by members of a President's party for high-risk military engagements, seeking congressional authorization is likely to present an opportunity for Presidents to deflect part of the blame to the opposition. Put differently, the ruling party's vulnerability on the issue of a possible military failure or stalemate is most pronounced when the political opposition is able to present a united front against the war. Thus, an important aspect of the President's political insurance strategy should be to fragment the political opposition about the wisdom of engaging in war. He can most effectively accomplish this objective by forcing a vote on Congress in which all members, including the opposition, have to come clean about how they stand on the wisdom of going to war. As discussed in Part III, because of the rally around the flag effect created at the initiation of a conflict, the President seeking congressional authorization for the use of force will usually garner the support of a majority of Congress, including those members of the opposition who are elected from competitive districts.

In any event, when key members of the political opposition have formally declared their support for the use of force, it becomes more difficult for other members of the opposition who oppose the war to exploit fully the political fallout from a failed military initiative. Moreover, to the extent opposition party leaders believe that open dissent against high-risk wars will make their party look confused and divided on an issue of national importance, they have an incentive to clamp down on protests from those members opposing the war. Indeed, in certain contexts, opposition party leaders might go public and formally try to distance themselves from the activities of any "fringe" group that opposes the use of force.

To summarize, Presidents have an incentive to seek political insurance for high-risk conflicts regardless of where they are on the electoral cycle. Because blame for high-risk wars is likely to be an important factor in the electoral fortunes of his party members, a second-term President is likely to seek to use congressional authorization as a shield to protect members of Congress from his party. In addition, the opportunity to share blame for high-risk wars with members of the opposition is likely to help the second-term President in the arena of public opinion. Since public support exerts a strong effect on the ability of the President to advance his policy agenda through Congress, a second-term President is likely to find congressional authorization of high-risk wars useful for promoting his legacy.

56. See Jon R. Bond & Richard Fleisher, *The President in a More Partisan Legislative Arena*, 49 POL. RES. Q. 729, 736-38 (1996).

III. MORAL HAZARD EFFECTS

This Part explains why the political insurance afforded by congressional authorization for the use of force might perversely encourage the President to engage in more high-risk conflicts through the dynamic of moral hazard. Subpart A introduces the general framework of moral hazard in the context of the congressional authorization to use force. Subpart B explains why the moral hazard effects associated with the congressional authorization to use force are likely to be different from other contexts in which Congress is asked to endorse the President's agenda.

A. The Mechanics of Moral Hazard in the War Powers Context

Like all insurance schemes, congressional authorization is subject to the potential risk of moral hazard.⁵⁷ In this picture, one significant consequence of providing political insurance to the President is that he is likely to be less careful about the kinds of wars he chooses, provided that he knows that he will share any down-side risks with other political actors. Thus an institutional framework ostensibly designed to create stumbling blocks in the war-making decision process might very well have the unintended consequence of increasing the amount of risky wars entered into by the United States. Of course, if Congress only authorized wars in which it independently determined that the risks and objectives were worth the military and political costs, it might reduce some of the moral hazard effects. But there is very little empirical evidence that suggests that Congress engages in any kind of meaningful oversight when it approves the President's request to use force.

One way for Congress to reduce the moral hazard problem is to distribute some of the risks of military failure back to the President. In practice, this is what normally happens whenever the President seeks congressional authorization for the use of force. As discussed earlier in Part II, when members of Congress authorize the President's military initiatives, they do not reallocate all the political risks of going to war from the President to themselves.⁵⁸ Indeed, congressional authorization operates more like a severe co-insurance scheme in which the bulk of the political risk of military failure still remains with the insured—the President. However, this approach does not completely eliminate the moral hazard effect. So long as congressional authorization offers the President some prospect of protection from punishment by a disappointed domestic audience, it creates some moral hazard even though it does not guarantee that the President will survive the political fallout from a failed military engagement.

57. For a detailed analysis of the moral hazard effect in insurance schemes, see Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996).

58. See *supra* Part II.A.

An alternative and more promising strategy to significantly eliminate the moral hazard problem would be to have Congress adhere to strict criteria in approving presidential requests for use of force. Presumably, such criteria might require that the President follow strict procedural rules in initiating certain kinds of conflicts or provide that Congress will only authorize wars that meet certain kinds of specific threats to U.S. security. In other words, if Congress raises the ex ante political insurance costs high enough it can force the President to fully (or largely) internalize the moral hazard effect.⁵⁹ In theory, the War Powers Resolution (WPR) was partly designed to be such a screening device. In practice, however, there is now widespread consensus that the WPR has largely failed as a meaningful congressional constraint against the President's discretion to initiate war. In any event, as discussed below in Subpart B, the logic of the electoral dynamics of war suggests that members of Congress will consistently have an incentive to reduce the costs of political insurance when they authorize wars and thus increase the level of moral hazard. Indeed, this low cost to the President of seeking congressional authorization for the use of force distinguishes Congress's role in the war-making process from most other forms of congressional action.

B. Why the Moral Hazard Effect in Authorizing War Is Likely to Be Different from Other Legislative Contexts

One might ask how the moral hazard effect in the authorization to use force is different from any other context in which Congress is invited to endorse the President's agenda, such as when the Senate approves presidential nominees or ratifies treaties negotiated by the President. One significant difference involves the costs the President incurs in seeking congressional authorization. Unlike in other contexts where the President faces a realistic chance of having his agenda rejected by Congress, the President is likely to get the legislature to sanction his war-making agenda without expending considerable political capital. In other words, the value of the political insurance that the President obtains from congressional authorization to use force is likely to be much higher than any ex ante costs he incurs.

The variance between the costs and benefits to the President of seeking congressional authorization stems from three different factors. The first is the President's ability to dominate the war agenda and frame it in a manner most likely to obtain congressional support. The second, which is closely related to the first, is that the decision to initiate the use of force is likely to have higher electoral saliency than almost any other foreign or domestic issue. The third

59. Indeed, one way insurance companies deal with this problem is that they tend to raise the insurance premium significantly whenever they think there is a high risk of moral hazard. See Jonathan R. Macey, *Commercial Banking and Democracy: The Illusive Quest for Deregulation*, 23 YALE J. ON REG. 1 (2006) (discussing regulatory schemes that link political insurance premiums with moral hazard risks).

stems from the fact that the electoral consequences of voting to go to war are usually asymmetric; in other words, it is usually much more electorally dangerous for a member of Congress to vote against a popular war than to vote for an unpopular war. Altogether, these factors suggest that ex ante congressional authorization might actually exacerbate the moral hazard problem, increasing the overall level of high-risk wars entered into by the United States.

To be sure, this Article is not the first to suggest that members of Congress might face electoral disincentives to be more aggressive in foreign policy. In many respects, however, existing institutional theories under-specify at critical junctures why members of Congress would tend to vote in a specific manner on a foreign policy issue. First, the literature does not explain why, even if the President dominates the agenda on war-related issues, it would necessarily lead members of Congress to largely endorse the President's agenda. This gap in the literature is particularly problematic because the President dominates the agenda on a whole range of foreign policy and domestic issues but yet he routinely faces resistance from Congress on those issues.⁶⁰ Second, given that the political consequences of going to war vary, especially when there is a military failure or stalemate, the existing literature does not explain why more members of Congress do not have much of an incentive to oppose the President's agenda at the initiation of a conflict. In sum, at every important juncture, the electoral incentives of members of Congress in the foreign policy arena seem to depend on factors that are yet to be specified. The next couple of Subparts do not attempt to address all of these shortcomings in the literature, nor do they seek to present a general theoretical framework that explains the electoral incentives of members of Congress in all aspects of foreign policy. Rather they seek to specify more clearly those factors that make it more likely that members of Congress will support the President's war-making agenda in high-risk conflicts.

1. *The President's rhetorical advantage*

Unlike any other political actor, the President is uniquely positioned to frame the contours of the political debate in the context of an international crisis. As various commentators have observed, the President can effectively use the presidential bully pulpit to promote and manage the public's perception of an external threat.⁶¹ By selectively focusing on certain risks that might

60. Congress's refusal to grant President Clinton fast-track authority for international trade negotiations in 1997 reflects one important area where Congress scuttled the President's agenda in foreign affairs. See Editorial, *Fast-Track Backtrack: The Unexpected Defeat of the Fast-Track Trade Legislation, Thanks to the Efforts of Labor Unions, Consumer Groups, Church Groups, and Environmentalists*, NATION, Dec. 1, 1997, at 3.

61. For a detailed discussion of the President's ability to frame the foreign policy agenda in wartime, see Nzelibe, *supra* note 14, at 1004-11. See also Michael A. Fitts, *The*

implicate the national security, the President can define those threats for the public and shape the public's perception of how to respond to these threats. Importantly, foreign military threats often do not become ensconced in the public's imagination until the President clearly articulates such a threat. Even when foreign threats become obvious to the public, such as the terrorist actions of September 11, the President plays an active role in shaping the public's perception of the extent of the threat. For instance, he can influence the public's belief as to whether the threat should be addressed by severe military measures immediately or by more limited diplomatic efforts. In other contexts, the President can identify a crisis even when the public might seem largely oblivious to its existence, such as when President Bush informed the American public in 2002 that Saddam Hussein was linked with the terrorists who conducted the September 11 attacks.⁶²

As relevant to the President's interaction with Congress, his ability to identify or frame an international crisis gives him a decisive advantage over members of Congress in deciding when and how to initiate the use of force. By merely describing a situation as an international crisis that warrants attention, the President can effectively put the identified crisis in the national spotlight and set the terms of the political debate about how to resolve it. More likely than not, members of Congress will be constrained to play second fiddle to the President in both discerning the existence of a crisis and deciding how best to respond to such a crisis.

The factor that defines the President's advantage over Congress in framing and deciding how to resolve an international crisis more than any other is his perceived access to superior information about foreign threats.⁶³ In other words, the public and members of Congress are likely to believe that the President has access to information about foreign threats that they do not. Importantly, the President can decide to present such information in a manner that maximizes his preferred policy choices for handling such a threat. In trying to increase the likelihood of obtaining congressional support for his military agenda, the President usually has three strategies for framing and relaying the relevant information to both Congress and the public.

First, the President is likely to frame the objective of the conflict in a manner most likely to garner public support. As various political scientists have

Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership, 144 U. PA. L. REV. 827, 890 (1996) (“[O]ne of the most important devices of a modern president is his ability to mobilize support through the bully pulpit—to take advantage of his unitary and visible position as a ‘focal point.’”).

62. For a general discussion of how the Bush administration helped create the impression that the threat of Iraq was linked to the terrorist events of 9/11, see Chaim Kaufmann, *Threat Inflation and the Failure of the Marketplace of Ideas: The Selling of the Iraq War*, INT'L SECURITY, Summer 2004, at 5.

63. See Moe & Howell, *supra* note 15, at 137-38 (1999) (observing that the President's massive bureaucratic network in foreign affairs gives him a clear information advantage over Congress).

observed, the American public tends to be most supportive of decisions to use force where the primary objective involves an attempt to curb clear acts of foreign aggression against U.S. citizens.⁶⁴ Unsurprisingly, Presidents consistently tend to frame the core objective of their military initiatives as attempts to address acts of aggression against Americans. The President's rhetorical stance will try to focus the public's attention on the fact that "American lives are at stake." For instance, in the build-up to the 2003 Iraq invasion, President Bush insisted that Hussein not only had chemical and biological weapons he would likely use against American citizens, but that he was also linked to past terrorist activities targeting Americans.⁶⁵ During the Grenada invasion of 1983, President Reagan emphasized the risk that the turmoil in that country posed to American medical students; indeed, he had actually changed the original objective of the intervention from countering communist forces on the island to a rescue effort to save American lives.⁶⁶ Ostensibly, the rescue rationale seemed to have greater resonance with the public in opinion polls taken soon after the invasion began.⁶⁷ When the President can produce tangible documentation to support such claims and little else is known by the public about the relevant adversary, the President has a better chance of framing the objectives with little opposition from Congress.

Second, the President will likely produce some documentation that illustrates the need for immediate attention in responding to the crisis. By insisting on the need to respond urgently to the threat, the President is likely to convey to the public a perception that the threat posed by a foreign adversary is both significant and imminent. Importantly, to the extent that the President can successfully cast the situation as one that requires immediate attention, he is likely to impress upon members of Congress that they have no luxury to engage in extensive debates about the merits of the proposed use of force. Furthermore, if the President can time the "urgency" rationale to coincide with an upcoming congressional election, he can more effectively pressure members of Congress to wrap up any debate and vote quickly for his preferred military response. A case in point is the 2002 October Resolution that Congress passed approving the war in Iraq. When President Bush called for the resolution in early October 2002, he made it clear that waiting for Iraq to act first was not an option: "The danger is clear: using chemical, biological or, one day, nuclear weapons, obtained with the help of Iraq, the terrorists could . . . kill thousands or hundreds of thousands of innocent people in our country, or any other."⁶⁸

64. See Bruce W. Jentleson, *The Pretty Prudent Public: Post Post-Vietnam American Opinion on the Use of Military Force*, 36 INT'L STUD. Q. 49, 49-54 (1992).

65. See Kaufmann, *supra* note 62, at 6.

66. For a general discussion of Reagan's public relations buildup to the Grenada invasion, see Nzalibe, *supra* note 14, at 1035-40.

67. See *id.*

68. President George W. Bush, Address to the Nation, President Says Saddam Hussein Must Leave Iraq Within 48 Hours (Mar. 17, 2003) (transcript available at

Initially, Democrats tried to propose postponing the request until after the November 2002 election, but ultimately they relented when Republican members of Congress started accusing them of playing politics with the country's national security. Interestingly, despite his appeal to urgency of the threat, President Bush did not order the military campaign against Iraq to begin until March 2003—a full five months after he initially received congressional authorization for the use of force.

Third, the President will likely try to present information that suggests that the United States will eventually prevail in the military engagement. Here, recent studies by political scientists suggest that Americans tend to be particularly defeat-phobic about foreign military engagements.⁶⁹ The President's rhetorical strategy will then tend to emphasize the impression that he has complete control over the crisis, which he expects to manage successfully and efficiently. In many circumstances, the President might try to convey to the American public that great sacrifices might be required over the long run, but he will also try to reassure them that ultimately victory will be the end result. The President is aware that if the prospects for obtaining military victory do not seem very promising to the public *ex ante*, he might find it more difficult to convince the public to rally around the flag at the beginning of the international crisis. Ultimately, one should expect the President to present some documentation or evidence that the foreign adversary can be defeated without significant economic costs or casualties.

Collectively, all these factors suggest that the President has considerable leverage in framing the informational context of an international crisis in a manner most likely to win congressional support for military action. Of course, if a President is operating with little or no political capital in the first place he might find it more difficult to win the public's trust about the scope or existence of a foreign threat. But if objective evidence of the existence of a related foreign threat exists, then the President has much more latitude in framing the informational contexts about other threats. As an illustration, President Bush's ability to convince the public that the regime in Iraq was a foreign threat that required immediate attention depended in large part on the occurrence of the September 11 terrorist attacks.⁷⁰ Without evidence of such attacks, it might have been very difficult for the President to focus the public's attention on the need to confront Iraq before another terrorist attack occurred.

<http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html>).

69. See Christopher Gelpi et al., *Success Matters: Casualty Sensitivity and the War in Iraq*, INT'L SECURITY, Winter 2005-2006, at 7, 8-10.

70. See Kaufmann, *supra* note 62, at 16-19.

2. *The electoral saliency of the use of force*

Another significant aspect of the President's ability to solicit congressional support involves the "rally around the flag" effect that occurs in an international crisis. As Crabb and Holt have observed, "once a president has made a foreign affairs decision that becomes known to the public, he automatically receives the support of at least 50 percent of the American people, irrespective of the nature of the decision."⁷¹ In the political science literature, Mueller first operationalized this rally effect and suggested that it involved three criteria: (1) the event must be international in nature; (2) the event involves the President directly; and (3) the event must be dramatic, specific, and sharply focused.⁷² Because the rally effect tends to result in a surge of patriotic feeling among the public, members of Congress will tend to fall in line with public sentiment and support the President's military initiatives. Indeed, some political scientists have shown that this rally around the flag has quite a strong effect on members of Congress.⁷³ On these occasions, those members of Congress who resist the President's initiatives risk being punished by an electorate who might view them as being unpatriotic in the face of an international crisis.

As described above, however, the rally around the flag argument seems to prove too much. While public support does surge for a President in an international crisis, the evidence suggests that the rally is a short-lived phenomenon that usually dissipates soon after the war is over or as casualties mount.⁷⁴ Thus, one would expect members of Congress to discount the temporary nature of the rally when they make decisions as to whether to approve the President's request to use force. Moreover, even if a rally creates a temporary upswing in public support for the President's military initiative, one might imagine that there are countless other issues on the domestic and international front that might be also electorally relevant to members of Congress. In this picture, one would expect the members of Congress to balance the rally effect against a whole range of other electorally relevant issues in deciding how to respond to the President's request. In other words, the dynamic of the rally effect would appear to be more complicated than the literature suggests.

71. CECIL V. CRABB, JR. & PAT M. HOLT, *INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT AND FOREIGN POLICY* 21 (2d ed. 1980).

72. See John E. Mueller, *Presidential Popularity from Truman to Johnson*, 64 *AM. POL. SCI. REV.* 18, 21 (1970).

73. See James L. Regens et al., *The Electoral Consequences of Voting to Declare War*, 39 *J. CONFLICT RESOL.* 168, 174-75 (1995); Richard J. Stoll, *The Sound of the Guns: Is There a Congressional Rally Effect After U.S. Military Action?*, 15 *AM. POL. Q.* 223, 224-25 (1987).

74. See RUSSETT, *supra* note 27, at 35, 46.

Given the complex dynamic of congressional involvement in war powers, we need to further refine our understanding of the rally effect to appreciate why members of Congress tend to endorse the President's military initiatives routinely in an international crisis. As relevant here, two factors which have not been discussed much in the literature seem to make the rally effect particularly salient for members of Congress: (1) the fact that other domestic and foreign policy issues tend to be crowded out by the presidential saber-rattling and military activities that occur both before and during a rally; (2) members of Congress might be uncertain about how long a rally might last, especially if it involves a high-risk conflict that may last a number of years. Both of these factors will tend to make it difficult for members of Congress to shield themselves effectively from the electoral consequences of voting against the President's military initiatives.

During an international crisis, the question of how to handle a foreign adversary tends to exert a crowd-out effect on other policy issues in the media and the public forum. As the experience building up to the congressional approval of the use of force in October 2002 illustrates, Iraq completely dominated the media and public consciousness for months, if not years.⁷⁵ Moreover, since late 2001, the most electorally relevant factors for a majority of Americans seemed to shift decisively from domestic to foreign policy issues. For instance, in polls conducted after the terrorist attacks, a super-majority of Americans ranked terrorism and national security as the most important issues confronting the United States.⁷⁶ During the 2004 presidential elections, Americans ranked international issues almost as highly as the economy as the most important issue in their decision about whom to vote for President.⁷⁷ Understandably, during the congressional debates leading up to the October 2002 vote to approve the war, Democratic leaders were wary of confronting the President on an issue on which he possessed a decisive advantage from a public

75. For discussion about media coverage of war events, see MATTHEW A. BAUM, *SOFT NEWS GOES TO WAR: PUBLIC OPINION AND AMERICAN FOREIGN POLICY IN THE NEW MEDIA AGE* (2003).

76. Mark Gillespie, GALLUP ORG., *Terrorism Reaches Status of Korean and Vietnam Wars as Most Important Problem* (Nov. 19, 2001), <http://www.galluppoll.com/content/?ci=5065>.

77. In a national poll conducted in October just before the 2004 presidential elections, about 26.8% of respondents said that terrorism was the most important issue, another 24.4% said it was Iraq while 31% said it was the economy. See Survey by CNN/USA Today/Gallup (Oct. 29-31, 2004) (available at iPOLL Databank, Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>). However, the poll mentioned above only gave the surveyed group four choices—terrorism, Iraq, the economy, and health care. In a June 2004 poll, the pollsters allowed the public to determine in a relatively open-ended fashion the most important issue facing the United States today. About 19.4% of respondents said that the economy was the most important issue while 12.8% said terrorism, and another 25.2% said the Iraq war. See Survey by Gallup News Service (June 3-6, 2004) (available at iPOLL Databank, Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>).

opinion perspective.⁷⁸ The Democrats' strategy apparently was to wait and hope that the public would eventually turn its focus from foreign to domestic issues after the November 2002 election—issues in which the Democrats believed the Republicans would be especially vulnerable.⁷⁹

In addition to the crowd-out effect of an international crisis, members of Congress are likely to be uncertain about how long a rally might last. If the President can strategically elicit a surge of public support at various stages in a crisis, one should expect members of Congress to be wary about standing up to the President at any point during an ongoing use of force. Moreover, the President might try to manipulate the timing of the rally effect to maximize congressional support. For instance, the President can request authorization for the use of force just before a national election, just as President Bush did when he sought congressional approval for the Iraqi invasion in the fall of 2002. But even if the request takes place in an off-election season, members of Congress might never be sure what public opinion of the war will be when the next electoral cycle comes around. If an international crisis lasts for more than a couple of years, for instance, the public opinion polls are likely to fluctuate with news of battlefield victories and setbacks. Indeed, political scientists have suggested that Presidents can boost their public support significantly when they take dramatic and forceful actions in the international arena.⁸⁰ For instance, public opinion polls in support of the Iraqi war declined in the months after the conclusion of the ground war in April 2003, but then the President received a significant bump in December 2003 after the capture of Saddam Hussein.⁸¹

Of course, one exception to this framework would be when public opinion seems to have coalesced strongly and firmly against the President's handling of an international crisis because of rising casualties or the public perception of a stalemate. In those circumstances, members of Congress will feel more comfortable challenging the President's judgment and are likely to demand from the President more information about the conduct of the conflict or insist on a timetable for pulling out of the conflict.⁸²

Second, in deciding whether to support the President, members of Congress are likely to factor in the public's beliefs that the United States is likely to prevail in the long-run. If the President's military initiative occurs in the wake of a recent military stalemate or a conflict with very high casualties, the public might be wary of embarking on a new high-risk military venture. Thus, we might expect members of Congress to be more resistant to the

78. See Louis Fisher, *Deciding on War Against Iraq: Institutional Failures*, 118 POL. SCI. Q. 389, 397-98 (2003).

79. John D. Huber, *Sleepwalking Democrats and American Public Support for President Bush's Attack on Iraq*, 10 CONSTELLATIONS 392, 402 (2003).

80. See Marra et al., *supra* note 45, at 592, 619-20.

81. See Nzelibe, *supra* note 14, at 1050.

82. See *id.* at 1021-22.

President's military initiatives in the context of a recent military engagement with high casualties.⁸³

Finally, one other caveat has to do with the existence of non-competitive congressional districts as well as congressional districts where the preferences of the median voter are decisively dovish. In both of these scenarios, a member of Congress might afford to stand firmly against the President's war initiatives with little risk of electoral punishment. In other words, a popular incumbent from a non-competitive or a dovish congressional district might be able to insulate herself from the rally around the flag effect in an international crisis regardless of the popularity of the President's military initiatives. For instance, during both the 1991 and 2002 congressional debates on whether to go to war in Iraq, Senator Byrd of West Virginia—an inscrutable politician who was virtually reassured of reelection—was a very vocal critic of the use of force.⁸⁴

Ultimately, the test is whether members of Congress who deviate from their constituents' preferences on the use of force are likely to face electoral punishment. If we assume that the median member of Congress will likely match the preferences of the median voter in a national election, we should expect that the median member of Congress will be subject to the rally around the flag effect. If the member of Congress ignores the rally sentiments of the median voter in her district, we should expect the voters to punish her during the next election cycle. In sum, since the President's preference for military action is likely going to match those of the median voter, voting for the use of force is likely to help the reelection prospects of the median member of Congress.

3. *The asymmetric electoral costs of congressional authorization*

In many respects, despite the rally around the flag effect, congressional persistence in supporting presidential military initiatives still remains somewhat of a puzzle. In any kind of high-stakes military engagement by the United States, members of Congress should ordinarily be subject to two different kinds of electoral risks. First, if members of Congress do little to constrain the President's war initiative, they could be blamed by voters for not doing enough in preventing the war if it devolves into an Iraq-style quagmire. Second, if members of Congress become too active in constraining the President, voters might blame them for undermining the President's ability as commander-in-chief to counter foreign threats. In either situation, members of Congress would seem to be subject to electoral consequences for their actions. Why then do

83. For an illustration of this dynamic, see SCOTT SIGMUND GARTNER, *STRATEGIC ASSESSMENT IN WAR* (1997).

84. See 148 CONG. REC. S700-S704 (daily ed. Feb. 13, 2002); see also Robert C. Byrd, *Congress Must Resist the Rush to War*, N.Y. TIMES, Oct. 10, 2002, at A39.

members of Congress largely seem to choose the second option, which is to largely defer to the President's military initiatives?

The simple answer seems to be that the electoral consequences of members of Congress voting for war are usually not symmetric; in other words, it is usually more electorally risky for a member of Congress to vote against a war than to vote for an unpopular war that results in a military failure or stalemate. Simply put, research suggests that members of Congress who oppose the President's popular military initiatives face harsh reelection prospects but the converse does not tend to be true for members of Congress who support unpopular wars.⁸⁵ Indeed, members of Congress who oppose a war are particularly vulnerable when the conflict ends in a decisive victory against the foreign adversary; in such circumstances, opposition candidates are likely to mobilize quickly against those incumbents who opposed the war. This unique characteristic distinguishes congressional authorization of the use of force from other instances where Congress is asked to endorse the President's policy agenda, such as when the President seeks approval for a judicial nominee or ratification of a domestic policy program.

For instance, Regens and his coauthors examined the consequences for members of Congress of voting in three different wars—the Mexican-American war, World War I, and the 1991 Persian Gulf War—and found that those members of Congress who opposed two of these wars were generally punished electorally for their decisions or chose not to rerun for office.⁸⁶ The authors did not find much evidence on electoral punishment for congressional dissent against the 1991 Persian Gulf War, but two factors might explain that outcome.⁸⁷ The first is that both the ground war and troop deployment during the 1991 war against Iraq ended rather quickly and thus the rally around the flag effect was rather short. The second is that voters' concerns during the 1992 elections seemed to be dominated by economic issues, and thus the war seemed to have little effect one way or the other at the polls. But in circumstances where the war seemed to be a key factor during an election season, members of Congress who opposed wars seemed to be decisively at a disadvantage from an electoral perspective. In any event, none of the data suggests that members of Congress who vote against the use of force tended to ever have better reelection prospects than those members who supported the President's military initiatives.

So why might voters be more willing to forgive members of Congress who acquiesce too easily to the President's war initiatives but not those who obstruct those same initiatives? One plausible explanation is that if the President seems

85. *See, e.g.,* Stoll, *supra* note 73, at 225 (observing that since the public will largely rally around the President in an international crisis, any opposition by members of Congress is likely to be inconsistent with the preferences of their constituents).

86. *See* Regens et al., *supra* note 73, at 174-76.

87. *See id.* at 179.

determined to place the troops in harm's way regardless of how Congress reacts, then members of Congress who resist the President's initiatives are likely to be blamed for risking the lives of troops. As one senator observed during the debates preceding the congressional authorization of the 1991 Persian Gulf War, members of Congress were significantly concerned that the President had implied that "those of us who criticized [the] decision were endangering the troops he had sent."⁸⁸ Another explanation is that voters generally understand that members of Congress operate in an atmosphere of uncertainty about whether a particular war might be harmful or beneficial to U.S. interests. Thus, the public might not expect members of Congress to possess much *ex ante* information about the desirability of a particular use of force. Given this uncertainty, voters might expect members of Congress to defer to the President's judgment in an international crisis—especially when voters believe that presenting a united front to the outside world increases the chance that the United States will prevail in the crisis. Finally, unlike the President, voters probably understand that members of Congress have some flexibility in switching their support for a war once it becomes unpopular. So if members of Congress subsequently decide that their initial calculation to support the President's military initiative has proven to be politically burdensome, they can still mitigate the political fallout by changing their positions. Significantly, they can claim that the President did not provide them enough information about the military objectives or risks when they first voted for the war. Unsurprisingly, members of Congress have routinely switched positions during politically unpopular wars from Vietnam in the 1960s to Iraq in 2003.

Of course, members of Congress who vote for unpopular wars do not always escape adverse electoral consequences for their actions. But the magnitude and scope of the factors that usually affect voter backlash against members of Congress for supporting politically unpopular wars are not likely to be discernible to those members at the beginning of a conflict. For instance, political scientists have shown that incumbents in districts that bear a disproportionate number of casualties in a high-stakes conflict tend to suffer a loss of vote share if they supported the conflict.⁸⁹ But members in Congress are likely to be uncertain at the time they are voting to approve the use of force as to whether the conflict is going to be unpopular and whether their district will bear higher casualties than other districts. Moreover, although anti-war incumbents seem to do better than hawkish incumbents in elections in the aftermath of an unpopular war with high district-level casualties, the evidence suggests that anti-war challengers do not seem to benefit either way.⁹⁰ Thus, members of Congress in potentially high casualty districts are likely going to

88. 137 CONG. REC. S374 (daily ed. Jan. 12, 1991) (statement of Sen. Kerrey).

89. See Gartner et al., *supra* note 40.

90. See *id.* at 475-76.

prefer to vote for a war and hope to capture any positive electoral payoff if there is victory. But if they subsequently observe higher than normal battlefield casualties for their districts, they might decide to revise downward their expectations of a positive electoral payoff and switch their support for the war.

At any rate, incumbent members of Congress seeking reelection are likely to view the electoral calculus of authorizing the use of force as biased in favor of supporting the President's military initiatives. In other words, members of Congress from competitive or hawkish districts can easily mitigate the risks of being punished electorally for their war powers decisions by voting for the President's request to use force. Of course, voting in favor of the President's initiatives does not guarantee that a member of Congress will be insulated from voter backlash against unpopular wars, but it does seem to be a much safer electoral choice than the alternative. Indeed, for those war dissenters in Congress who manage to get reelected, their success seems to reflect the significant and entrenched opposition of the dissenters' constituencies to the war rather than any independent judgment by a swing voter that the member of Congress might have made the correct decision in opposing a war.⁹¹ But since a presidential commitment to use force almost always gains the support of the median voter, it makes sense that a median member of Congress would generally choose the safe course of supporting the President's military initiatives.

* * *

To recapitulate, the conventional wisdom that prior congressional authorization for the use of force will lead to less dangerous wars by the United States has not been shown, and there is deductive logic and some contrary evidence that suggests that congressional authorization will actually do the opposite. In other words, congressional authorization to use force, ostensibly intended as an institutional constraint on the executive branch's discretion, is more likely to act as a form of political insurance which protects the President against the political fallout from high-risk wars. But like all insurance systems, congressional authorization is prone to the pathology of moral hazard because it is likely to encourage excessive risk-taking by the insured. More significantly, the moral hazard problem created by congressional authorization is likely to be acute because the ex ante costs incurred by the President in seeking congressional authorization are likely to be insignificant when compared to the political insurance benefits reaped by the President.

Critics of the model might object by pointing out that increasing procedural barriers on the President's foreign policy discretion should limit the President's military initiatives, even if it only does so marginally. But this objection fails to appreciate that bifurcating the burden of political accountability when one party

91. See Regens et al., *supra* note 73, at 174 ("The higher rate of reelection by dissenters [during the Mexican-American War] probably reflects the opposition in their constituency to the war . . .").

has almost complete control of the crisis escalation agenda can have unintended consequences. In other words, congressional authorization for the use of force means that no single political actor is completely responsible for the political fallout from imprudent or unpopular wars even though one actor is very much responsible for framing the agenda for going to war. By making the war initiation process less of a high-stakes decision than it would be otherwise, congressional authorization can influence the President's calculus in a direction towards more high-risk and unpredictable wars.

The next Part will sketch out some of the empirical challenges with demonstrating whether congressional authorization causes moral hazard and then try to illustrate how the political insurance factor (and moral hazard) might have played a key role in congressional debates regarding the 2003 invasion and ongoing occupation of Iraq.

IV. DISCERNING EVIDENCE OF MORAL HAZARD IN USE OF FORCE EVENTS

The model developed here simply suggests that a moral hazard effect is probable whenever Congress passes resolutions authorizing the use of force. In other words, there is no reason to assume *ex ante* that prior congressional authorization will lead the President to be more cautious in initiating military conflicts. On the contrary, it might lead the President to select into more dangerous wars. But is this latter risk of moral hazard significant enough to displace any deliberative benefits by Congress?

In the end, whether congressional authorization has on the balance produced wars that are more dangerous or cautionary from an institutional perspective is an empirical question, but this question cannot be resolved by making *ex ante* assumptions about the nature of the institutional process itself. Subpart A below illustrates some of the empirical problems one is likely to encounter in trying to prove whether congressional authorization reduces or exacerbates the chance that the United States will engage in high-risk wars. Subpart B examines a historical example of the political insurance model from the Civil War involving Horace Binney's defense of Lincoln's suspension of the writ of habeas corpus. Subpart C then turns to the ongoing Iraq crisis as a current illustration of how the congressional authorization of the use of force could sometimes exhibit moral hazard effects.

A. The Empirical Challenges

Although much research has documented the interaction of public support with the President's decision to use force, very little work has been done to show whether congressional support (or the lack thereof) actually influences the President's decision to use force. This lacuna represents a significant gap in our ability to understand how differential political accountability between the

political branches for the use of force might affect the President's incentive to initiate high-risk conflicts.

One critical objection to any empirical study of the effects of congressional authorization on the use of force is that the sample size of congressionally authorized wars is far too small to justify making any empirical generalizations. Indeed, according to various accounts, Congress has only authorized the use of force nine times in American history.⁹²

A related objection is that any such study would likely be prone to selection bias. In other words, since it will prove difficult to observe those wars that the President might not have initiated because of congressional opposition, any effort to examine what institutional factors affect the President's decision to initiate conflicts will be necessarily deficient and imprecise.⁹³ Here, the criticism suggests a methodological flaw which might render any statistical analysis in this area somewhat fruitless unless one could isolate all instances in which the use of force by the United States seemed likely but the President refused to act.

While this methodological objection has some merit, the obstacles to a systematic empirical study of the value of congressional authorization do not seem insurmountable. For instance, one might try to isolate all objective opportunities to use force by the United States and examine whether institutional factors such as the risk of the lack of congressional authorization prevented the President from using force in certain circumstances. Indeed, political scientists have tried to isolate the pool of likely opportunities to use force in other contexts.⁹⁴ In any event, it seems somewhat unlikely that the President might have a strong preference for the use of force in any specific instance that would not be observable by the domestic audience. If the President anticipates that he is about to embark on a high-risk conflict, he is likely going to expend considerable time and resources trying to mobilize the public to "rally around the flag" before he seeks congressional authorization. Thus, to estimate the number of wars that Presidents did not initiate because of congressional opposition, one could examine significant military buildups or rally events initiated by the President that did not result either in the use of force or in the United States achieving its purported military objectives. Of course, such a mobilization or rally event would not tell us conclusively whether it was congressional authorization or some other factor that forced the

92. Lori Fisler Damrosch, *Comment: War and Uncertainty*, 114 YALE L.J. 1405, 1408 (2005) ("Only nine times has Congress acted with bright-line clarity to authorize initiation of major combat.").

93. See James Meernik, *Presidential Decision Making and the Political Use of Military Force*, 38 INT'L STUD. Q. 121 (1994) (observing limitations of previous empirical research on the presidential decision to use force due to selection bias that tended to focus on actual uses of force).

94. See, e.g., *id.* at 127-29 (developing model of presidential opportunities to use force).

President's hand, but it might suggest that the President believed that congressional authorization for the use of force was not forthcoming. In any event, the political science literature that has analyzed presidential opportunities to use force does not seem to suggest that congressional factors played a significant role in the presidential decision to initiate conflicts.⁹⁵

To a certain degree, congressional influence on the President's decision to use force might manifest itself in other ways. For instance, Howell and Pevehouse have recently shown that after controlling for a host of other institutional factors, Presidents tend to use force more frequently abroad when the President's party's share of Congress increases.⁹⁶ Conversely, the President tends to use less force when the size of the opposition party in Congress increases.⁹⁷ The authors' analysis does not differentiate between unilateral and jointly initiated wars. In other words, the findings by these authors do not suggest any difference between the frequency of unilateral wars and jointly-decided wars when the partisan composition of Congress changes.

This evidence is consistent with what one would expect from a political insurance model, which predicts that the opposition party will have an incentive to exploit the President's military failures. In other words, being the dominant party in Congress gives the opposition more leverage to punish the President for his unpopular military decisions through mechanisms such as cutting of funds, filibustering, or blocking the President's other policy initiatives. Thus, the President has an incentive to be more cautious about his military initiatives during periods of divided government. Importantly, however, this constraint does not turn on whether the President's decision to initiate conflict was done unilaterally or with congressional authorization. In other words, the President would have every incentive to be wary about embarking on a high-risk conflict in the face of a Congress dominated by the opposition even if the Constitution explicitly gave the President the powers to initiate wars unilaterally. Moreover, the partisan constraint need not occur directly at the conflict initiation stage; it might simply reflect the President's belief that he is more likely to get exploited by an opposition-led Congress if there is a subsequent military stalemate or military failure.

Put differently, the results of the Howell and Pevehouse study are intriguing, but their analysis does not suggest that Presidents face a significant risk that their military initiatives will not be authorized during periods of divided government. At some level, their research does pose a challenge to the claim that Congress does not matter at all in the presidential decision to use

95. *See id.* (showing that presidential decisions to use force are more likely the greater the threat to the nation's overseas military facilities and more likely when presidents try to maintain their domestic reputation for taking forceful action).

96. William G. Howell & Jon C. Pevehouse, *Presidents, Congress, and the Use of Force*, 59 INT'L ORG. 209 (2005); *see also* David H. Clark, *Agreeing to Disagree: Domestic Institutional Congruence and U.S. Dispute Behavior*, 53 POL. RES. Q. 375 (2000).

97. *See* Howell & Pevehouse, *supra* note 96, at 228.

force. But none of the evidence suggests that Congress is likely to exercise its institutional leverage when the President is actually seeking congressional authorization to use force. As discussed earlier, since the President can easily create a rally around the flag effect among members of the public before he seeks such authorization, Congress is less likely to be assertive at the early stages of the conflict. But if a President anticipates he will lack subsequent political support in Congress to prosecute the conflict to a successful conclusion, he may hesitate in embarking on such a conflict in the first place.

At bottom, the evidence suggests that the primary constraints on the President's discretion to use force are likely to operate in both unilateral and jointly decided wars. The first constraint, which has been documented extensively in the literature, involves the interaction of the voting public with the foreign policy options of the President and the party in power. Since the President and his party can only retain authority through periodic elections, they have an incentive to make sure their use of force decisions align with the preferences of the median voter. The public, which bears the brunt of the costs of high-risk wars, has an incentive to vote out Presidents and parties that pursue unpopular military policies. The second constraint, which has been discussed above, involves the existence of divided government. In the two-party system of the United States, an opposition-dominated Congress is more likely to take a more adversarial stance towards the President's foreign policy initiatives regardless of whether such initiatives were unilateral or not. In other words, when different parties control the congressional and executive branches, the number of veto players increases because opposition party leaders in Congress can adversely affect the execution of the President's military initiatives.

Of course, it remains possible that Congress might still exercise significant constraints on the President's ability to initiate conflicts even during periods of undivided government. A systematic empirical investigation would be needed to support such a claim. But even if such constraints were shown to exist, they might still operate even without Congress playing a formal role in authorizing the use of force. In other words, an empirically plausible account of the role of congressional authorization would have to show that a President's decision to initiate a particular conflict depends in part on his belief that Congress will actually agree to authorize the use of force.

In any event, given the lack of any clear empirical support on either side of this issue, it is particularly puzzling that much of the commentary tends to assume that congressional authorization will only exert a unidirectional pull towards less dangerous wars by the United States. As demonstrated above, the moral hazard effect of congressional authorization might actually dilute any deliberative effect and lead to more dangerous wars. At this time, the best available empirical work does not suggest that the relative weight of either effect displaces the other, but until such evidence becomes available it seems premature to assume uncritically that congressional authorization would tend to lead to less dangerous wars. The next Subparts look at two episodes to illustrate

that the risks of moral hazard when the President seeks congressional authorization for high-stakes decisions during wartime are not merely hypothetical, but that they actually do occur. The first involves Binney's defense of Lincoln's suspension of the writ of habeas corpus during the Civil War and the second involves the ongoing interaction between the political branches in the current occupation of Iraq.

B. Binney's Defense of Lincoln's Suspension of the Writ of Habeas Corpus

Although Lincoln's suspension of the writ of habeas corpus in 1861 does not fit neatly within the congressional initiation-of-hostilities framework, it ostensibly involved the question of the President's power to engage in a politically risky decision during wartime without prior congressional authorization.⁹⁸ At the early stages of the Civil War, Lincoln had ordered the writ suspended in Maryland and detained scores of suspected saboteurs, including John Merryman—who was a well-known southern sympathizer.⁹⁹ In *Ex Parte Merryman*, Chief Justice Taney, sitting as a circuit judge in Baltimore, ruled that Lincoln lacked the authority to suspend the writ without first seeking congressional permission.¹⁰⁰ Lincoln defied the ruling, arguing that Presidents could lawfully suspend the writ in a national crisis when Congress was not in session.¹⁰¹

As with contemporary constitutional debates about the initiation of wars, critical commentators at the time were quick to point out that the Constitution located the authority to suspend the writ in Article I, which covers Congress's powers, and not in Article II, which covers the President's powers.¹⁰² Although widely vilified for his decision,¹⁰³ Lincoln did have his defenders.¹⁰⁴ One of

98. Thanks especially to Richard Pildes for this example.

99. For an extensive discussion of this episode during the Civil War, see DANIEL FARBER, *LINCOLN'S CONSTITUTION* 157-63 (2003). For a general discussion of the constitutional issues implicated by suspending the writ, including Congress's role, see Trevor W. Morrison, *Hamdi's Habeas Puzzle: Suspension as Authorization?*, 91 *CORNELL L. REV.* 411 (2006).

100. *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

101. Later that summer of 1861, Congress retrospectively ratified Lincoln's unilateral suspension of habeas corpus at a special session convened on July 4. See Act of Aug. 6, 1861, ch. 63, 12 Stat. 326.

102. For a detailed analysis of the constitutional debates during the period and the strong reactions it spawned, see Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 *WM. & MARY L. REV.* 2001, 2064-70 (2005).

103. See *id.* at 2067-71. Indeed, Lincoln's decision to ignore Justice Taney's decision is still widely criticized as unconstitutional. See Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 *CARDOZO L. REV.* 81, 98-99 (1993) ("The prevailing consensus is that Lincoln's actions were wrong as a matter of constitutional law, at least in principle: the final judgments of the judicial branch must be enforced by the executive . . ."). *But cf.* Akhil Reed Amar, *Architexture*, 77 *IND.*

his most prominent defenders was Horace Binney, a Philadelphia attorney who at the time was one of the most eloquent and articulate lawyers of his generation.¹⁰⁵ Binney offered up an impressive array of textual, functional, and structural rationales against Justice Taney's opinion in *Ex Parte Merryman*, but he also laid out what was ostensibly a moral hazard rationale for unilateral presidential action during wartime:

But be the danger what it may, the safety with which such a power is placed with the President, to be exercised upon his own responsibility, is greater than if it were lodged with Congress, and greater than if it were devolved by Congress upon the President. Congress is irresponsible. Congress, in sympathy with President by the grant, lessens the President's responsibility. The President, directly and personally responsible for his own judgments and acts, makes the guarantee more complete than any other provision. . . . When his own judgment brings the power into exercise, and his own application of it works a wrong in any degree, he has nothing to fall back upon but his patriotic intentions. As a theorem of republican polity, a most dangerous power, if this be dangerous, should be lodged in the feeblest hands. In suspending the privilege of the Writ of Habeas Corpus upon his own judgment, the President can have no support but from his integrity and his patriotism; and he stands directly before accusers and judges who have had no part in his acts.¹⁰⁶

If Binney is correct, one might argue that there is a greater risk that the writ of habeas corpus would be suspended more frequently and less prudentially if the President could jointly share the political risks of suspending the writ with Congress. Indeed, in the paragraphs that follow the above-quoted passage, Binney illustrates one such imprudent attempt to suspend the writ by Thomas Jefferson, who managed when he was President to co-opt the Senate to agree to suspend the writ in 1807 so he could more easily detain confederates of Aaron Burr.¹⁰⁷ Despite the fact that when Jefferson sought the writ there was no risk of a rebellion, invasion or national crisis, the Senate swiftly approved his request with little debate.¹⁰⁸ Ultimately, Jefferson failed to also get the House of Representatives to agree to his request. Nonetheless, Binney aptly suggests that Jefferson would have never contemplated suspending the writ if he had to bear the political fallout from that decision alone.¹⁰⁹

Of course, Binney was not a social scientist and he does not elaborate on all the rational choice mechanisms that would produce the moral hazard problem he identifies. But one does not have to deploy sophisticated theoretical

L.J. 671, 697-98 (2002) (defending Lincoln's decision on textual and structural grounds).

104. See Spaulding, *supra* note 102, at 2067-71.

105. See *id.* at 2067-70.

106. Horace Binney, *The Privilege of the Writ of Habeas Corpus Under the Constitution*, in 1 UNION PAMPHLETS OF THE CIVIL WAR, 1861-1865, at 199, 246-47 (Frank Freidel ed., 1967).

107. See *id.* at 247-48.

108. See *id.*

109. See *id.*

models to see how Binney's insight might operate in practice. Indeed, one need only conjecture that if in a national crisis the President can get Congress to agree to suspend the writ at little political cost, there is a significant risk that the diffusion of political responsibility between the President and Congress will create more moral hazard problems than political deliberation benefits. However, nothing in this analysis of Binney's arguments depends on one accepting that Lincoln had exclusive responsibility to suspend the writ; it merely suggests that one be cautious about the merits of diffusing political responsibility in any context where there might be significant downside political risks for the political actor who is shaping the agenda. In the next Part, I will try to spell out a more contemporary example of the moral hazard problem created by allowing Presidents to shift some of the political responsibility for initiating wars to Congress.

C. How the President Has Profited from Congressional Authorization in the Ongoing Iraqi Occupation

The Bush Administration's decision to seek congressional authorization for the Iraq invasion has already reaped significant political dividends for the President (and the Republican Party) that far exceed the paltry political capital President Bush had to invest convincing Congress to support the invasion in the fall of 2002. As relevant here, the most obvious dividends for the President have included: (1) the continuing deep-seated division within the Democratic Party leadership as to whether to take a more strident position against the Iraq occupation and push for a concrete timetable for withdrawing American troops; and (2) the inability of the Democrats to benefit from the early declining support for the invasion during the 2004 national elections. In both circumstances, the President succeeded in using congressional authorization of the Iraq war to drive a wedge between key members of the political opposition and exploited that wedge to his political advantage. Moreover, by fragmenting the political responsibility for initiating the war between the President and Congress, the President made it more difficult for the political opposition to blame the President exclusively for the political fallout of the Iraqi occupation. In other words, the blame-sharing feature of congressional authorization undoubtedly made the Iraqi occupation less of a political gamble for the President and the Republican Party than it would have been had the President acted unilaterally.

1. Fragmenting the political opposition on the wisdom of the use of force

In mid-September 2001, days after the terrorists struck into the twin towers of the World Trade Center, President Bush reassured the American public that he would take all necessary measures to bring both the terrorists and the states that harbor such terrorists to justice, and his approval ratings soared to one of

the highest levels of any post-World War II President.¹¹⁰ Within a year, Bush was able to capitalize on his extensive political capital and easily convince Congress to give him a broad and open-ended mandate to go to war in Iraq—a country whose regime was purportedly in alliance with the 9/11 terrorists.¹¹¹ However, just a little less than two years after the conclusion of the popular and well-executed ground war in Iraq, Bush's political fortunes had plummeted almost as rapidly as they had risen in the fall of 2001; indeed, public opinion polls taken in the spring of 2006 suggest that the President might have hit one of the lowest approval ratings for modern chief executives.¹¹²

Of course, the ebb and flow in the public opinion polls of war Presidents and the ruling party are quite common. Overall, the value of generalizing about the effects of such polls on the President's legacy is quite limited. Nevertheless, it is quite puzzling as to why many leading Democratic Party members have repeatedly balked at exploiting the President's declining ratings on the Iraq occupation to their advantage. In the wake of the 2006 mid-term elections, Democratic leaders in Congress pointedly avoided discussing Iraq much and instead tried to get the public to focus on the Republican Party's vulnerabilities on domestic issues such as the state of the economy, energy costs, health care benefits, minimum wage legislation, and ethics scandals.¹¹³ Indeed, even after winning majorities in both houses of Congress after the 2006 elections, Democrats have balked at directly confronting the President over a concrete timetable for withdrawing troops. Instead, the Democrats have focused their energies on trying to pass a nonbinding resolution criticizing the President's decision in early 2007 to build up the number of ground troops in Iraq.¹¹⁴ Of course, as public opinion against the deployment coalesces, the Democrats may change course and try to force the President's hand on a withdrawal timetable.

110. See Survey by Gallup/CNN/USA Today (Sept. 21-22, 2001) (available at iPOLL Databank, Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>).

111. In the hours just before the Iraq invasion, the Senate cemented its goodwill towards the President by voting 99-0 in favor of the military intervention. See *Senate Commends President, War Effort*, TIMES UNION (Albany, N.Y.), Mar. 21, 2003, at A7, available at 2003 WLNR 708803.

112. See Survey by Gallup/USA Today (May 5-7, 2006) (available at iPOLL Databank, Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>); see also *Bush's Approval Rating Falls to 31 Per Cent in Poll*, GLOBE & MAIL (Toronto), May 10, 2006, at A12, available at 2006 WLNR 7992326. In the spring of 2006, a historian wrote that President Bush's ratings among professional historians and the public might rank him as one of the worst presidents in history. See Sean Wilentz, *The Worst President in History?: One of America's Leading Historians Assesses George W. Bush*, ROLLING STONE, May 4, 2006, at 32, available at http://www.rollingstone.com/news/profile/story/9961300/the_worst_president_in_history.

113. See Steven Thomma, *Democrats Offer Strategy, But Dodge Iraq Plan*, CONTRA COSTA TIMES (Walnut Creek, Cal.), Apr. 23, 2006, at F4, available at 2006 WLNR 6775428.

114. See Robin Toner & Michael Luo, *House Democrats Unveil Measure Denouncing Iraq Buildup*, N.Y. TIMES, Feb. 13, 2007, at A10.

However, the 2002 authorization seems to have bought the President and the Republican Party some political wiggle room.

In many respects, the Democrats' tactics serve as a striking example of the dynamics illustrated here—the political insurance benefits to both the President and the ruling party of first seeking congressional authorization before embarking on a high-risk military engagement. Significantly, the President's decision to seek prior congressional authorization in the fall of 2002 seems to have significantly fragmented the Democratic Party's leadership on the wisdom of the Iraqi occupation. In other words, the fact that many leading Democratic members of Congress voted for the resolution has significantly complicated the ability of Democrats to criticize the increasingly unpopular Iraqi occupation. Indeed, rather than avoiding or curbing congressional participation on the Iraqi occupation, both President Bush and the House Republican leadership have actively solicited Congress's opinions at various stages of the conflict in order to force important members of the opposition to come clean on whether or not they support the war.

Thus far, the Bush Administration's strategy seems to have yielded some concrete benefits. The Democratic leaders in Congress do not seem to have come to any consensus on any aspect of the occupation, including whether or not to insist on a defined and concrete withdrawal timetable. Indeed, the leading prospective candidate for the Democratic presidential nomination in 2008—Senator Hillary Clinton (D-N.Y.)—has repeatedly made public pronouncements in support of the ongoing occupation.¹¹⁵ She and other prominent members of the party like Senator Joseph Lieberman (D-Conn.) also hesitated in calling for any timetable for withdrawing troops from Iraq—suggesting that any such defined timetable would be both premature and imprudent.¹¹⁶ But other Democratic Party leaders, including House Minority Leader Nancy Pelosi (D-Cal.), former presidential candidate John Kerry (D-Mass.), and Democratic National Committee Chairman Howard Dean—see the unpopular war as a prime political opportunity to reverse Republican congressional gains and demand a clear timetable for withdrawal.¹¹⁷ As the different factions have failed to produce a unified platform, the Democratic leaders have turned to bickering and arguing with each other about the wisdom of opposing the President and insisting on a withdrawal plan.¹¹⁸ Indeed, one prominent Democratic member of Congress warned his colleagues about

115. See Jeff Mapes, *Clinton Defends Her Iraq Stance in Portland, Drawing Cheers, Boos*, OREGONIAN (Portland), Jan. 29, 2006, at B02, available at 2006 WLNR 1688618.

116. See Rick Klein, *Democrats Struggle to Find One Voice on Iraq*, BOSTON GLOBE, June 30, 2005, at A1.

117. See Robert J. Caldwell, *The Democrats' Quandary on Iraq*, SAN DIEGO UNION-TRIB., Dec. 11, 2005, at G6, available at 2005 WLNR 20041987; Doyle McManus, *War Critics Have Backing, But Not Much of a Following*, L.A. TIMES, Aug. 28, 2005, at A1.

118. See Kate Zernike, *On Iraq, Kerry Again Leaves Democrats Fuming*, N.Y. TIMES, June 21, 2006, at A1.

hesitating to use the fallout from the war for partisan purposes in the 2006 elections: “Democrats would be well-advised to ride this [wave of anti-war sentiment]. It’s just a question of time for the party to realize that.”¹¹⁹

Understandably, given this division on a highly visible national issue, many leading Democrats have made a strategic decision to steer clear from making specific recommendations about the Iraqi occupation in an election season.¹²⁰ But the irony is that opposition to the war probably unites the Democratic grassroots more than any other issue. Indeed, a fall 2005 public opinion poll found that 85% of registered Democrats disapproved of the way President Bush was handling the Iraqi occupation.¹²¹ Nonetheless, Democratic leaders have tried to distance themselves visibly from the growing anti-war sentiments among their grassroots members. Indeed, in a wave of anti-war protests around the country in late 2005, no major Democratic Party leader showed up to show support for the protesters.¹²² In any event, the more the Democrats are forced to turn their attention away from the occupation, the less blame the Republicans have to shoulder for the declining public support for the war during an election season.

Unsurprisingly, Republicans have moved to capitalize on the rift within Democratic Party leadership on the Iraqi occupation. Republican members of Congress have repeatedly pointed to the division as evidence that the Democrats are indecisive, weak, and incoherent on important national security issues.¹²³ Indeed, in mid-June 2006, the Republican members pushed aggressively for a vote on a non-binding resolution in support of the Iraq occupation.¹²⁴ Ostensibly, the congressional vote would have no effect on the President’s policies but it forced members of Congress, including wavering Democrats, to state on the record what their current position was regarding the occupation in the wake of the mid-term elections. Eventually, forty-two Democratic members of Congress joined an overwhelmingly united Republican contingency in endorsing a resolution that called for the occupation to work towards “creat[ing] a sovereign, free, secure and united Iraq” without

119. See Klein, *supra* note 116.

120. See David Lightman, *Both Parties Take Risks in Staking Out Campaign Positions on Troop Strength*, HARTFORD COURANT, June 26, 2006, at A1 (“Democrats avoid using terms like pullout or withdrawal—especially when Republicans keep accusing them of being eager to cut and run.”).

121. See Joan Vennochi, *Democrats Still Fear Dissent on Iraq*, BOSTON GLOBE, Sept. 25, 2005, at D11.

122. Steven Thomma, *Anti-War Movement Short on Democrats: Party Divided on Eve of Protest in Washington*, SUN HERALD (Biloxi, Miss.), Sept. 23, 2005, at D6, available at 2005 WLNR 14993141.

123. See Frank Rich, *Karl Rove Beats the Democrats Again*, N.Y. TIMES, June 18, 2006, § 4, at 12; Jim Rutenberg & Adam Nagourney, *Rallied by Bush, Skittish G.O.P. Now Embraces War as an Issue*, N.Y. TIMES, June 22, 2006, at A1.

124. See Jonathan Weisman & Charles Babington, *House Backs Bush’s Policies in Iraq; 42 Democrats Join Republicans to Pass Resolution 256 to 153*, WASH. POST, June 17, 2006, at A05.

establishing “an arbitrary date for the withdrawal or redeployment” of American troops.¹²⁵ Meanwhile, in the Senate, the Republican leadership also co-opted an amendment drafted by Senator Kerry calling for an explicit timetable for the withdrawal of troops.¹²⁶ The amendment was eventually rejected overwhelmingly by a vote of 93-6.¹²⁷

Interestingly, these non-binding resolutions illustrate powerfully that the President and the ruling party have a strong incentive to make proactive efforts to seek formal congressional action during wartime in order to politically box in the opposition. In this case, the Republicans sensed correctly that the Democrats were badly divided over Iraq and that an open congressional debate over the occupation would highlight those divisions. The Republicans exploited the debates during these non-binding resolutions and attempted to portray the Democrats as willing to “cut and run” at the first hint of difficulties in the battlefield.¹²⁸ Finally, the division within the Democratic Party leadership makes it easier for the Republican Party leaders to portray the decision to initiate the Iraqi invasion as a complicated and ultimately difficult decision for the President. In other words, the Republican mantra seems to be that when the President decided to initiate the Iraq invasion, he was operating in good faith with the best evidence and intelligence available at the time. Thus, if the Democratic leadership still seems divided and ambivalent about the occupation three years after the ground war ended, it is more difficult to argue that the President made an impulsive or rash decision in initiating conflict.

To summarize, the 2002 congressional authorization of the use of force helped create and expose deep-rooted divisions in the Democratic Party over the wisdom of both the Iraq invasion and the later occupation. In the end, the authorization and the splinter it created among the Democratic Party establishment reveals the tough choices faced by opposition leaders during wartime. If the Democrats decide to stay the course and the Iraq occupation eventually ends successfully, the President and the Republican Party are likely to reap much of the resulting political windfall. But if the occupation continues to be unpopular and eventually ends with Congress forcing a troop withdrawal, the Democrats will likely be blamed for being equivocal and uncommitted in their support of the troops. Either way, congressional authorization for the use of force in Iraq seems to have diminished the ability of Democrats to exploit the political fallout of the occupation. Of course, the Democrats might eventually be able to muster a majority of members of Congress who are

125. *Id.*

126. See Jonathan Weisman & Charles Babington, *Parties Face Off Over Iraq War in 11-Hour Debate*, WASH. POST, June 16, 2006, at A01. The Senate subsequently rejected two other proposals for a timetable that were offered by Democrats the following week. See Kate Zernike, *Senate Rejects Calls to Begin Iraq Pullback*, N.Y. TIMES, June 23, 2006, at A1.

127. See Weisman & Babington, *supra* note 126.

128. See Joseph Williams, *GOP Wants “Cut and Run” Label to Stick; Analysts: Branding of Democrats’ War Policy Could Pay Off*, BOSTON GLOBE, June 21, 2006, at A2.

willing to force the President's hand by voting a concrete withdrawal timetable, but the split in the party leadership makes such a vote unlikely in the short run.

2. *Raising the political costs to the opposition of switching support for the war*

In addition to dividing the political opposition, Bush's decision to seek congressional authorization for the Iraq intervention earned another important dividend: it made it easier for the Republicans to depict Democratic leaders who voted for the resolution but later changed their minds when the war became unpopular as being inconsistent and opportunistic.

In war, members of the opposition have an incentive to try to assess the prospects of victory and then make a cost-benefit assessment as to whether to support the President's military initiatives. Given that a majority of Americans are likely to approve of the President's handling of a high-risk war in the early phases but disapprove later when casualties mount, the political opposition has a great incentive to play a wait-and-see game once the President initiates the use of force. In other words, the political opposition might want to wait until the political fallout of the President's military initiatives is clear before it decides whether to support the President.

The President's decision to seek congressional authorization partially forecloses the political opposition from engaging in this kind of opportunistic behavior. Indeed, the issue that probably bedeviled the Democrats the most during the 2004 national elections was the perception that their presidential nominee—Senator Kerry—was a flip-flopper on the Iraq war.¹²⁹ Senator Kerry voted in support of the fall 2002 resolution but then later tried to recant—or perhaps more appropriately, qualify—his support for the war as public approval for the occupation nosedived during the 2004 election season.¹³⁰ But President Bush and Republican leaders were quick to portray Kerry's change in position as a sign that he was indecisive and inconsistent on national security.¹³¹ For instance, one poignant electoral advertisement released by the Republican National Committee asked: "How can John Kerry protect us, when he doesn't even know where he stands?"¹³² At a basic level, the Republican strategy worked. Public opinion polls leading up the 2004 elections consistently showed that despite the war's growing unpopularity, a majority of voters believed that

129. See Terry M. Neal, *Election Reflections*, WASHINGTONPOST.COM, Nov. 4, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A24733-2004Nov4.html>.

130. See Glen Johnson & Anne E. Kornblut, *On Iraq, Both Candidates Seize on CIA Report*, BOSTON GLOBE, Oct. 8, 2004, at A1.

131. See *id.*

132. *Debate Centers on Iraq*, BRADENTON HERALD (Bradenton, Fla.), Sept. 30, 2004, at 1A, available at 2004 WLNR 18938376.

Bush was a much more decisive and resolute leader on national security than Senator Kerry.¹³³

In many respects, Senator Kerry was caught in a dilemma. If he did not sufficiently distinguish himself from President Bush's position on Iraq, he would not give voters any reason to prefer him to Bush on national security—an issue that loomed large in voters' minds during the 2004 elections. But at the same time, changing his position from his fall 2002 vote would make him look inconsistent and irresolute. At some level, Kerry tried to split the baby on Iraq by drawing a nuanced distinction: he claimed that President Bush made a mistake because he did not sufficiently engage the allies in the war in Iraq and did not have a clear plan for sustaining the post-war peace. In hindsight, polls revealed that many voters thought Kerry's explanation of his position on Iraq was a little convoluted. More recently, Senator Kerry—who may have been trying at the time to position himself for the 2008 presidential election—has tried to sound a much more resolute note on Iraq. He has announced that his decision to vote for the war in 2002 was a mistake and that Congress should establish a concrete timetable for withdrawing American troops within a year.¹³⁴ Ironically, his current, more aggressive stance on seeking a quick and concrete timetable for withdrawing troops has alienated other Democratic leaders who view his change of heart as politically opportunistic and dangerous for the party.¹³⁵

Beyond successfully depicting Senator Kerry as a waffler whose position on the war tended to shift with the winds of public opinion, the Bush Administration also used the fall 2002 congressional authorization to attack other members of Congress who tried to change their positions once the occupation became unpopular. In a series of speeches delivered in late 2005, President Bush asserted that members of Congress had access to the same intelligence he had when they decided to vote for the resolution in 2002.¹³⁶ Referring to those members of Congress who voted for the war but then later recanted because they claimed that the President manipulated pre-war intelligence, he accused them of playing politics with the troops' lives.¹³⁷ In

133. See Andrew Miga, *The Presidential Debates: Round One: War of Words Over Iraq: Kerry Launches Debate Offensive Against Bush*, BOSTON HERALD, Oct. 1, 2004, at 005 (“Polls show Bush enjoys a strong advantage on national security issues with voters. The president is more widely seen as decisive and truer to his convictions than Kerry, who has struggled to shed charges he is a waffler.”); see also J. Scott Orr, “America Has Spoken”: Bush Reaches Out to Nation After Kerry's Concession: President Gives Thanks for Mandate to Continue, STAR-LEDGER (Newark, N.J.), Nov. 4, 2004, at 1, available at 2004 WLNR 20264123 (“Experts agreed that Bush's strategy of portraying himself as the nation's ever-vigilant protector and casting his opponent as indecisive and weak paid off at the polls.”).

134. See Scot Lehigh, *John Kerry's Encore*, BOSTON GLOBE, May 23, 2006, at A17.

135. See Zernike, *supra* note 118.

136. See Richard W. Stevenson, *Bush Contends Partisan Critics Hurt War Effort*, N.Y. TIMES, Nov. 12, 2005, at A1.

137. See George W. Bush, Press Conference of the President (Dec. 19, 2005)

this and other contexts, the President's message was unambiguous: if there is any political fallout for the occupation of Iraq, the members of Congress who voted for the 2002 resolution cannot avoid their share of the blame by subsequently changing their stance on the wisdom of the occupation.

In hindsight, the 2002 congressional authorization has hampered the ability of Democrats to switch their support of the war without suffering significant political costs. Even as the President's supply of wartime public goodwill depletes, he has managed to forestall a full scale political attack on the Iraq occupation by Democratic members of Congress because many of these members realize that their decision to vote for the 2002 resolution has made them somewhat complicit in the occupation's outcome. However, although the 2002 congressional authorization might have mitigated the political costs to the President and the Republican Party, it has not made them invincible. As the casualties mount in the ongoing occupation, the President has still taken a significant hit at the public opinion polls.¹³⁸ Nonetheless, as the declining public polls of Congress also attest, the President has managed to share a significant part of this political blame with Congress.¹³⁹ More importantly, public opinion polls in mid-summer 2006 gave the Democratic leaders in Congress lower marks than President Bush on having a clear plan for success in Iraq.¹⁴⁰

Put differently, the President has managed to tap into a deep reservoir of political insurance provided by the 2002 congressional resolution authorizing the Iraq war even though his efforts to obtain this authorization were minimal. By all accounts, the congressional debates leading up to the resolution were fairly low-key and perfunctory.¹⁴¹ The House International Relations Committee quickly voted the Resolution out of committee by a vote of thirty-one to eleven.¹⁴² Eventually, the House passed the Resolution by a sizable margin of 293 to 133. The Senate also quickly approved the Resolution with Senate Majority Leader Thomas Daschle (D-N.D.) making a special plea for

(transcript available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html>).

138. See Survey by Opinion Research Corp./CNN (June 14-15, 2006) (available at iPOLL Databank, Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>).

139. See Survey by CBS News (June 10-11, 2006) (available at iPOLL Databank, Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>).

140. See Dan Balz & Richard Morin, *Nation Is Divided on Drawdown of Troops: Poll Shows Growth in Support for Bush*, WASH. POST, June 27, 2006, at A01 (referring to opinion polls showing that 64% of those polled did not think President Bush had a clear plan for withdrawing troops while 71% said the same about Democrats in Congress).

141. See Derek Willis, *The Missing Debate on Iraq*, MORNING NEWS, Oct. 23, 2002, http://www.themorningnews.org/archives/stories/the_missing_debate_on_iraq.php.

142. H.R. REP. NO. 107-721, at 39 (2002), as reprinted in 2002 U.S.C.C.A.N. 1001, 1009.

bipartisanship.¹⁴³ Senator Byrd (D-W. Va.) did try to plead with his colleagues to have a more serious and extensive debate on the Resolution but he was all but completely ignored.¹⁴⁴ On October 10, the Senate voted by a margin of seventy-seven to twenty-three in support of the Resolution.¹⁴⁵ At no stage during the few weeks that Congress debated the Resolution was there any doubt that congressional authorization would be both forthcoming and swift.

At bottom, if the greatest political constraints on the President during wartime come from a divided government or an active political opposition, the Iraq occupation shows that those constraints can be considerably weakened when a President first seeks congressional authorization for the use of force. President Bush's decision to seek congressional authorization most likely weakened the resolve of the Democratic Party to force the President's hand once the Iraq occupation became unpopular. But one could only imagine how different the political climate would be if the President had decided to embark on the Iraq occupation unilaterally. In some respect, he would have saved himself the trivial political capital he invested convincing Congress to approve his request for the use of force; on the other hand, he and the Republican Party would have likely inherited a colossal political burden. In a unilaterally initiated conflict, the Democratic opposition would have the option of waiting to see how the war turns out in the court of public opinion before deciding whether or not to support the war. If the war ends in failure or stalemate, the opposition would then have wide latitude in condemning every aspect of the decision to use force without the prospect of facing any political recriminations for seeming inconsistent or formally divided about the wisdom of going to war.

Ultimately, President Bush's ability to bifurcate political blame for the Iraqi occupation aptly illustrates the moral hazard risk inherent in first seeking congressional authorization for the use of force. If a President knows *ex ante* that he can get political insurance cheaply and get to share the political risks of a high-stakes military conflict with the political opposition, then it is very plausible to think that he is more likely to initiate more high-stakes conflicts with congressional authorization than he would if he were acting unilaterally.

What about the role of moral hazard in other modern conflicts? In many respects, the framework established in this Article also illuminates the political insurance role congressional authorization has played for other contemporary Presidents. One could argue, for instance, that congressional authorization for the 1982-1984 military deployment in Lebanon helped President Reagan avoid some of the political fallout once the deployment became increasingly unpopular in early 1984.¹⁴⁶ Indeed, during the last couple of months before

143. Dana Bash & Ted Barrett, *Congress Mixed on Iraq Resolution*, CNN.COM, Sept. 20, 2002, <http://archives.cnn.com/2002/ALLPOLITICS/09/20/congress.iraq.resolution>.

144. Byrd, *supra* note 84.

145. *Senate Approves Iraq War Resolution*, CNN.COM, Oct. 11, 2002, <http://archives.cnn.com/2002/ALLPOLITICS/10/11/iraq.us>.

146. For a description of the Lebanese deployment and Congress's role in authorizing

Congress forced a withdrawal of United States troops in February 1984 the President had lost much of the considerable foreign policy reputation he had cultivated in the wake of the successful Grenada invasion of October 1983.¹⁴⁷ Nonetheless, Reagan sought to use the congressional authorization he received in the summer of 1983 to blunt growing congressional criticism of the deployment.¹⁴⁸ When Deputy Secretary of State Lawrence Eagleburger was questioned by a hostile Congress on the progress of the war in early 1984, he kindly reminded the members of Congress that that they bore a share of the blame for the outcome of the deployment by passing the resolution authorizing the use of force the previous summer.¹⁴⁹

CONCLUSION

Does congressional authorization of the use of force decrease the likelihood that the President will initiate imprudent or unpopular wars? Legal commentators and social scientists have largely assumed that it does; but no systematic empirical evidence supports this claim. This Article does not purport to correct this empirical lacuna in the literature, but merely suggests that the claims regarding the deliberative or drag effects of congressional authorization rest on empirical and theoretical assumptions that are either dubious or highly contestable. More importantly, it suggests that by fragmenting the political blame for potentially risky military engagements between the President and the political opposition congressional authorization might actually have a perverse effect of unintentionally encouraging the President to engage in more imprudent wars. This Article introduces a theoretical framework to understand the problem and illustrates it by reference to some of the ongoing congressional debates about whether to continue endorsing the President's handling of the Iraqi occupation.

Significantly, although largely ignored by the received wisdom, the value of prior congressional authorization for the use of force is not only about democratic deliberation but also about buying political insurance for the President and the ruling party in the context of the political uncertainty created by high-risk wars. But given the relatively low costs the President usually incurs when he seeks congressional authorization before he initiates conflict, it seems highly unlikely that the deliberative value will consistently trump the political insurance value. When it does not, the moral hazard effect afforded by congressional authorization might actually increase the level of high-stakes or imprudent wars entered into by the United States.

the use of force, see Nzelibe, *supra* note 14, at 1026-35.

147. *See id.* at 1031-33.

148. *See id.* at 1033.

149. *See* John Felton, *Democrats Step Up Pressure for Beirut Pullout*, CQ WEEKLY, Feb. 4, 1984, at 227.

Of course, the critical question as to whether on balance the moral hazard problem of congressional authorization outweighs the deliberative benefits remains open to debate. Similar debates regarding the competing values of other public or private insurance schemes pervade policy discussions in other contexts.¹⁵⁰ For instance, although deposit insurance might lead to more risky behavior by banking institutions,¹⁵¹ proponents have argued that this cost is outweighed by the benefit of bringing public confidence to the banking system.¹⁵² Unfortunately, such debates rarely occur in the academic literature regarding the role of domestic institutions on the use of force. In many respects, this Article is an attempt to foster such a debate by sketching out some of the core assumptions behind the two competing values of deliberation and political insurance when Congress authorizes the use of force: a necessary first step towards a more systematic study of congressional influence in the initiation of wars.

150. See generally Baker, *supra* note 57 (describing the ubiquity of moral hazard analysis in contemporary policy debates about the benefits of insurance).

151. See, e.g., Geoffrey P. Miller, *The Future of the Dual Banking System*, 53 BROOK. L. REV. 1, 19 (1987) (“The deposit insurance system is often said to create moral hazard on the part of depository institutions by giving them an incentive to take excessive risks with the knowledge that the costs of unsuccessful risk-taking will be borne by the deposit insurance funds, while the benefits will be captured by the banks.”).

152. See Joseph J. Norton, *A “New International Financial Architecture?”—Reflections on the Possible Law-Based Dimension*, 33 INT’L LAW. 891, 893 (1999) (“As to the existence of a deposit insurance scheme and moral hazard, in this author’s view a properly constructed and implemented deposit insurance scheme, on balance, brings more benefits of public confidence than systemic risks to a banking system.”). *But see* Jonathan R. Macey & Geoffrey P. Miller, *Nondeposit Deposits and the Future of Bank Regulation*, 91 MICH. L. REV. 237, 272 (1992) (advocating a voluntary rather than a mandatory deposit insurance scheme on the assumption that such a scheme would only survive if the benefits outweigh the moral hazard costs).

