



American War Powers and Terrorists: The Case of Usama Bin Laden

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During the Cold War, observers of American politics noted that an “imperial presidency” developed in regards to the decision to use force abroad. Although the Constitution and the War Powers Act of 1973 grant significant war powers to the Congress, Congress largely deferred and abdicated these powers to the commander in chief, as the President asserted essential unlimited constitutional authority. This practice held true when the United States used force against “terrorist” actors, such as President Ronald Reagan’s strikes against Muammar Qaddafi. However, President Clinton’s strikes against Usama Bin Laden represent a different example of the war powers interplay. Domestic political considerations for Clinton and the nature of the United States’ target presented new incentives and an unprecedented case of much closer consultation with Congress prior to using force.

The War Powers Act (WPA), established in 1973 over President Richard M. Nixon’s veto, sought to reassert Congressional war powers into American foreign policymaking. After the perceived imperialism of Nixon and President Lyndon B. Johnson during the Vietnam War, Congress felt compelled to place some restrictions on the commander in chief and to invoke greater war powers for itself. Yet by most analysts’ measures, the WPA has failed in many respects.¹ The literature on war powers demonstrates convincingly that Congress has neglected to exercise its constitutional responsibilities while watching the commander in chief assert and practice nearly unilateral foreign policy authority.² In the immediate aftermath of the use of force Congress may press the president on the specific requirements of the WPA, but these short-lived initiatives can usually be explained by partisan politics and have made little progress in amending the strained relationship between Congress and the chief executive.

This norm of deference to the president has also occurred in regard to the use of force against alleged “terrorists,” in part, because the public has supported strong presidential leadership against such foes. Moreover, when American presidents have used force in response to attacks from terrorists, Congress has been kept out of the policymaking loop and the commander in chief has made all vital military decisions. However, in the case of President Bill Clinton’s strikes against Usama Bin Laden and his network in Afghanistan and the Sudan, Clinton and Congress worked together in perhaps the most

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constitutional manner since the onset of the Cold War. Congress was clearly “consulted” and informed of the decision to use force against Bin Laden as the Act requires, and was instrumental after the strike by galvanizing the public to support the strikes. After the attacks there was virtually no challenge to President Clinton over his perceived constitutional or legal authority. A number of factors explain why this close level of consultation occurred.

This article examines the attacks against Usama Bin Laden by focusing on the interplay between Congress and the president prior to and after the strike. Although the WPA grants the president some unilateral authority regarding the use of force, particularly in the case of immediate defensive needs against terrorists, President Clinton chose to closely follow the principles set forth by the Act. In this case, the president’s political strategy with Congress was unlike his predecessors’ courses of action and his own previous occasions as president when military force was used. The president’s problems with impeachment, the self-interests of key Cabinet officials, the 1998 midterm elections, and strong public support in the bombings’ aftermath all provide insight on the level of agreement and consensus between both branches of government.

The article begins with a short discussion of the War Powers Act, with particular attention given to the president’s constitutional responsibilities regarding a military response to terrorism. It follows with an analysis of President Ronald Reagan’s strike on Libyan leader Muammar Qaddafi—the most analogous use of force during the Cold War to Clinton’s strikes on Bin Laden. The Libyan case is useful because it gives insight on a prior chief executive’s use of force in response to a terrorist act that took American lives. Moreover, the Libyan bombing also provides a comparative perspective on how Congress responded to the president’s constitutional claims, in which intelligence information was used to justify the bombings—just as with Bin Laden. The article then moves to the Clinton administration and the extraordinary level of war powers interplay that occurred in August 1998. As will be demonstrated, the politics surrounding Clinton’s impeachment created a new dynamic that encouraged real dialogue between the branches of government, which is unfortunately unlikely to be repeated. While substantive consultation occurred between Congress and the president, in future strikes against terrorism it will be the president who alone determines when to use military force. Presidential unilateralism, coupled with Congressional acquiescence is more probable to be the behavioral norm, which diminishes the principle of checks and balances. Thus, despite the nonpartisan and cooperative interplay witnessed between the executive and legislative branches in August 1998, and the novel political strategy employed by President Clinton prior to the attacks, the strikes against Usama Bin Laden should not be viewed as a model for future adherence to the Constitution or the War Powers Act when combating terrorists.

The War Powers Act

The Vietnam War impelled Congress to rethink its ability to control the commander in chief. Although Congress approved of the Tonkin Gulf Resolution in 1964, which authorized President Johnson to use force in Vietnam, and could have eliminated funding for the operation at any time, many members of the House and Senate argued that Presidents Johnson and Nixon exploited their powers as commander in chief, relegating Congress to a distant if not tertiary player in American foreign policy. Due to this perceived imbalance, Senator Jacob K. Javits (R-NY), and Congressmen Dante Fascell

(D-FL) and Clement Zablocki (D-WI) wrote and successfully guided the passage of the War Powers Resolution. The House voted 283-123 on the measure and the Senate supported the Resolution 75-20. After President Nixon's veto, it again achieved the necessary two-third's majority to guarantee its passage.³ Since this time, every president has argued that the "Resolution" is an unconstitutional infringement on the commander in chief's powers.⁴

The intent of the WPA was to reestablish Congress's war powers as set forth in Article I, Section VIII in the Constitution. The founding fathers gave Congress vast military powers, including the authority to raise armies and navies, to grant letters of marque and reprisal, to provide for the common defense and—most importantly for our purposes—the ability to "declare war." In James Madison's notes on the Constitutional Convention, it was clear that the founders believed in the separation of powers and that the ability to use force should not rest with one branch or one individual alone.⁵ One founder, Elbridge Gerry from Massachusetts, noted that he "never expected to hear in a republic a motion to empower the executive alone to declare war."⁶ Although analysts today argue over whether Congress in fact gave away some of its war powers through the WPA, its authors and advocates contend that while it may be flawed, its intent was to reassert the war powers that the founders envisioned for Congress.⁷

One of the WPA's central components is Section 3. This requires that "the President in every possible instance should consult with Congress" before and after troops are introduced into hostilities. The Act also requires that the president inform Congress of any use of force within forty-eight hours of a military action undertaken by the United States. Furthermore, the Act orders that after notifying Congress, the president then has sixty days (with the possibility of a thirty-day extension) to gain Congressional approval. If approval is not given, the president must recall the troops and cease the use of force.⁸

The WPA does not specifically address the constitutional duties of either branch of government in response to "terrorist" attacks. Most constitutional scholars concur that the founders believed that if there is an immediate and clear threat to the United States's defense, the president is authorized to use force unilaterally, without Congress's explicit approval. This principle is restated in Section 2c of the Act, which allows for the commander in chief to use force in "a national emergency created by attack upon the United States, its territories, or possessions, or its armed forces."⁹ At the same time, there is nothing in the Act that ever negates the necessity of consulting in "every possible instance," regardless of whom the organization is.¹⁰ Moreover, if the attack was provoked by the United States, legitimate doubts exist for a unilateral executive claim to use force in a non-defensive manner. Although not specifically stated, it follows that if there is any uncertainty about the identity of a terrorist perpetrator, or the absence of an immediate need to retaliate against a terrorist, Congress should again be consulted in "every possible instance." Thus, the president does have unilateral authority to respond to terrorism if the defensive needs of the country are in peril according to Constitutional scholars and, by implication, the WPA. Yet the president's authority can be slightly tempered based on the particular situation(s) regarding terrorists. If time permits, or if the president has acted in an aggressive way that provoked an attack on the United States, these conditions would certainly merit Congressional involvement. Defining these particular situations, whether it has been against terrorists or some other enemy, has never been easy for Congress. Generally Congress has avoided constitutional debates of this nature, but in the aftermath of a strike may raise legal challenges against the president. In a case that has similarities to Clinton's use of force against Usama Bin Laden,

some confusion and controversy arose over President Ronald Reagan's constitutional responsibilities when his administration used force against Muammar Qaddafi's regime. The case is not perfectly analogous, in that terrorism had not achieved the heightened saliency that it now commands, and Qaddafi is a state leader, unlike Usama Bin Laden, a non-state actor. Yet, Reagan's 1986 air strikes still remain useful due to Clinton's similar use of force against a terrorist in 1998. It is to Reagan's strikes to which we now turn.

Libya

Muammar Qaddafi came to power in 1969 after a bloodless coup on Libyan King Idris. A flamboyant and often self-righteous leader, Qaddafi was inspired by the leadership of Egypt's Gamal Abdul Nasser, and viewed himself as the leader of a pan-Arabic revolution.¹¹ While in power, Qaddafi by some measures managed to improve social conditions for many Libyans. However, he also ruled in an authoritarian manner and employed international terrorism to achieve his foreign policy objectives. His terrorist activities have been most closely connected to Palestinian extremist groups, and have extended beyond Africa to the Middle East and Europe. By 1979, the Carter administration considered his regime a substantial national security threat. Qaddafi drew the Reagan administration's attention in its first year when the United States shot down two Libyan aircraft for threatening America's naval presence in the region. Tensions with the United States mounted in 1986, when the Reagan administration led a worldwide effort to place and implement tight economic sanctions on Qaddafi for his terrorist connections. By this time, the U.S. State Department maintained that the Libyan regime had been involved in 59 terrorist acts.¹²

In early 1986, viewing the waters of the Gulf of Sidra as part of Libyan territory, Qaddafi stated that any ship or aircraft that crossed the "line of death" in the Gulf would be fired upon. Although this territorial claim was not accepted by most states in the world, the Reagan administration chose to test it by placing U.S. ships and aircraft in the contested waters and airspace. Libya responded with anti-aircraft missiles, prompting the United States to fire on missile sites and patrol boats in the area near the Libyan city, Sirte. Approximately two weeks later, a bomb exploded in a German dance club frequented by American servicemen on location. One U.S. soldier and one German woman were killed. 200 others, including 60 Americans, were injured. Soon thereafter, with the assistance of French and German intelligence sources, the bombing was attributed to the Libyan regime. Reagan responded on 14 April 1986 with air and naval strikes on Libyan military sites, which also likely resulted in the death of Qaddafi's adopted daughter.¹³

In his address to the nation, the president noted that Qaddafi's links to the terrorist bombing in Germany were "conclusive," and that the evidence was "direct," "precise," and "irrefutable."¹⁴ In his notification letter to Congress, which is required by the WPA, Reagan wrote that he conducted these strikes pursuant to his "authority under the Constitution, including my authority as Commander in Chief of United States Armed Forces." He also noted that his actions were allowed under Article 51 of the United Nations Charter, which permits member states of the United Nations the right to self defense.¹⁵

Three hours before the attack, Reagan asked Congressional leaders to come to the White House to be consulted. While the administration later argued that any member of Congress could have stopped the operation there, other members present at the meeting argued that they had been merely informed as to what was going to happen. While the

bombings were well received by the American populace,¹⁶ many Democrats and some Republicans contended that the WPA had been violated, in that proper consultation had not taken place. Sam Nunn (D-GA), a senior senator respected by both parties for his knowledge of defense-related issues, noted that in order for consultation to occur, many options had to be open to consideration. He maintained that this was not the environment during the Reagan administration's ad hoc meeting. Another senior senator, Robert Byrd (D-WV), likewise argued that proper consultation had not taken place, and that Congress had been merely "notified" about the attack.¹⁷ These concerns eventually resulted in a Senate proposal to form a permanent consultative committee so that Congress would always be a part of the decision-making process involving the use of force.¹⁸ Senator Alan Cranston (D-CA) also introduced a bill to require better consultation with Congress when the president seeks to use force.¹⁹ Others in the Senate, most importantly Senate Majority Leader Bob Dole (R-KS), argued that Congress was trying to micromanage foreign policy and that the president should be given more latitude in using force against terrorists.²⁰

In the House, Democratic members went a step further by holding hearings on Reagan's actions and the WPA. At a meeting of the House Foreign Affairs Subcommittee on Arms Control, International Security and Science, led by Foreign Affairs Chairman Dante Fascell (D-FL), Democrats pushed the administration on what they perceived as a lack of compliance with the WPA. Through its legal advisor, Abraham Sofaer, the Reagan administration argued to the Committee that, with regard to counterterrorism, the executive branch had unilateral authority to use force, due to the need for secrecy and because these actions fall short of total war.²¹ While the hearings produced much discourse on war powers and counterterrorism, in the end Congress let the constitutional issues rest and made no formal changes to the WPA.

In retrospect, the war powers interplay produced much tension and controversy. With the exception of the Dole initiative, many members of Congress, particularly Democrats, argued that the WPA had been violated and that greater consultation was required in order for the WPA's requirements to be met. Even though the target of the president's strikes was considered a terrorist state—guilty of terrorist acts against Americans and others—many in Congress felt that Reagan had overinterpreted his powers as commander in chief and had ignored the obligation to consult with Congress. Qaddafi's convincing "credentials" as an international terrorist made little difference to the war powers advocates on the Hill. In the case of Usama Bin Laden, however, the interplay was much more unconventional and produced very different results.

Usama Bin Laden and the WPA

As an anti-Western, Muslim extremist, Usama Bin Laden has long been a thorn in the side of the United States. He was born in Saudi Arabia, the youngest son of a wealthy contractor. As a young man, his first and most pivotal event in world affairs came with the U.S.S.R.'s intervention into Afghanistan—a state heavily populated with Muslims. Bin Laden viewed the Soviet's actions as a direct and unforgiving assault on Islam, which disturbed him profoundly and motivated him to travel to the country to support the Islamic Mujahideen fighters. During the war, Bin Laden's religious zeal and political extremism against the West also developed. These interests, coupled with his financial resources—estimated at \$200 million—allowed Bin Laden to develop and oversee a network of Islamic terrorist organizations by the late 1980s. In the ensuing years, this network had been linked to an assassination plot on the Pope, the 1993 bombing of the

World Trade Center, a 1993 bombing in Yemen, a 1995 truck-bombing in Saudi Arabia, and various other high-profile terrorist acts.²² In February 1998, as tensions between the United States and Iraq reached new heights over Iraq's refusal to comply with the United Nations Special Commission on weapon inspections, Bin Laden publicized a "fatwa," or a call for a holy war, against all United States citizens and military personnel. A similar edict had previously been announced in August 1996.²³ Thus, Bin Laden was no stranger to those in the intelligence community, nor was his willingness to take extreme measures to achieve his goals.

On 7 August 1998, the United States embassies in Kenya and Tanzania were bombed. Nearly 300 people were killed, including 12 Americans, along with 5,000 others who were injured in the blasts. Approximately two weeks later, the Clinton administration responded by launching 79 tomahawk missiles on Bin Laden's outposts in Afghanistan and the Sudan. When the president addressed the nation on the strikes he provided essentially four justifications for his actions. He noted that (1) Bin Laden had publicly called for a terrorist war against the United States; (2) that his network of radical Islamic organizations had been involved in other major terrorist attacks in the 1990s; (3) that there was "convincing information" that Bin Laden was behind the embassy bombings in Kenya and Tanzania; and (4) that "compelling evidence" suggested Bin Laden was planning another attack on the United States.²⁴

In his notification letter to Congress, Clinton, like Ronald Reagan, noted that under Article 51 of the United Nations Charter he was entitled to act in the country's self defense. He also stated that his actions were undertaken pursuant to his "constitutional authority to conduct U.S. foreign relations and as commander in chief and chief executive." Included in this letter was the statement that he had kept Congress "fully informed, consistent with the War Powers Resolution."²⁵ This justification was nearly identical to Reagan's legal arguments for his overt strike on Qaddafi. Clinton's letter also differed little from his past constitutional claims when unilateral military force had been used.²⁶ However, while the legal substance is essentially the same as Reagan's, Clinton's political strategy with Congress prior to the attack was markedly different, and quite dissimilar from that of any president since the WPA's passage.

After the embassy bombings, U.S. investigations in Kenya and Tanzania began immediately. Intelligence information gathered was quickly shared with Speaker of the House Newt Gingrich (R-GA) and other top Congressional leaders, who were immediately brought "into the loop" with the Clinton administration's foreign policy team. Other key members of Congress's party leadership who were informed days in advance of the strikes to come included Majority Leader Trent Lott (R-MS), House Minority Leader Dick Gephardt (D-MO), and Senate Minority Leader Tom Daschle (D-SD). This is a marked difference to the three hours notice given to Congressional leaders in 1986.²⁷

The efforts to consult produced high dividends for the president. In the immediate aftermath of the strikes there was almost no negative reaction or skepticism from Congress regarding the strikes. The vast majority in Congress was highly supportive from the beginning. Senator Lott noted that the information on Bin Laden's connection to the bombings was "very compelling." Gingrich stated that consultation with the White House had been "done in a methodical, professional way," and that he strongly supported the United States government acting that way.²⁸ Gingrich also informed the Republican caucus that it would be wise to stand behind the president against Bin Laden and to give strong support to Clinton for his actions. Moreover, in the immediate aftermath of the bombings Gingrich instructed his close partisan ally and political operative Rich Galen to contact all major Republican media personalities and radio talk shows to reiterate

Gingrich's support for the president on this measure.²⁹ Congressman Norman Dicks (D-WA), ranking minority member of the House Permanent Select Committee on Intelligence, noted that the evidence against Bin Laden was "compelling." Even Clinton antagonist and sometimes acerbic House Majority Leader Dick Armey (R-TX) backed the president.³⁰

Two members of the Senate, Arlen Specter (R-PA)—no stranger to drawing media attention and controversy—and Dan Coats (R-IN) publicly expressed reservations on the bombings by questioning the political timing of the attacks. Only three days before, the president had admitted to his affair with Monica Lewinsky. However, Specter and Coats's reservations quickly subsided the following day, presumably after discussions with their leadership. In short, members of the House gave strong support to Clinton at a time when his public trust was in question.³¹ No constitutional reservations were introduced and no qualms regarding adherence to, or exploitation of, the WPA were raised.

In sum, the interplay between the White House and the Congress was unprecedented. In the case of Libya, there was only cursory notification, rather than consultation. During his time in office, President Clinton had also never consulted Congress to this degree prior to an attack. In 1993, Clinton fired 23 tomahawk missiles on Iraq after the Central Intelligence Agency uncovered evidence linking an assassination attempt on President Bush to Saddam Hussein when Bush was visiting Kuwait. Prior to the strikes, Clinton made virtually no effort to formally consult with members of Congress. The president did make an effort to telephone Congressman Ron Dellums (D-CA), a strong backer of Congressional war powers. Otherwise, there is little other public information suggesting that Clinton even met informally with other members of Congress.

In the aftermath of the strikes, Dellums noted: "This unilateral U.S. military action was initiated by the executive alone, and is further evidence of the absolute imperative to reestablish the proper balance between the Executive and Congress."³² In other cases of peace keeping and peace enforcement during the Clinton administration, when American troops were deployed in foreign states, including Somalia and Bosnia, considerable debate surfaced in Congress over Clinton's authority to conduct these operations, and his responsibilities with regard to the WPA.³³ But in his strikes against Bin Laden, Clinton had essentially universal support from both legislative chambers and no qualms with regard to the WPA. In contrast to their negative reactions to past uses of force, members of Congress were quite satisfied with their relationship to and their role with the White House regarding the use of force.

According to the Constitution and the WPA, one could make a case that the president may have had unilateral authority to use force—without Congressional consent. If one accepts as true what President Clinton said in his national address concerning Bin Laden—which was never refuted or challenged by any of the Congressional leaders—the President was justified to act on behalf of the country's defense. It had been established that Bin Laden supporters had attacked United States "possessions," that he had openly declared war on United States citizens and military personnel, and that evidence existed that he was about to strike the United States again. In theory, the president certainly could have made a strong case for a unilateral strike because Bin Laden ostensibly represented an immediate danger to Americans around the world. Despite this, the WPA still requires consultation in "every possible instance." Because there was a considerable time lag between the actual intelligence gathering and the strike, the president did have a responsibility to consult with Congress in advance.³⁴ Yet, even with legal arguments that favored the president, Clinton still reached out to Congress in advance and met the requirements of the WPA perhaps more closely than any president since its

passage. As demonstrated in the Libyan case, many in Congress felt that Reagan had violated the WPA in his strikes against Qaddafi. When President Ford used force to rescue Americans being held hostage in the Mayaguez incident, Congress was not consulted in any substantive manner.³⁵ When President Carter deployed forces in an attempt to rescue American hostages held in the U.S. embassy in Iran, his administration likewise never consulted with Congress.³⁶ Although these uses of force were not entirely analogous to the attack on Bin Laden, the Clinton administration's war powers behavior was striking in comparison to past presidential behavior where consultation was not even attempted.

From Congress, there were few complaints in the aftermath of the attacks about any violations of the WPA, which a president often faces after the use of force from partisan quarters. The Republican rank and file stayed quiet on these constitutional questions, and in sharp contrast, the administration's most partisan critics lobbied on the president's behalf. Even current advocates of Congressional war powers, such as Senator Joseph Biden (D-DE) and Senator Russ Feingold (D-WI), raised no constitutional qualms with the president.³⁷ Those members who doubted the president in the first few hours after the strike also quickly refrained from any more challenges. Explaining this phenomenon, the interplay, and this markedly different behavior entails analysis of a number of political factors.

The Interplay Examined

On 17 August 1998, President Clinton announced in an address to the nation that he had "misled" the public regarding his extramarital affair with Monica Lewinsky.³⁸ While Clinton's admission had little impact on how the public felt about the president's job performance, it immediately impacted on the public's trust in him. Polls showed a rapid decrease in the president's credibility with the people.³⁹ Having denied the affair for months and now openly admitting to infidelity, the Clinton administration no doubt understood that there would be a major political, partisan, and possibly legal fallout. This recognition placed the White House in a crisis-like state, with tremendous political ambiguities and uncertainties for the president.

With this new dynamic and scandalous revelation introduced into the political environment, the president had strong incentives to share with Congressional leaders all intelligence gathered on the embassy bombings. In the days immediately prior to Clinton's public admission of his relationship with Ms. Lewinsky, Clinton had incentives to "play it safe" with the Speaker of the House in the event that the president would be forced to publicly confess. Gingrich, as well as other Congressional leaders, were briefed almost immediately on the available intelligence regarding Bin Laden. It seems probable that Clinton understood that if he was forced to admit to his "inappropriate relationship," having Congress behind him for a military action that potentially involved the loss of American lives would be essential. Had Clinton used force only hours after admitting that he lied to the public—without consultation—many in Congress and the media would have waged an all-out assault on him, accusing him of diversionary tactics and a lack of substantive "consultation." Such a reaction was quite possible from House GOP members, particularly those who entered the House in 1994, many of whom had waged anti-Clinton campaigns to win their seats.⁴⁰ While other presidents have easily survived Congressional scrutiny after the use of force, Clinton's situation was unprecedented and extremely volatile. Without substantive "consultation" in advance, one can easily imagine serious reservations about supporting the president, and

constitutional qualms soaring onto Congress's political agenda. Thus, for his own political self-interest, Clinton wisely consulted with the leadership in advance.

Another consequence of Clinton's decision to "mislead" the public was that the entire administration was now placed in a very precarious position. All Cabinet members had been lied to and earlier in the year had publicly defended the president against the Lewinsky charges. Because the use of force always entails political and military risks and because the administration's political stature had become so precarious, members of Clinton's Cabinet also had strong self-interests in "opening the loop" to Congress. If force had been used without a real dialogue, the Cabinet too would have faced additional scrutiny for its decisions. This was especially true of Secretary of Defense William Cohen. While serving as a U.S. senator from Maine, Cohen spoke and wrote on the issue of war powers during the Persian Gulf Crisis. In the buildup to Desert Storm, Cohen published an article in the *Washington Post*, arguing that Congress needed to take a stand on President Bush's military actions, and that Congress must be more involved in the conflict's decision-making process if a constitutional standard was going to be met.⁴¹ Contrary to his previous position, in his first year-and-a-half as secretary of defense, Cohen had defended the traditional executive position of nearly unilateral authority to use force without Congressional approval.⁴² However, in light of these new developments and with Clinton now under extraordinarily high Congressional and media scrutiny, it made good political sense for Cohen and other top administration officials to work closely with Congressional leaders. Their level of success and historic record is inextricably tied to the president's ability to lead, and with the commander in chief's dubious status at the time, there were strong incentives for consultation.

The way in which Usama Bin Laden was portrayed provides additional insight into this extraordinary interplay. During the Cold War, Congress granted presidents considerable leeway when force was used against communists. The same has held true for President Clinton when he has either threatened or used force against Saddam Hussein, who is widely accepted as a threat to U.S. national security.⁴³ In Bin Laden's case, the intelligence provided was ostensibly excellent. All top foreign policymakers agreed that the evidence was "compelling." Moreover, Clinton had not "provoked" Bin Laden, as some suggested about Reagan's actions in Libya.⁴⁴ Bin Laden also publicly declared war on American citizens on more than one occasion. Thus, from a political perspective, all of these factors made Bin Laden a safe target for the Clinton administration.⁴⁵ No member of Congress would have wanted to be accused of preventing the president from using force against a Muslim extremist linked to the embassy bombings, who also had declared war on the United States.

In terms of campaign considerations, the 1998 midterm elections were also only three months away. Traditionally, the president's party loses seats at the midterm election of his second term, and now with the new dynamic of the presidential lie, the Democratic party and its party members were faced with the possibility of a significant political defeat. While the president could no longer hide from his personal lie he could work to ensure that no further harm was done to his party. As an individual who had thrived on elections throughout his life, it would not be outlandish to assume that Clinton understood that his lie could potentially threaten the party as it moved closer to the midterm elections.⁴⁶ Dealing with the Republicans and Democrats in an open and honest way regarding Usama Bin Laden would be one way of providing some insulation for the party against future partisan attacks.

Finally, the Afghan and Sudan bombings won popular appeal.⁴⁷ A poll taken by *Newsweek* found that 73 percent of the public approved of the strikes, while a *CBS/New*

York Times poll similarly found 70 percent approval ratings for the strike.⁴⁸ Thus, criticizing the president on the strikes went directly against public opinion. The president had made a strong and convincing case for the attack, which was supported by Congressional leaders of both parties. A member of Congress who was motivated to take on the president would be fighting not only public opinion, but his or her party leaders in Congress as well.

In sum, even though there are some important similarities between the uses of force against Bin Laden and Qaddafi, in that Reagan also struck a terrorist and the public gave strong support for the attack, Congress's reactions to the Bin Laden attack were markedly different. Many senior members of Congress raised constitutional concerns over war powers and questioned Reagan on the constitutionality of his conduct. In other cases when President Clinton used force, both Democrats and Republicans challenged him on his Constitutional authority to conduct these military operations. None of this happened with Usama Bin Laden. Congress was essentially silent on war powers, making no partisan attacks on the president, and instead completely rallied around the commander in chief.

Conclusion and Implications

This case represented a unique example of substantive war powers consultation between the White House and the Congress. Unlike past presidents faced with comparable circumstances, and in President Clinton's past uses of force—most notably in Iraq in 1993—the president's level of consultation over Usama Bin Laden was unprecedented. While the president could have made a strong legal case that substantial consultation was not required against a known terrorist such as Usama Bin Laden, which in most other cases would likely have been accepted by members of Congress, the president still interacted with Congressional leaders in a constitutional manner prior to the attack. This extraordinary level of interplay can mostly be explained by the president's revelation of his affair with Ms. Lewinsky and the political conditions that it created.

Due to the president's admission that he had "misled" the American public, a new dynamic was introduced into the war powers question. The president's self-interest, Cabinet members' self-interests, strong public support for the attack, and a relatively uncontroversial target created the conditions for the commander in chief to work with Congress in a manner that was certainly consistent with the WPA. The president consulted with Congress "in every possible instance" and shared information in a way that was very convincing to Congress's leadership. However, it was the political circumstances inherent to the Clinton presidency that produced these results, rather than a renewed interest in Constitutionalism or new political conditions present in the post-Cold War era. Because events similar to the political circumstances in 1998 are unlikely to occur again, it is improbable that this case will serve as a precedent for future military strikes against terrorists or other actors.

The president still has institutional incentives to act without Congressional consultation in order to gain some military latitude—free of Congressional interference. When force is used against terrorist states or nongovernmental terrorist organizations, presidents are much more likely to use the Reagan model. This model avoids the invitation of potentially controversial questions and roadblocks from Congress, and allows the president more freedom in determining American foreign policy. In this respect, Clinton's strikes against Bin Laden represent the exception, rather than the norm. Congress, whose practice of deference to the president is well-entrenched, will continue to bemoan a

president's resistance to substantive "consultation" before and after the use of force, but will not demand strict adherence to the WPA. It is much easier to play a secondary role in war powers by waiting to judge the public's response to the use of force, rather than exercising the constitutional powers the founding fathers bestowed upon it. As demonstrated in the Desert Fox bombings against Iraq and in the 1999 air strikes against Yugoslavia, Congress resisted voting on a declaration of war and essentially let the president "sink or swim" with NATO's actions, which potentially invites a constitutional battle over war powers authority and the relevance of the American Constitution in U.S. foreign policymaking.

However, this case demonstrates the value of substantive dialogue and consultation between the White House and Congress. The president gained a number of foreign policy benefits by working with Congress in advance. Valuable time was saved in the aftermath of the attacks, in that constitutional questions did not have to be reevaluated. Moreover, Washington was able to send a strong message to Usama Bin Laden and to other extremist organizations that America will respond vigorously and with force to terrorist strikes. American national security interests were advanced with the nonpartisan and inter-branch cooperation on war powers. Presidents would be wise to share intelligence with Congressional leaders in order to avoid public controversy over war powers authority and to meet a higher democratic standard. Unfortunately, Constitutionalism of this nature appeared to be only a temporary phenomenon that may extend to some degree in Clinton's post-impeachment presidency, but is unlikely to impact other presidents and military actions taken in the future.

Notes

1. Among the many who argue against the WPA, see Louis Fisher and David Gray Adler, "The War Powers Resolution: Time to Say Goodbye," *Political Science Quarterly*, vol. 113, no. 1 (1998): 1–20; Michael J. Glennon, "Too Far Apart: Repeal the War Powers Resolution," *University of Miami Law Review*, vol. 50, no. 17 (1995): 17–31.

2. Ryan C. Hendrickson, "War Powers, Bosnia and the 104th Congress," *Political Science Quarterly*, vol. 113, no. 2 (1998): 241–258; David Gray Adler and Larry N. George, eds., *The Constitution and the Conduct of American Foreign Policy* (Lawrence, KS: University Press of Kansas, 1996); Louis Fisher, *Presidential War Power* (Lawrence, KS: University Press of Kansas, 1995); Gary M. Stern and Morton Halperin, eds., *The U.S. Constitution and the Power To Go To War* (Westport, CT: Greenwood Press, 1994); John Hart Ely, *War and Responsibility* (Princeton: Princeton University Press, 1993); Cecil V. Crabb, Jr. and Pat M. Holt, *Invitation to Struggle: Congress, the President, and Foreign Policy*, 3rd ed. (Washington, DC: Congressional Quarterly, Inc., 1989).

3. See Pat Holt, *The War Powers Resolution* (Washington, DC: American Enterprise Institute for Public Policy Research, 1978), pp. 1–9. For earlier attempts to assert Congressional war powers during the Cold War see Duane Tananbaum, "Not For the First Time: Antecedents and Origins of the War Powers Resolution, 1945–1970," in Michael Barnhart, *Congress and United States Foreign Policy* (Albany: State University of New York Press, 1987), pp. 39–54.

4. The one exception is President Jimmy Carter, whose administration argued that the Act was an understandable effort to check the president to prevent another Vietnam War, but at the same time did not necessarily agree that the Act was Constitutional. See Joseph R. Biden and John B. Ritch III, "The War Power at a Constitutional Impasse," *The Georgetown Law Journal*, vol. 77 (1988). Early in President Clinton's first term, in a written response to a letter from Representative Henry Gonzales (D-TX), Clinton also noted that war powers had been an area of some tension and that it was an issue deserving of some attention. Letter reprinted in *Congressional Record*, 19 April 1993, p. H1899. Clinton's Communications Director, George Stephanopoulos, also stated that the

administration agreed in principle with the Act, but did not go into specifics. See John M. Broder and Doyle McManus, "Clinton's Bosnia Plan Expected on Saturday," *Los Angeles Times*, 30 April 1993, p. A1. However, throughout his presidency Clinton has asserted nearly unilateral powers as president and thus has followed in the tradition of all presidents since 1973.

5. David Gray Adler, "The Constitution and Presidential WarMaking: The Enduring Debate," *Political Science Quarterly*, vol. 103, no. 1 (1988): 1–36; Charles A. Lofgren, "War-Making Under the Constitution: The Original Understanding," *Yale Law Journal*, vol. 81 (1972).

6. James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: W. W. Norton & Company, 1987): p. 476.

7. Jacob K. Javits, "The Debate Over the War Powers Resolution," in Michael Barnhart, ed., *Congress and United States Foreign Policy* (Albany: State University of New York Press, 1987): 55–59.

8. Public Law 93-148 (7 November 1973).

9. *Ibid.*

10. *Ibid.*

11. Lillian Craig Harris, *Libya: Qadhafi's Revolution and the Modern State* (Boulder, CO: Westview Press, 1986); David Blundy and Andrew Lycett, *Qaddafi and the Libya Revolution* (Boston: Little, Brown and Company, 1987).

12. Don Oberdorfer, "U.S., Libya Near State of Undeclared War," *Washington Post*, 6 April 1986, p. A35; Associated Press, "U.S., Libya have been at odds since Khadafy came to power," *San Diego Union-Tribune*, 25 March 1986, p. A8.

13. *Congressional Quarterly Almanac* (Washington, DC, 1986): 199; Pat Towell, "After Raid on Libya, New Questions on Hill," *Congressional Quarterly Weekly*, 19 April 1986, p. 838. See also Associated Press, "Qaddafi's Wife is Angry," *New York Times*, 22 April 1986, p. A8. For doubts on Qaddafi's claims regarding the death of the adopted daughter see Bob Woodward, "Libyans Show Bombed Naval School," *Washington Post*, 21 April 1986, p. A1.

14. "Reagan, Officials' Statements on Libya," *Congressional Quarterly Weekly*, 19 April 1986, p. 881.

15. Ronald Reagan, "Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate of the United States on the United States Air Strike Against Libya," *Public Papers of the Presidents*, 16 April 1986, p. 478.

16. James Reston, "Leave it to the People," *New York Times*, 20 April 1986, p. 25; Tom Wicker, "After the Raids," *New York Times*, 18 April 1986, p. A35.

17. Pat Towell, "After Raid on Libya, New Questions on Hill," *Congressional Quarterly Weekly*, 19 April 1986, p. 839.

18. *Congressional Record*, 8 May 1986, pp. 9968–9971.

19. See John Felton, "In Wake of Libya, Skirmishing Over War Powers," *Congressional Quarterly Weekly*, 10 May 1986, pp. 1022–1023.

20. *Congressional Record*, 17 April 1986, pp. 7894–7897.

21. U.S. House of Representatives, Subcommittee on Arms Control, International Security and Science, "War Powers, Libya, and State-Sponsored Terrorism," 29 April, 1 and 15 May, 1986, pp. 12–32.

22. Vernon Lobe, "A Global Pan-Islamic Network; Terrorism Entrepreneur Unifies Groups Financially, Politically," *Washington Post*, 23 August 1998, p. A1; U.S. Department of State, "Fact Sheet: Usama bin Laden," (21 August 1998), released by the Coordinator for Counterterrorism; *Intelligence Newsletter*, "Bin Laden Acts after Treasurer's Defection," 19 March 1998 at Lexis-Nexis, Middle East news file.

23. *Ibid.* Also see Magnus Ranstorp, "Interpreting the Broader Context and Meaning of Bin-Laden's *Fatwa*," in *Studies in Conflict and Terrorism*, vol. 21 (1998): 321–330 for a reprint of the text and analysis of Bin Laden.

24. Bill Clinton, "Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan," *Public Papers of the President*, 20 August 1998, p. 1643. Many of these

- arguments were later repeated on his weekly radio address two days later. See Bill Clinton, "The President's Radio Address," *Public Papers of the President*, 22 August 1998, p. 1651.
25. Bill Clinton, "Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan," *Public Papers of the Presidents*, 21 August 1998, pp. 1650–1651.
26. See, for example, Bill Clinton, "Letter to Congressional Leaders on the Strike on Iraqi Intelligence Headquarters," *Public Papers of the Presidents*, 28 June 1993, p. 1183.
27. Chuck McCutcheon, "Lawmakers Back Missile Strikes despite a Bit of GOP Skepticism," *Congressional Quarterly Weekly*, 22 August 1998, pp. 2289–2290.
28. Both quotes can be found at *Ibid.*, p. 2289.
29. Guy Gugliotta and Juliet Eilperin, "Tough Response Appeals to Critics of President," *Washington Post*, 21 August 1998, p. A17. For more on Galen's relationship to Gingrich see Michael Kranish, "Biggest Battle Could Lie Ahead," *Boston Globe*, 18 August 1998, p. A1.
30. For Dicks's quote see Wendy Koch and Jessica Lee, "Support on Hill Mostly Solid," *USA Today*, 21 August 1998, p. 6A. See also Gugliotta and Eilperin, *supra* note 29.
31. Douglas Turner, "Credibility of President is in Crisis, Polls Show," *Buffalo News*, 19 August 1998, p. 1A.
32. John Aloysius Farrell and John W. Mashek, "Clinton Reaping Political Gain From Raid," *Boston Globe*, 29 June 1993, p. 1
33. Congress frequently voices its rhetorical differences with the president, which often quickly subside once the American public rallies around the president. For more specifics on Somalia see Pat Towell, "Behind Solid Vote on Somalia: A hollow victory for Clinton," *Congressional Quarterly Weekly*, 2 October 1993; On Haiti, see Carroll J. Doherty, "Congress, After Sharp Debate, Gives Clinton a Free Hand," *Congressional Quarterly Weekly*, 8 October 1994; On Bosnia, see Hendrickson, *supra* note 2.
34. For a similar interpretation of the requirements of "consultation" and terrorists, see John F. Seiberling's (D-OH) remarks in U.S. House of Representatives, Subcommittee on Arms Control, International Security and Science, "War Powers, Libya, and State-Sponsored Terrorism," 29 April, 1 and 15 May 1986, p. 288.
35. John F. Guilmartin, Jr., *A Very Short War; The Mayaguez and the Battle of Koh Tang* (College Station: Texas A & M University Press, 1995); Duane Tanenbaum, "Gerald Ford and the War Powers Resolution," in Bernard J. Firestone and Alexej Ugrinsky, eds., *Gerald R. Ford and the Politics of Post-Watergate America* Vol. 2 (Westport, CT: Greenwood Press, 1993).
36. See Thomas G. Paterson, "Congress, the CIA and Covert Actions," in Michael Barnhart, *Congress and United States Foreign Policy* (Albany: State University of New York Press, 1987), p. 165.
37. Biden's interest in war powers has long been established. For example, see Biden and Ritch III, *supra* note 4 and Biden's effort to reassert Congress's war powers in the *Congressional Record*, 30 July 1998, p. S9444. For Feingold's interest, see Russ Feingold, "The Role of Congress in Deploying U.S. Troops Abroad," *The Brown Journal of International Affairs*, vol. 3 (Winter/Spring, 1996).
38. Bill Clinton, *Public Papers of the Presidents*, 17 August 1998, p. 1638.
39. See Turner, *supra* note 31; Mark Suzman, "Lewinsky called back to appear before grand jury," *Financial News*, 19 August 1998, p. 1.
40. Clyde Wilcox, *The Latest American Revolution?* (New York: St. Martins, 1995).
41. See the *Congressional Record*, 24 September 1990, pp. 25299–25300.
42. See, for example, Cohen's remark on 13 June 1998 on the United States's authority to use force against the Serbs for their attacks on Kosovars in Susan M. Shafer, "Cohen: NATO doesn't need UN permission for Kosovo action," *Associated Press*, 13 June 1998, Lexis-Nexis, general news file.
43. Ryan C. Hendrickson, "Clinton's Legal Dominion: War Powers in the Second Term," *National Security Studies Quarterly*, vol. V (Winter, 1999): 49–64.

44. See Brian Atwood's remarks in U.S. House of Representatives, Subcommittee on Arms Control, International Security and Science, "War Powers, Libya, and State-Sponsored Terrorism," 29 April, 1 and 15 May 1986, p. 90.

45. There have been some journalistic accounts that have begun to question the evidence cited by the Clinton administration. See Tim Weiner, "U.S. Hard Put to Find Proof Bin Laden Directed Attacks," *New York Times*, 13 April 1999, p. A1. However, these efforts have drawn minimal attention from Congress. For one exception, see *Congressional Record*, 23 September 1998, p. H8508.

46. For an excellent biographical account of Clinton see David Maraniss, *First in His Class* (New York: Touchstone Books, 1996).

47. John T. Rourke, Ralph Carter, and Mark A. Boyer, *Making American Foreign Policy* (Madison, WI: Brown and Benchmark, 1996), p. 193.

48. Kathy Kiely and Richard Sisk, "Prez Goes After Terror Assets," *Daily News*, 23 August 1998, p. 3. See also Brian McGrory, "US calls terrorists' losses significant," *Boston Globe*, 22 August 1998, p. A1.