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EXECUTIVE POWER IN THE OBAMA ADMINISTRATION AND THE
DECISION TO SEEK CONGRESSIONAL AUTHORIZATION FOR A
MILITARY ATTACK AGAINST SYRIA:
IMPLICATIONS FOR THEORIES OF UNILATERAL ACTION

Kenneth R. Mayer*

INTRODUCTION

The primary axiom of the unilateral-powers literature is that the institutional setting and political incentives that confront presidents push them to seek maximum discretion over policy. The straightforward implication is that presidents will seek control (Terry Moe calls it autonomy¹)—always contentious given the competitive political authority at the heart of separation of powers, but necessary to them given their interests and position in the political system.² Empirically, presidents are expected to (and do) act unilaterally, moving first to put their stamp on policy and process, shape institutional structures, and alter the status quo to shift government outputs toward their preferred position. A corollary is that presidents will not voluntarily surrender the discretion that their institutional position provides and their political interest demands, because doing so leaves their fate in the hands of other actors with very different goals and interests. Unilateral action can increase governability, as the President retains the capacity to function even in the face of gridlock or partisan opposition.³

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¹ Terry M. Moe, *Presidents, Institutions, and Theory*, in RESEARCHING THE PRESIDENCY: VITAL QUESTIONS, NEW APPROACHES 337, 364–65 (George C. Edwards III et al. eds., 1993).

² See *id.*; Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1, 11–12 (Spring 1994). See also generally WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* (2003) (arguing that presidents regularly set public policies over vocal objections by Congress, interest groups, and the bureaucracy); KENNETH R. MAYER, *WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER* (2001) (analyzing the pattern of presidents' use of executive orders and describing an office much more powerful and active than the one depicted in the bulk of the political-science literature). This notion finds analogues in other presidency literatures, such as Stephen Skowronek's argument that the presidency is a uniquely "*order-shattering* institution in that it prompts each incumbent to take charge of the independent powers of his office and to exercise them in his own right." STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 20 (6th prtg. 2003) (emphasis in original).

³ Norman Ornstein makes this argument in the context of recess appointments. See Norman J. Ornstein, *Disarming the White House*, N.Y. TIMES, Jan. 21, 2014, http://www.nytimes.com/2014/01/22/opinion/disarming-the-white-house.html?_r=0.

President Barack Obama reflected this pattern, to the consternation of many of his supporters. Although he explicitly and repeatedly promised to reverse many Bush administration policies and practices and rejected his predecessor's view of executive power, he actually made few dramatic retrenchments and even went further in some areas. The prison at Guantanamo Bay remains open, and the President has all but given up on his promise to close it. He restarted the military commission process to adjudicate cases against detainees charged with terror offenses,⁴ and he continued the policy of extraordinary rendition.⁵ His administration invoked the state-secrets doctrine to head off litigation, and it claimed executive privilege to keep information from Congress.⁶ His Justice Department has aggressively investigated leaks of classified information and initiated more prosecutions under the Espionage Act (eight) than all previous administrations combined (three).⁷ On two occasions, the Office of Legal Counsel advised the President that statutory restrictions in appropriations acts were unconstitutional and could be ignored.⁸ The frequency of drone attacks has increased dramatically, and President Obama claims the authority to order the killing of American citizens who engage in terror activities abroad, without any due process protections or independent checks.⁹ He ordered military action in

⁴ Jordan J. Paust, *Still Unlawful: The Obama Military Commissions, Supreme Court Holdings, and Deviant Dicta in the D.C. Circuit*, 45 CORNELL INT'L L.J. 367, 367–68 (2013).

⁵ LOUIS FISHER, *PRESIDENTIAL WAR POWER* 251 (3d ed. 2013); Michael J. Glennon, *National Security and Double Government*, 5 HARV. NAT'L SEC. J. 1, 2 (2014).

⁶ Louis Fisher, *The Law: Obama's Executive Privilege and Holder's Contempt: "Operation Fast and Furious"*, 43 PRESIDENTIAL STUD. Q. 167, 179–80 (2013).

⁷ Glennon, *supra* note 5, at 7; David McCraw & Stephen Gikow, *The End to an Unspoken Bargain? National Security Leaks in a Post-Pentagon Papers World*, 48 HARV. C.R.-C.L. L. REV. 473, 492 (2013).

⁸ Both issues involved language that prohibited the executive branch from funding certain diplomatic activities. These were a 2009 ban on paying expenses for a U.S. delegation to any United Nations body chaired by a country that the Secretary of State had designated as a sponsor of international terrorism and a 2011 ban prohibiting the White House Office of Science and Technology Policy from entering into any bilateral agreement with China or Chinese companies. *See generally* Memorandum from Virginia A. Seitz, Assistant Att'y Gen., Office of Legal Counsel, on the Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(A) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (Sept. 19, 2011), *available at* <http://www.justice.gov/olc/opiniondocs/conduct-diplomacy.pdf>; Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, on the Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act (June 1, 2009), *available at* <http://www.justice.gov/olc/opiniondocs/section7054.pdf>. The Office of Legal Counsel concluded that these activities fell within the President's exclusive authority to conduct diplomatic relations, rendering the statutory language unconstitutional. *Id.*

⁹ Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 8, 2011, <http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all>. NBC News obtained a "White Paper,"

Libya without any congressional approval, maintaining that the operation did not constitute a “war” that required a congressional declaration or fell within the meaning of the War Powers Act.¹⁰ The President has “continued, and in some ways, expanded, Bush era surveillance policies”¹¹ and has embraced weak reforms only after the leaks by Edward Snowden revealed a monumental electronic surveillance apparatus that included monitoring of allied leaders and collecting data on Americans’ phone calls.¹² Compared to President George W. Bush, “in several fundamental respects we have experienced wider assertions of unconstitutional executive authority under President Obama.”¹³

Domestically, President Obama revised immigration policy when it became clear that Congress would not act, suspending prosecutions for many illegal immigrants in what became known as the “mini-DREAM Act”;¹⁴ declined to

which it claimed was based on a classified memo that outlined the basic argument for the U.S. government’s ability to kill American citizens it believes to be an “associated force.” See Michael Isikoff, *Justice Department Memo Reveals Legal Case for Drone Strikes on Americans*, NBC NEWS (Feb. 4, 2013, 5:57 PM), http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans. According to *The New York Times*, the leaked paper “closely tracks the rationale in [the classified] document.” Charlie Savage & Scott Shane, *Memo Cites Legal Basis for Killing U.S. Citizens in Al Qaeda*, N.Y. TIMES, Feb. 5, 2013, <http://www.nytimes.com/2013/02/05/us/politics/us-memo-details-views-on-killing-citizens-in-al-qaeda.html>.

¹⁰ See Memorandum from Caroline D. Krass, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, on the Authority to Use Military Force in Libya 7 (Apr. 1, 2011), available at <http://www.fas.org/irp/agency/doj/olc/libya.pdf>. Louis Fisher, a long-standing opponent of presidential uses of force absent congressional authorization, found the administration’s justifications “not only strained, but several cases incredulous.” Louis Fisher, *The Law: Military Operations in Libya: No War? No Hostilities?*, 42 PRESIDENTIAL STUD. Q. 176, 177 (2012). In ignoring the War Powers Resolution, Bruce Ackerman and Oona Hathaway write, President Obama had pushed beyond what President Clinton and President Bush had done: “Make no mistake: Obama is breaking new ground, moving decisively beyond his predecessors.” Bruce Ackerman & Oona Hathaway, *Death of the War Powers Act?*, WASH. POST, May 17, 2011, http://www.washingtonpost.com/opinions/death-of-the-war-powers-act/2011/05/17/AF3Jh35G_story.html.

¹¹ Glennon, *supra* note 5, at 6.

¹² See Barton Gellman, *Obama’s Restrictions on NSA Surveillance Rely on Narrow Definition of ‘Spying’*, WASH. POST, Jan. 17, 2014, http://www.washingtonpost.com/world/national-security/obamas-restrictions-on-nsa-surveillance-rely-on-narrow-definition-of-spying/2014/01/17/2478cc02-7fcb-11e3-93c1-0e888170b723_story.html; Alison Smale et. al, *Data Suggests Push to Spy on Merkel Dates to ’02*, N.Y. TIMES, Oct. 27, 2013, <http://www.nytimes.com/2013/10/28/world/europe/data-suggests-push-to-spy-on-merkel-dates-to-02.html>.

¹³ Michael D. Ramsey, *Meet the New Boss: Continuity in Presidential War Powers?*, 35 HARVARD J.L. & PUB. POL’Y 863, 863 (2012).

¹⁴ Robert Delahunty and John Yoo argue that President Obama wrote into law what Congress had declined to enact via an unconstitutional abdication of the President’s “take care” obligations. Robert J. Delahunty & John C. Yoo, *Dream On: The Obama*

defend the Defense of Marriage Act against legal challenges;¹⁵ used recess appointments when the Senate would not confirm his nominations;¹⁶ centralized policy making within the White House, relying on policy “czars” for advice and coordination and hinting that he would ignore appropriations language that limited his ability to pay them;¹⁷ relied on signing statements just as earlier presidents had;¹⁸ and used the regulatory process to limit greenhouse gas emissions to address climate change in response to Congress’s failure to enact clean-energy legislation.¹⁹

In short, President Obama has taken a broad view of executive authority, acting to preserve and extend his autonomy in both domestic and foreign policy and at times pushing beyond what President Bush was willing to do. In acting unilaterally, he articulated the same justifications as his predecessors did: compensating for congressional opposition and dysfunction, protecting national security and the national interest, interpreting statutory and constitutional language in a way that preserves presidential flexibility, and protecting the institution of the presidency. He behaved, in other words, just as theory predicted, even when his actions differed sharply from what he said as a candidate about what he would do as President. His presidency validates the empirical implications of the unilateral-action model.

Placed against this pattern, President Obama’s decision to ask for congressional approval of a military attack against Syria in August 2013, after the regime used chemical weapons against civilians, stands out as a clear outlier. Here, President Obama departed from what unilateral-action theories predicted, from his pattern of showing no reluctance to do it alone in other contexts, and from the longer historical pattern of presidents actively working to expand the reach of their authority and their range of discretionary action. It is thus an anomaly that invites analysis and explanation, and it presents an opportunity to assess the state of unilateral-action theory.

There are several elements to consider. The first is whether the President’s action (or, more properly, inaction) poses a challenge to the theory itself. If a President departs from the underlying expectations in such a prominent way, is it merely an aberration, or is it an indication that the theory is wrong? The theoretical

Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause, 91 TEX. L. REV. 781, 835–51 (2013).

¹⁵ Kathleen Tipler, *Obama Administration’s Non Defense of DOMA and Executive Duty to Represent*, 73 MD. L. REV. 287, 291–99 (2013).

¹⁶ Peter E. Quint, *Implications of the President’s Appointment Power*, 73 MD. L. REV. 85, 90–99 (2013).

¹⁷ Mitchell A. Sollenberger & Mark J. Rozell, *The Law: Prerogative Power and Executive Branch Czars: President Obama’s Signing Statement*, 41 PRESIDENTIAL STUD. Q. 819, 819–20, 831–32 (2011).

¹⁸ See Christopher S. Kelley, *Rhetoric and Reality? Unilateralism and the Obama Administration*, 93 SOC. SCI. Q. 1146, 1149–57 (2012).

¹⁹ Jody Freeman, *Climate and Energy Policy in the Obama Administration*, 30 PACE ENVTL. L. REV. 375, 376, 378–85 (2012).

predictions are surely not that a President will never forego unilateral action when faced with a decision point (indeed, there are many examples of presidents doing just that). But such a conspicuous deviation, where the President's ability to act was unchallengeable, needs exploration, and fitting it into the existing framework requires more than the facile reasoning that the President must have felt that the costs of action were greater than the costs of inaction, or vice versa.

Alternative explanations might be that it was a "mistake" that resulted from a flawed assessment of what the situation required or that it was the result of previous poor decisions that put the President in an impossible situation. Here, the insight of political scientist Richard Neustadt's view of the presidency is instructive. In *Presidential Power*, Neustadt argued that presidents lack the authority needed to carry out the job. As a consequence, presidential power comes not from the ability to command but instead is "the power to persuade."²⁰ Scholarly attention to unilateral powers challenged this view, providing a theoretical model and empirical evidence showing that presidents can frequently get their way via unilateral action.²¹

Neustadt's view and the unilateral approach are usually seen as antagonists, but when applied to this event, both converge on the same conclusion. Neustadt emphasized the importance of "power stakes" to presidents, which he defined as the understanding of the effects that a current decision can have on *future* events and ability to act. An effective President "guards his power prospects in the course of making choices"²² and understands that "adequate or not, a President's own choices are the only means in his own hands of guarding his own prospects for effective influence."²³ Neustadt was writing about persuasion and influence, not about formal authority and institutional process, but the argument is almost identical to unilateral theory's emphasis on the President's need to preserve discretion and flexibility.

Finally, I ask what this means for the argument that presidential authority expands but does not contract, with each successive increase becoming a new point of departure for future expansions (i.e., the "ratchet effect").²⁴ President Obama provides some support for both sides in this debate. On the one hand, he has been at least as aggressive as President Bush in moving unilaterally in most areas and thus validates the ratchet metaphor. But on the other hand, in explicitly declining to act unilaterally, President Obama also confirms that expanding presidential

²⁰ RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 11 (1990).

²¹ See HOWELL, *supra* note 2, at xiv–xvi; MAYER, *supra* note 2, at 16–22; Kenneth R. Mayer, *Going Alone: The Presidential Power of Unilateral Action*, in *THE OXFORD HANDBOOK OF THE AMERICAN PRESIDENCY* 427, 427–50 (George C. Edwards III & William G. Howell eds., 2009); Moe *supra* note 1, at 364–65; Moe & Wilson *supra* note 2, at 3.

²² NEUSTADT, *supra* note 20, at 47.

²³ *Id.* at 49.

²⁴ ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 131–32 (2007); Mayer, *supra* note 21, at 443.

authority is not the only possibility. Explicitly backing away from unilateral action might *appear* to roll back presidential power by setting a new precedent in the opposite direction, which might mean that future presidents may have to justify their own expansive readings and explain why they are ignoring this earlier precedent.

Placing President Obama's use-of-force decision within the unilateral-action framework leads to two conclusions. The first is that President Obama's decision to go to Congress regarding Syria was a mistake, not because it was constitutionally unnecessary, but because it will constrain his discretion and make it much more difficult to act credibly in future contingencies. The second is that it is not likely to have any consequences for the contemporary practice of presidential use of force. Instead, it will serve as a cautionary tale for future presidents, who will dismiss President Obama's decision as an aberration not applicable to what they are facing.

I. OBAMA AND SYRIA

Since the beginning of unrest and civil war in Syria in 2011—which has killed over one hundred thousand people and displaced millions of desperate refugees²⁵—President Obama rejected direct U.S. military involvement in the conflict. But at an August 2012 press conference, the President said that the preparation or use of chemical weapons by the Syrian government was a “red line” that would “change [the] calculus” for military action.²⁶ He would come to regret those words. President Obama had authorized limited military aid to rebel forces in June 2013 in the aftermath of reports that Syrian forces had used chemical weapons in some small-scale attacks; it is unclear whether any arms had actually been shipped, in part because of worries that lethal aid could fall into the hands of Jihadi groups affiliated with the resistance.²⁷

On August 21, 2013, the Syrian military used chemical weapons in an attack that killed nearly fifteen hundred civilians, including nearly four hundred children.²⁸ Shortly thereafter, the White House signaled that President Obama was ready to order a military strike to punish Syrian President Bashar al-Assad and

²⁵ See Alan Cowell, *War Deaths in Syria Said to Top 100,000*, N.Y. TIMES, June 26, 2013, <http://www.nytimes.com/2013/06/27/world/middleeast/syria.html>.

²⁶ President Barack Obama, Remarks by the President to the White House Press Corps (Aug. 20, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps>.

²⁷ JEREMY M. SHARP & CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., RL 33487, ARMED CONFLICTS IN SYRIA: U.S. AND INTERNATIONAL RESPONSE 8–10 (2013).

²⁸ Karen DeYoung & Anne Gearan, *U.S. Officials' Strong Words on Syria Signal That Attack Is Near*, WASH. POST, Aug. 30, 2013, http://www.washingtonpost.com/world/national-security/kerry-lays-out-evidence-of-chemical-weapons-attack-by-syria/2013/08/30/d1c19d58-118f-11e3-bdf6-e4fc677d94a1_story.html.

degrade his capability to launch further chemical attacks.²⁹ Administration officials, including Secretary of State John Kerry, justified the impending military action as moral, important to U.S. strategic interests, and, in the secretary's words, "directly related to our credibility and whether countries still believe the United States when it says something."³⁰

But several days later, President Obama announced that he would seek congressional approval for an attack, even though he had "decided that the United States should take military action against Syrian regime targets" and believed that he had "the authority to carry out this military action without specific congressional authorization."³¹ This step was unprecedented (at least in the modern era) as there are no other instances of a President asking for advance congressional approval for an attack of this scale. While presidents have sought congressional authorization prior to ordering limited military operations, most of the cases were from the eighteenth and nineteenth centuries and involved sending personnel into combat or prolonged defensive operations.³² More recent examples involved peacekeeping operations (Lebanon in 1983) or broader Area Resolutions authorizing the President to use the military in Asia (1955) and the Middle East (1957) if he deemed it necessary. President Bill Clinton asked for congressional support for an air campaign in Kosovo in 1999, but he was clear that he would not base his ultimate decision on congressional approval.

There is no doubt that under long-standing practice and formal legal opinions, President Obama had the authority to order a military attack relying solely on his commander-in-chief power. Even if an attack on Syrian chemical weapons capabilities presented a unique set of circumstances—no direct threat to Americans, no United Nations approval, and no support from any allies—that

²⁹ See Mark Landler et al., *Obama Set for Limited Strike on Syria as British Vote No*, N.Y. TIMES, Aug. 29, 2013, <http://www.nytimes.com/2013/08/30/us/politics/obama-syria.html>; Charlie Savage, *Obama Tests Limits of Power in Syrian Conflict*, N.Y. TIMES, Sept. 8, 2013, <http://www.nytimes.com/2013/09/09/world/middleeast/obama-tests-limits-of-power-in-syrian-conflict.html?pagewanted=all>; Thom Shanker et al., *Obama Weighs "Limited" Strikes Against Syrian Forces*, N.Y. TIMES, Aug. 27, 2013, <http://www.nytimes.com/2013/08/28/world/middleeast/obama-syria-strike.html>.

³⁰ DeYoung & Gearan, *supra* note 28.

³¹ President Barack Obama, Statement by the President on Syria (Aug. 31, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria>.

³² Jennifer Elsea and Richard Grimmert identify five cases prior to 1900: two in 1798 when Congress authorized the use of the Navy to protect American vessels engaged in civil shipping from seizure by France; one in 1802 authorizing the Navy to attack and seize Tripolitan ships; one in 1815 authorizing action to protect American shipping from Algerian attacks; and one in 1819 for protecting American shipping from piracy. JENNIFER K. ELSEA & RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL 31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 88–94 (2011).

would not change the prevailing legal understandings of what the President could do.³³

The President's decision to go to Congress thus represented an anomaly in the patterns of unilateral power that was inconsistent with both President Obama's overall reliance on executive authority and his previous uses of military force. President Obama had shown less concern with strict constitutional process in ordering attacks in Libya without advance congressional approval. In that instance, the Office of Legal Counsel advised him that "[t]he President had the constitutional authority to direct the use of military force in Libya because he could reasonably determine that such use of force was in the national interest. . . . [P]rior congressional approval was not constitutionally required to use military force in the limited operations under consideration."³⁴ The administration also argued the operations did not constitute "hostilities" contemplated in the War Powers Act because they "do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors."³⁵

Unilateral theory observes that presidents surrender discretion at their own peril, and what followed President Obama's announcement reinforced that danger. Legislators immediately moved to put conditions on any use of force as they added their own caveats and constraints. Even if the President fully expected to obtain approval (a confidence that turned out to be wildly overestimated, as noted below), he could not have expected legislators to pass whatever he asked.

Despite reports that the contemplated attack would involve missiles fired from ships and aircraft well outside of Syrian borders, the President proposed an open-ended authorization to use military force to "prevent or deter the use or proliferation" of chemical weapons or to "protect the U.S. and its allies and partners against the threat posed by such weapons."³⁶ That language would not survive. After the Senate Foreign Relations Committee completed its deliberations,

³³ See Ian Hurd, *Bomb Syria, Even if It Is Illegal*, N.Y. TIMES, Aug. 27, 2013, http://www.nytimes.com/2013/08/28/opinion/bomb-syria-even-if-it-is-illegal.html?_r=0 (arguing that an attack would be illegal under international law—presumably whether Congress authorized it or not—but that the President should order it anyway).

³⁴ Memorandum from Caroline D. Krass, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, on the Authority to Use Military Force in Libya 1 (Apr. 1, 2011), available at <http://www.fas.org/irp/agency/doj/olc/libya.pdf>.

³⁵ Report from Joseph E. Macmanus, Acting Assistant Sec'y, Dep't of State and Elizabeth L. King, Assistant Sec'y, Dep't of Defense, to John A. Boehner, Speaker of the House of Representatives, on the U.S. Activities in Libya (June 15, 2011).

³⁶ Press Release, The White House, Office of the Press Sec'y, Draft Resolution of Use of U.S. Military in Syria, N.Y. TIMES, August 31, 2013, <http://www.nytimes.com/interactive/2013/09/01/world/middleeast/syria-resolution.html>.

the legislation it reported to the floor on a narrow 10–7 vote³⁷ imposed a “limited and specified” condition on the use of force, required a written presidential determination delivered in advance to Congress including a certification that the United States “has used all appropriate diplomatic and other peaceful means” to address the threat of chemical weapons in Syria, required ongoing reports, prohibited the use of American combat personnel inside the country, and set time limits.³⁸ A House version authorized only a single round of missile strikes, with time limits and a ban on troop deployments.³⁹ The administration opposed the ban on deployments—“boots on the ground”—because it would “take off the table an option that might or might not be available to a president of the United States to secure our country” in the event the President decided it was necessary.⁴⁰

The decision to go to Congress is even more perplexing given that all of the available evidence suggests that Obama would have lost, and lost badly, any congressional vote on military action. While the unofficial vote counts do not consider what might have happened once the White House began applying intense pressure, the numbers were overwhelmingly negative from the start. In early September, *The Washington Post* counted 263 House members as against or leaning against, and only 25 expressing public support.⁴¹ The count in the Senate was 23 in favor and 43 against or leaning against, with 34 undecided.⁴² A CNN tally was 25 yes votes and 179 no in the House with the remaining undecided or unknown.⁴³ A CBS count was 32 in support to 199 opposed in the House and 27 for to 33 opposed in the Senate.⁴⁴ These counts occurred after the House leadership had publicly expressed support for the authorization and after the Senate Foreign Relations Committee had reported its limited resolution to the floor. The President was losing by at least 6 to 1 (and by up to 10 to 1) in the House and nearly 2 to 1 in

³⁷ Authorization for the Use of Military Force Against the Government of Syria to Respond to the Use of Chemical Weapons, S.J. Res. 21, 113th Cong. (2013), available at <http://www.foreign.senate.gov/imo/media/doc/S.%20J.%20Res.%20211.pdf>.

³⁸ *Id.*

³⁹ Karen Tumulty, *Reps. Chris Van Hollen, Gerry Connolly Draft Narrow Authorization of Force in Syria*, WASH. POST, Sept. 3, 2013, http://www.washingtonpost.com/politics/van-hollen-connolly-draft-narrow-authorization-of-force-in-syria/2013/09/03/7c6c6b60-14c0-11e3-b182-1b3bb2eb474c_story.html.

⁴⁰ *Hearing on U.S. Military Action Against the Syrian Government Before the S. Comm. Foreign Relations*, 113th Cong. (2013) (statement of John Kerry, Sec’y of State), <http://www.foreign.senate.gov/imo/media/doc/S.%20J.%20Res.%20211.pdf>.

⁴¹ Aaron Blake, *Where the Votes Stand on Syria*, WASH. POST, Sept. 10, 2013, <http://www.washingtonpost.com/blogs/the-fix/wp/2013/09/02/where-the-votes-stand-on-syria/>.

⁴² *Id.*

⁴³ *U.S. House: How They’ll Vote on Syria Strike*, CNN POLITICS (Sept. 10, 2013, 4:00 PM), <http://www.cnn.com/interactive/2013/09/politics/syria-congress-vote-count/house.html>.

⁴⁴ Stephanie Condon, *Little Support for Syria Strike in Congress*, CBS News Estimate Shows, CBSNEWS.COM (Sept. 10, 2013, 5:37 PM), <http://www.cbsnews.com/news/little-support-for-syria-strike-in-congress-cbs-news-estimate-shows/>.

the Senate. This was shaping up to be an embarrassing public repudiation on a crucial national-security issue.

An unexpected set of events saved the President from defeat. At a joint press conference in London on September 9, 2013, with British Foreign Secretary William Hague, Secretary of State Kerry was asked if there was “anything at this point that [President Assad’s] government could do or offer that would stop an attack.”⁴⁵ Kerry answered almost off the cuff: “Sure. He could turn over every single bit of his chemical weapons to the international community in the next week. Turn it over, all of it, without delay, and allow a full and total accounting for that. But he isn’t about to do that, and it can’t be done, obviously.”⁴⁶ Almost immediately, both President Assad and Russian President Vladimir Putin agreed to do just that. The next day, in a nationally televised address that was originally intended to explain military action, President Obama announced that he would instead pursue a diplomatic solution.⁴⁷ Syria agreed to join the international treaty banning chemical weapons, and the United Nations Security Council unanimously approved a resolution requiring Syria to surrender its chemical weapons.⁴⁸ Had he not enjoyed this reprieve, President Obama would have been in the difficult position of appearing indecisive and lacking the support of his own party on a war-powers question.

Why would a President choose to handcuff himself, severely limit his flexibility in a core area of unilateral action, and invite what would have been a humiliating defeat? Taking the President at his word—that he believed he had the authority to order an attack but would be in a stronger political and strategic position with a congressional authorization—does not tell us why or how he could have miscalculated so badly in assessing the chances of actually obtaining that authorization or why he would choose to “transfer[] greater responsibility for U.S. foreign policy to a Congress that is more divided, more incapable of reasoned debate or action, and more dysfunctional than any in modern American history.”⁴⁹

As a pragmatic matter, the President may have wanted Congress to share the blame if the attack went badly or triggered wider U.S. involvement or a broader conflict, particularly given deepening public skepticism of interventionist foreign

⁴⁵ John Kerry, Sec’y of State, Remarks with United Kingdom Foreign Secretary Hague (Sept. 9, 2013), *available at* <http://www.state.gov/secretary/remarks/2013/09/213956.htm>.

⁴⁶ *Id.*

⁴⁷ Michael D. Shear, *Planned as Call to Act, Obama’s Speech Became Plea to Wait*, N.Y. TIMES, Sept. 11, 2013, http://www.nytimes.com/2013/09/12/world/obama-syria.html?pagewanted=1&_r=0.

⁴⁸ Colum Lynch & Anne Gearan, *U.N. Security Council Unanimously Passes Syria Chemical Weapons Resolution*, WASH. POST, Sept. 27, 2013, http://www.washingtonpost.com/world/national-security/un-approval-near-on-syrian-chemical-arms/2013/09/27/da007544-27aa-11e3-9372-92606241ae9c_story.html.

⁴⁹ David Rothkopf, *The Gamble: Five Big Consequences of the President’s Call to Let Congress Decide About America’s Syrian Intervention*, FOREIGN POLICY (Aug. 31, 2013), http://www.foreignpolicy.com/articles/2013/08/31/the_gamble.

policy. He may have been looking for a way not to attack and gone to Congress because he anticipated that they would say no. Some observers attribute President Obama's backtracking on Syria to a failure to obtain international cooperation for a military attack, or to British Prime Minister David Cameron's inability to obtain parliamentary approval for British involvement in the military response.⁵⁰ The decision may have resulted from deep divisions and uncertainty among President Obama's advisors about the consequences of an attack or from concern that unilateral action would complicate future congressional support for foreign policy issues, specifically on Iran.⁵¹ Perhaps President Obama felt the need to distinguish himself from President Bush and deflect criticism that he was unilaterally taking the country into another war. His earlier "red line" remark may have boxed him into a position in which his credibility was at stake.⁵² It is even possible—however unlikely it appears to be—that President Obama envisioned a diplomatic solution all along, threatening military action only to bring Syria and Russia to the bargaining table and going to Congress to buy time for his plan to work.⁵³

Even if President Obama was constitutionally correct in seeking congressional authorization, wanted to avoid a military attack altogether, or saw the potential of diplomacy from the beginning, he acted in a way that hurt his presidency.⁵⁴ The decisions appeared to be ad hoc, starting with the President's 2012 "red line" comment that surprised many of his advisors, "underscore[d] the improvisational nature of Mr. Obama's approach to one of the most vexing crises in the world,"⁵⁵

⁵⁰ David E. Sanger, *After British Vote, Unusual Isolation for U.S. on Syria*, N.Y. TIMES, Aug. 30, 2013, <http://www.nytimes.com/2013/08/31/world/after-british-vote-unusual-isolation-for-us-on-syria.html>.

⁵¹ Mark Mazzetti et al., *Obama's Uncertain Path Amid Syria Bloodshed*, N.Y. TIMES, Oct. 22, 2013, <http://www.nytimes.com/2013/10/23/world/middleeast/obamas-uncertain-path-amid-syria-bloodshed.html?pagewanted=all>.

⁵² Julian Pecquet & Ian Swanson, *Obama Boxed In on Syria*, THE HILL (Aug. 25, 2013, 10:00 PM), <http://thehill.com/blogs/global-affairs/middle-east-north-africa/318595-obama-in-a-corner-on-syria>.

⁵³ Mark Fitzpatrick, *Destroying Syria's Chemical Weapons*, 55 SURVIVAL: GLOBAL POL. & STRATEGY 107, 108 (2013) (claiming that Kerry's remark "did not come totally out of the thin air. Russia and the United States reportedly discussed the [disarmament] idea in advance.")

⁵⁴ Fisher insists that President Obama was correct in seeking congressional authorization, while David Cole has little patience with the argument that going to Congress was a mistake. Instead of an unconstitutional decision to use military force absent congressional authorization, President Obama "is now pursuing a path that accords with the rule of law, and may in fact be more effective at deterring further use of chemical weapons. Indeed, it may even prepare the way for a diplomatic strategy to end the underlying civil war." David Cole, *Clogging the War Machine*, N.Y. REV. OF BOOKS BLOG (Sept. 19, 2013, 9:10 AM), <http://www.nybooks.com/blogs/nyrblog/2013/sep/19/syria-clogging-war-machine/>.

⁵⁵ Peter Baker et al., *Off-the-Cuff Obama Line Put U.S. in Bind on Syria*, N.Y. TIMES, May 4, 2013, <http://www.nytimes.com/2013/05/05/world/middleeast/obamas-vow-on-chemical-weapons-puts-him-in-tough-spot.html?pagewanted=all&r=0>.

and forced the President's hand after the August chemical attack. The off-hand remark was a "terrible—and all too representative . . . blunder."⁵⁶ Inside the government, White House staffers were commenting (sometimes on the record) about foot-dragging, "navel gazing," and abrupt policy reversals on Syria.⁵⁷ President Obama's abrupt decision to go to Congress "baffled even his closest advisors"⁵⁸ and "overruled the advice of many of his aides who worried about [a congressional] defeat."⁵⁹

Ultimately, the President asked for the congressional backlash that undermined the credibility of the original threat to use force and any threats he might want to make in the future: "By giving Congress a vote, the President appears not only to have tied his own hands in carrying out his threat, but to have tipped off American rivals and partners that congressional support for new military actions (for which the President might also seek congressional authorization) is generally frail."⁶⁰ President Obama's advisors understood that Congress's response was a "potential turning point that could effectively define his foreign policy for his final three years in office."⁶¹

From the standpoint of both unilateral-action theory and Neustadt's framework of presidential power, it looks less like an act of seasoned statesmanship than a case where a President who was unsure what to do got very lucky. Machiavelli noted the importance of *fortuna* to leaders, but he also cautioned that it is a dangerous thing to rely on.⁶²

⁵⁶ John B. Judis, *Lessons From Obama's Almost-War*, NEW REPUBLIC, Oct. 7, 2013, at 33.

⁵⁷ Mazzetti et al., *supra* note 51.

⁵⁸ Scott Wilson, *Obama Demands Congress Clarify U.S. Military Intervention in Syria and Beyond*, WASH. POST, Sep. 6, 2013, http://www.washingtonpost.com/politics/obama-demands-clarify-us-military-intervention-in-syria-and-beyond/2013/09/06/3897e436-170a-11e3-be6e-dc6ae8a5b3a8_story.html.

⁵⁹ Peter Baker & Jonathan Weisman, *Obama Seeks Approval by Congress for Strike in Syria*, N.Y. TIMES, Aug. 31, 2013, http://www.nytimes.com/2013/09/01/world/middleeast/syria.html?_r=0; Gayle Tzemach Lemmon, *Inside Obama's Syria Deliberations: "The Promise of More Discussion"*, DEFENSE ONE (Sept. 18, 2013), <http://www.defenseone.com/management/2013/09/inside-obamas-syria-deliberations-promise-more-discussion/70510/> (stating that at least some key White House aides learned about it only when the President announced it publicly).

⁶⁰ Matthew C. Waxman, *Syria, Threats of Force, and Constitutional War Powers*, 123 YALE L.J. ONLINE 297, 308 (2013), <http://www.yalelawjournal.org/forum/syria-threats-of-force-and-constitutional-war-powers>.

⁶¹ Peter Baker, *White House Looks to Syria Vote as Rudder for Rest of Term*, N.Y. TIMES, Sept. 5, 2013, <http://www.nytimes.com/2013/09/06/world/europe/obama-arrives-in-russia-for-g20-summit.html?pagewanted=all>.

⁶² NICCOLÒ MACHIAVELLI, *THE PRINCE* 84–87 (Peter Bondanella trans., Oxford 2005).

II. IMPLICATIONS FOR UNILATERAL ACTION THEORIES

After a decade of tremendous growth in the literature on unilateral action, scholars have established the basic elements of how presidents have wielded their authority to accomplish governing and policy goals. This work has demonstrated that presidents rely on their unilateral authority to make and reshape policy, change institutional structures and procedures, and outmaneuver Congress in the competition over influence and control. The structures and unique incentives of the executive institution shaped presidential behavior, not the individual character of presidents as embodied in presidential style, character, skill, or temperament. As Moe put it, the best way to understand the presidency “is to stop thinking about presidents as people and start thinking about them *generically*: as faceless, nameless, institutional actors whose behavior is an institutional pattern.”⁶³ In unilateral-action models, it does not matter who occupies the Oval Office because presidential behavior is driven by predictable and understandable incentives that produce regularized behavior.

One of the first things new presidents confront is the knowledge that they can be held responsible for everything that happens in government. This is particularly important on national security and (since 9/11) counterterrorism issues. President Obama’s attitudes toward surveillance were different from those of candidate Obama: “Like other presidents before him, the idealistic candidate . . . found that the tricky trade-offs of national security issues look different to the person charged with using that power to ensure public safety.”⁶⁴

This behavior has deep historical roots. Shortly after the 1800 election, Alexander Hamilton predicted that President Thomas Jefferson would be more supportive of a strong executive than his campaign rhetoric suggested. As described by Rob Chernow, “whenever it suited his views, Jefferson had supported executive power, as if he knew he would someday inherit the presidency and did not wish to weaken the office.”⁶⁵ William Howard Taft took a more expansive view of executive power as President than he did in his later publication, *Our Chief Magistrate and His Powers*.⁶⁶ In noting the various authorities on different sides of debates over presidential power, Justice Jackson observed that “it even seems that President Taft cancels out Professor Taft.”⁶⁷

⁶³ Moe, *supra* note 1, at 379.

⁶⁴ Peter Baker, *Obama’s Path from Critic to Overseer of Spying*, N.Y. TIMES, Jan. 15, 2014, <http://www.nytimes.com/2014/01/16/us/obamas-path-from-critic-to-defender-of-spying.html>.

⁶⁵ RON CHERNOW, ALEXANDER HAMILTON 634 (2004).

⁶⁶ WILLIAM HOWARD TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 139–40 (1916).

⁶⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (Jackson, J., concurring). The pattern extends as well to those who advise presidents. As a law professor, Harold Koh criticized “the false promise of a foreign policymaking system overdominated by the executive,” Harold Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lesson of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1319 (1988), and

This perspective explains why President Obama took a broad view of executive power once in office, but it offers less insight into what was different about the Syria case. Here, the appropriate question is asking why, generally, presidents might choose to be cautious in their exercise of unilateral powers.

Within the literature, there are several outstanding puzzles that are not yet resolved. Among the most important is the inverse of the question of why presidents rely on unilateral action: we know something about the circumstances in which presidents are likely to rely on it, but somewhat less about the circumstances in which presidents will *decline* to push the envelope. This is a difficult phenomenon to study, because it is by definition difficult to observe things that do not happen. We know when a President acts unilaterally because there is a clear indicator of that action—an executive order, proclamation, directive, or some other instrument.⁶⁸ A decision to *not* act is harder to interpret, because there will often be nothing to see. Sometimes this process can be observed, particularly in those cases where there is an ongoing and public discussion of the President's role in addressing an issue that is clearly within his discretionary authority.⁶⁹ But Syria constitutes a specific instance in which a President publicly considered and then just as publicly rejected an option to act unilaterally, therefore presenting an opportunity to investigate it.

One demonstration of the problem is the effect of divided government on the frequency of unilateral action. The logic of unilateral action predicts that presidents will fall back on their unilateral power when other paths, especially legislative ones, are blocked. Consequently, the expectation is that unilateral actions will increase under divided government, when the President will have difficulty assembling legislative majorities. Presidents and their staffs, as well as reporters,

urged a broader role for Congress and the judiciary, especially for war powers. As State Department legal advisor during the first Obama administration, however, he took a decidedly more expansive view of presidential authority, arguing that no congressional declaration of war was necessary for the Libya operations because the President “could reasonably determine that U.S. operations in Libya would serve important national interests.” *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 17 (2011) (statement of Harold Koh, Legal Advisor, U.S. Dep’t of State).

⁶⁸ An obvious exception to this would be a classified action, such as President George W. Bush’s secret 2001 order authorizing the National Security Agency to conduct warrantless electronic surveillance. But some of these actions, such as the NSA surveillance program, are eventually revealed through disclosure or leaks. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, <http://www.nytimes.com/2005/12/16program.htm>.

⁶⁹ An example is the 1993 controversy over President Clinton’s campaign promise to issue an executive order ending the ban on gay military personnel. Faced with overwhelming opposition within Congress and among military leaders, the President had no choice but to back down. Instead, President Clinton proposed “Don’t Ask, Don’t Tell” as a compromise, which Congress subsequently enacted in the 1994 Department of Defense Authorization Act. Jeffrey T. Sporer, *The Pennsylvania Avenue Tug-of-War: The President Versus Congress Over the Ban on Homosexuals in the Military*, 45 WASH. U. J. URB. & CONTEMP. L. 175, 175–76 (1994).

behave as if they *believe* this to be true. After the Republican sweep in the 1994 midterm elections, in which the Republicans captured majorities for the first time in forty years, White House officials forecasted more “regulations, executive orders, and other presidential tools to work around Capitol Hill, much as Ronald Reagan and George Bush did when the House and the Senate were in Democratic hands.”⁷⁰ During the Clinton impeachment, advisor Paul Begala foresaw increased reliance on executive orders and other unilateral tools. In an oft-repeated (and reviled) quote, he summed up the thinking: “Stroke of the pen . . . Law of the land. Kind of cool.”⁷¹ President Obama said much the same thing in 2011, telling aides that “the administration needed to more aggressively use executive power to govern in the face of Congressional obstructionism.”⁷² In 2014, aides promised a renewed focus on “an executive style of governing that aims to sidestep Congress more often.”⁷³

The actual empirical practice, however, is much murkier. While we can easily enough point to specific examples that fit the presumptive pattern, the full range of data suggests a far more nuanced picture. Presidents rely *less* on unilateral action when they face divided government, no matter what their staffs say they will do, in part because of fear of a congressional backlash. Investigations, hearings, and the prospect, however small, of Congress overturning a unilateral act can raise the political cost of presidential adventurism.

William Howell and Jon Pevehouse have found strong evidence that presidents are less likely to use military force when they face divided government, concluding that Congress retains a substantial role in limiting presidential discretion.⁷⁴ Their findings are based on a database of possible opportunities for presidents to take this step.⁷⁵ They have analyzed patterns of how presidents use force (or do not) to identify the causal factors that shape those decisions.⁷⁶ They found that presidents are more likely to be cautious in ordering the use of force when they face substantial and organized congressional opposition, as measured by the number of seats controlled by the opposition party and measures of unity.⁷⁷

⁷⁰ Douglas Jehl, *The 1994 Elections: States the President; One Hand Tied, Clinton Offers the Other*, N.Y. TIMES, Nov. 10, 1994, <http://www.nytimes.com/1994/11/10/us/the-1994-elections-states-the-president-one-hand-tied-clinton-offers-the-other.html>.

⁷¹ James Bennett, *True to Form, Clinton Shifts Energies Back to U.S. Focus*, N.Y. TIMES, July 5, 1998, <http://www.nytimes.com/1998/07/05/us/true-to-form-clinton-shifts-energies-back-to-us-focus.html>.

⁷² Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES, Apr. 22, 2012, <http://www.nytimes.com/2014/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html>.

⁷³ Scott Wilson, *Obama’s Rough 2013 Prompts a New Blueprint*, WASH. POST, Jan. 25, 2014, http://www.washingtonpost.com/politics/obamas-rough-2013-prompts-a-new-blueprint/2014/01/25/99cddd0c-846d-11e3-8099-9181471f7aaf_story.html.

⁷⁴ WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWER* 92–99 (2007).

⁷⁵ *Id.* at 78–81.

⁷⁶ *Id.*

⁷⁷ *Id.* at 92–99.

Presidents have frequently declined opportunities to use force, they found, with outcomes shaped by the possibility of politically costly opposition.⁷⁸

Anticipating the reaction to a potential unilateral move is thus consistent with underlying theory, as is deciding not to pursue a unilateral strategy when the political costs are too high. This anticipation is, in Howell's view, central to any useful model of unilateral action:

[W]henver presidents contemplate a unilateral action, they anticipate how Congress and the judiciary will respond. The limits to unilateral powers are critically defined by the capacity, and willingness, of Congress and the judiciary to overturn the president. Rarely will presidents issue a unilateral directive when they know that other branches of government will subsequently reverse it.⁷⁹

This serves as a useful general explanation. However, applying it to any specific case requires caution, as the argument very easily becomes tautological: any presidential choice to not to push the boundaries of executive power can then, by definition, be attributed to a fear of a backlash or unacceptable political costs.

It is reasonable to think that Obama's decision to defer to Congress was a function of what the congressional response might have been on other issues if he opted to go alone—the budget, Iran, appointments, relations with allies—or what the political consequences would be of a poor outcome. Even so, the sequence of the President's decision-making remains difficult to explain as something other than a series of miscalculations. If the political costs were unacceptably high, it was still a mistake to declare that he wanted to attack and then cede that discretion to Congress. In doing so, President Obama, quite literally, invited Congress to repudiate him. A President who acknowledges in his own acts the utility of unilateral power in the face of congressional resistance ought not to have put himself in such a position, particularly when by his own admission it was unnecessary.

The problem is not as simple as President Obama asking Congress for something that it would not provide. Presidents do this routinely, never expect to get everything they ask for, and rarely suffer for it. Rather, it was surrendering the initiative by giving up the authority to make the decision. For presidents, there are few things worse than vacillating or appearing indecisive, and failing to act can be worse than making a bad decision:

Nothing invites censure like failing to utilize the full extent of authority to meet a crisis head-on. The greatest disgrace a president can commit is to sit idle while the world unravels around him. Presidents who advance normatively bad policy, who patently pursue their own private interests, or who engage in corrupt or even criminal behavior will usually receive

⁷⁸ *Id.*

⁷⁹ HOWELL, *supra* note 2, at 27.

their due admonishments. But when refusing to act—or worse yet, proving unable to act precisely when action appears called for—presidents invite all sorts of ridicule on themselves.⁸⁰

III. EFFECT AS PRECEDENT

Because the constitutional boundaries of executive power are ambiguous, they are strongly shaped by practice through “common law constitutionalism.”⁸¹ In areas lacking a precise delineation of constitutional authorities, competition between the President and Congress over political control plays a role as well. Long-standing congressional deference to presidential action “may be treated as a gloss on ‘Executive Power’ vested in the President by § 1 of Art. II.”⁸² In blunter terms, a presidential unilateral move that is not unambiguously turned back by either Congress or the judiciary becomes a justification that future presidents can use to do the same thing or, more likely, push a bit further.⁸³

Will the deferral to Congress have any long-term effect on the allocation of war powers? One way to answer the question is by examining previous instances of presidents making similar decisions. There are two analogous cases: President Dwight D. Eisenhower, who sought (and received) congressional authorizations to deploy military forces in the straits of Taiwan in 1955 and the Middle East in 1957; and President Clinton, who asked Congress to support an air campaign in Kosovo in 1999 (which Congress declined to do).

These cases are similar to President Obama’s in that neither President conceded that he *needed* prior congressional approval for military action. President Eisenhower asked for congressional authorization because he believed that “national commitments would be stronger if entered into jointly by both branches,”⁸⁴ not because he felt that he lacked the requisite constitutional authority to deploy troops without it.⁸⁵ Congressional action was politically useful, in other

⁸⁰ WILLIAM G. HOWELL, THINKING ABOUT THE PRESIDENCY: THE PRIMACY OF POWER 106 (2013).

⁸¹ Cass R. Sunstein, *An Eighteenth Century Presidency in a Twenty-First Century World*, 48 ARK. L. REV. 1, 15 (1995).

⁸² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 611 (1952) (Frankfurter, J., concurring).

⁸³ Even a seemingly trivial power can follow this pattern. Robert Spitzer notes that President Obama continued and extended the arcane practice of the “protective return veto,” in which the President both pocket vetoes a bill during an intrasession recess *and* returns the bill to Congress as a regular veto. While such vetoes do not have any clear substantive consequences, they also have no constitutional validity; the very fact that the practice has become common reveals how something “unconstitutional on its face” becomes legitimated through “sheer repetition.” Robert J. Spitzer, *Growing Executive Power: The Strange Case of the “Protective Return” Pocket Veto*, 42 PRESIDENTIAL STUD. Q. 637, 650, 652 (2012).

⁸⁴ FISHER, *supra* note 5, at 116.

⁸⁵ President Eisenhower tended to duck the question of whether the President had the authority to order the use of force without Congress, arguing instead that “cooperation of

words, but not required. President Eisenhower's 1955 request to Congress was explicit on this point: in asking for authorization to deploy troops to Formosa Straits, he claimed that "authority for some of the actions which might be required would be inherent in the authority of the Commander-in-Chief," but a congressional resolution "would make clear the unified and serious intention of our Government, our Congress, and our people."⁸⁶ In this regard, his position was the same as President Obama's.⁸⁷

President Clinton's 1999 request was likewise a matter of political utility. In a March 23, 1999, letter to Senate leadership, he said, "[W]ithout regard to our differing views on the Constitution about the use of force, I ask for your legislative support as we address the crisis in Kosovo."⁸⁸ The Senate voted 58–41 to approve military action.⁸⁹ President Clinton ordered the strikes to begin the next day, before the House had acted.⁹⁰ A month later, the resolution failed to pass the House, losing on a 213–213 tie.⁹¹

President Eisenhower has been praised for taking a narrow view of the presidential war power. Louis Fisher observed that President Eisenhower "avoided unilateral moves in dispatching troops abroad" in reaction to President Harry S. Truman's actions in Korea and in the Steel Seizure case.⁹² Richard Grimmett

the Congress" enhances the credibility of U.S. commitments. *Id.* at 120. Fisher notes that when President Eisenhower was asked a direct question on the matter by House Majority Leader John McCormack (D-Mass.) in 1957, the President responded that "greater effect could be had from a consensus of Executive and Legislative opinion [T]he Constitution assumes that our two branches of government should get along together." *Id.* at 121 (quoting DWIGHT D. EISENHOWER, *WAGING PEACE* 179 (1965)).

⁸⁶ Letter from President Dwight D. Eisenhower to the Minority Leaders of the Senate and House of Representatives Concerning Measures to Aid Economic Growth, 1958 PUB. PAPERS 208, 209–10 (March 8, 1958).

⁸⁷ Even before President Obama's Syria decision, observers had drawn parallels between him and President Eisenhower, particularly with respect to the claim that both presidents were similarly cautious in their foreign policy (what Zakaria calls "strategic restraint") and reluctance to intervene militarily in foreign disputes. Fareed Zakaria, *On Foreign Policy, Why Barack is Like Ike*, TIME (Dec. 19, 2012), <http://poy.time.com/2012/12/19/on-foreign-policy-why-barack-is-like-ike/>.

⁸⁸ 145 CONG. REC. S3101 (daily ed. Mar. 23, 1999) (statement of Sen. John Warner).

⁸⁹ S. Con. Res. 21, 106th Cong., 145 CONG. REC. H2451 (1999).

⁹⁰ *A Kosovo Chronology*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/kosovo/etc/cron.html> (last visited May 1, 2014).

⁹¹ S. Con. Res. 21, 106th Cong., 145 CONG. REC. H2451 (1999). In a very narrow sense, this would constitute a prior case of Congress refusing to approve a presidential request for authorization. In this instance, though, the Senate had approved the resolution, and on the day the campaign started, the House overwhelmingly, by a vote of 424 to 1, approved a resolution "expressing support" for military personnel engaged in the operation. H.R. Res. 130, 106th Cong. (1999). The House tie vote took place only after the campaign had started, and in May of that year, Congress approved emergency supplemental appropriations legislation that provided funding for the effort. Emergency Supplemental Appropriations Act, Pub. L. No. 106-31, §§ 2001–12, 113 Stat. 57 (1999).

⁹² FISHER, *supra* note 5, at 116.

offers a slight qualification, arguing that apart from actions to evacuate or protect U.S. civilians and military personnel in conflict areas, President Eisenhower did not unilaterally order the use of force.⁹³

But President Eisenhower may not have been quite as restrained as these sources claim. According to a widely used database of military actions, President Eisenhower used military force as a political threat fifty-eight times, including major cases in Asia, Central America, the Middle East, Europe, and Africa.⁹⁴ Not all of these cases involved large-scale deployments, but all were either active or covert, or threatened military operations.⁹⁵ Other instances of President Eisenhower's use of force were at least arguably unilateral. The deployment of fourteen thousand Marines to Lebanon in July 1958 was nominally permitted by the 1957 congressional authorization,⁹⁶ but President Eisenhower made no mention of the authorization in announcing the step, saying only that he made the decision "after taking advice from leaders of both the Executive and Congressional branches of the government."⁹⁷ Some scholars concluded that President Eisenhower was relying on his "inherent" constitutional power⁹⁸ or "the ever more capacious presidential prerogative."⁹⁹

In fact, President Eisenhower held a broad view of the executive's inherent powers. He was especially aggressive in the use of covert operations without congressional authorization, including U.S. involvement in the overthrowing of governments in Iran in 1953 and Guatemala in 1954.¹⁰⁰ The CIA's own internal history of its intervention in Guatemala conceded the "blatant illegality" of a blockade imposed as part of the operation and the boarding of French and British ships "in defiance of international law."¹⁰¹ It was clear that President Eisenhower understood a blockade to be an unambiguous act of war; in responding to suggestions that he impose a blockade of China in response to that country's espionage trials and convictions against American pilots shot down during the Korean War, he stated,

⁹³ See RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL 32170, INSTANCES OF USE OF UNITED STATES ARMS FORCES ABROAD, 1798–2009, at 11–12 (2010).

⁹⁴ JAMES M. MCCORMICK, AMERICAN FOREIGN POLICY AND PROCESS 73 (5th ed. 2010). For detailed calculations of the use of American military force between 1946 and 1975, see BARRY M. BLECHMEN & STEPHEN S. KAPLAN, FORCE WITHOUT WAR: U.S. ARMED FORCES AS A POLITICAL INSTRUMENT 547–53 (1978).

⁹⁵ *Id.*

⁹⁶ FISHER, *supra* note 5, at 120–24.

⁹⁷ Statement by the President Following the Landing of United States Marines at Beirut, 1958 PUB. PAPERS 553 (July 15, 1958).

⁹⁸ Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19, 26 (1970).

⁹⁹ ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 162 (1973).

¹⁰⁰ FISHER, *supra* note 5, at 273. President Eisenhower, moreover, was actively hostile to the idea of congressional involvement of intelligence operations and relied on unilateral action to deflect and minimize the threat of congressional oversight. MAYER, *supra* note 2, 170–71.

¹⁰¹ NICK CULLATHER, SECRET HISTORY: THE CIA'S CLASSIFIED ACCOUNT OF ITS OPERATIONS IN GUATEMALA, 1952–1954, at 82 (1999).

A blockade is an act in war intended to bring your adversary to your way of thinking or to his knees. . . . [T]he word “blockade,” is, so far as I know, an act of war, a part of war. I have not checked this with the constitutional lawyers, but I believe it to be true.¹⁰²

At a minimum, President Eisenhower’s desire to secure Congress’s support for large military operations was inconsistent with his general constitutional view of the President’s “war powers” and, as shown above, did not stop him from using military force when he deemed it necessary.

Moreover, not every observer praised the resolutions as examples of careful deliberation or restraint. Matthew Crenson and Benjamin Ginsburg argue that “Eisenhower in effect demanded a blank check from Congress for possible military action in the Taiwan Straits and the Middle East.”¹⁰³ Julian Zelizer, a historian, saw the Formosa Resolution as “the second step in the expansion of presidential war-making authority that began when President Truman sent troops to Korea without a formal declaration of war,” because President Eisenhower would not need additional congressional action before initiating even full-scale conflict.¹⁰⁴ Stephen Griffin concludes that the resolutions represented “nothing unusual in the terms of . . . legal authority” but still criticizes them as merely “ways for presidents to get Congress on board rather than truly deliberate and build a cycle of accountability.”¹⁰⁵

More germane to the present case is that President Eisenhower’s request for advance authorization did not interrupt the pattern of increasing presidential discretion in using military force. Mariah Zeisberg finds in these requests a broader pattern that was not constricting:

By the end of the Eisenhower administration, a kind of accommodation had been reached. Presidents would seek legislative support, but with the idea that the legislature was supporting a constitutional power that was already the president’s. This would allow for ongoing legislative participation in constructing a structured defensive politics—naming enemies, priorities, and focusing attention—while reinforcing the constitutional construction of the independent presidential defensive war powers that had been achieved in the past ten years.¹⁰⁶

¹⁰² The President’s News Conference of December 2, 1954, 1954 PUB. PAPERS 1073, 1076.

¹⁰³ MATTHEW CRENSON & BENJAMIN GINSBURG, *PRESIDENTIAL POWER: UNCHECKED & UNBALANCED* 262–63 (2007).

¹⁰⁴ JULIAN E. ZELIZER, *ARSENAL OF DEMOCRACY: THE POLITICS OF NATIONAL SECURITY—FROM WORLD WAR II TO THE WAR ON TERRORISM* 130 (2010).

¹⁰⁵ STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 106 (2013).

¹⁰⁶ MARIAH ZEISBERG, *WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY* 142 (2013).

CONCLUSION

President Obama's decision to defer to Congress will not serve as a precedent that constrains future presidents, since it did not resolve any questions about the correct distribution of the constitutional war powers and was a pragmatic judgment rather than a principled one. Previous instances of presidents making analogous decisions had no lasting effect on the overall trend toward increasing presidential discretion in using military force.

Presidential unilateralism begets other instances of unilateral action. Furthermore, engaging Congress in what is more commonly an area of unilateral action not only fails to serve as a precedent in the other direction but can also lead to more unilateralism. The process of presidential action could certainly be described as a ratchet process. At the same time, it is unrealistic to expect a single decision to reverse a long-standing historical trend. Eric Posner and Adrian Vermeule have little patience with ratchet arguments in any event, insisting that the necessary conditions do not exist and that the term serves as a loose label "often confused with a simple trend or with endogenous but reversible change in some variable that would quickly revert to its original value if other legal or social conditions changed."¹⁰⁷

If President Obama's decision will have little long-term effect on the distribution of power, what lessons can be drawn from it? We might reframe the underlying prediction of maximizing discretion as a normative one for which presidents need to be aware that foregoing unilateral action comes with political cost. In 2014, President Obama and his aides concluded that he has not been aggressive enough in asserting the office's capacity to act as a general matter. Reviewing 2013—which the White House concedes was not a very good year for the President—Senior Advisor Dan Pfeiffer concluded that the President "too often governed more like a prime minister than a President" and recommended an emphasis on "an executive style of governing that aims to sidestep Congress more often."¹⁰⁸ It was more of a rhetorical shift than a substantive one, since President Obama had hardly shied away from unilateral action earlier in his presidency, with a few exceptions. But it is more consistent with unilateral theory, and it suggests that the President recognizes the risks of passivity and the importance of retaining the initiative.

¹⁰⁷ POSNER & VERMEULE, *supra* note 24, at 133.

¹⁰⁸ Wilson, *supra* note 58.