

PRESIDENTIAL WAR POWER IN THE DELIBERATIVE MOMENT: AN
INTEGRATED TRADITIONAL AND EMPIRICAL LEGAL STUDY

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This dissertation examines how congressional deliberation over the constitutionality of a use of force affects the war power relationship between the president and Congress. In particular, it presents empirical data on whether and how Congress exerts its attempts to control presidential war power through deliberation, on the limits of congressional ability to regulate a war, on historical patterns of the presidential unilateral use of force, and on the institutional conditions for good congressional deliberation. My main argument is that congressional deliberation over the constitutionality of a use of force is a primary influence on Congress's ability to exert its will through the passage of legislation to check the president's use of force.

I focus on congressional floor debates recorded in the Congressional Record (1989-2009) over different use of force events occurring from 1989 to 2003. These incidents are collected from the Correlates of War Project Dataset. I cluster 229 congressional deliberations on the constitutionality of the use of force and bills thereof into 14 military events according to the war timeline depicted by the Correlates of War Project Dataset.

In response to the main research question, I present three empirical models. The first empirical model demonstrates that a higher level of congressional deliberation over a use of force influences Congress to impose a higher level of control over presidential war power. The second model demonstrates that as long as

Congress imposes control over a military deployment, the president systematically resists that control.

Although the second model demonstrates that congressional attempts to check presidential war power cannot prevent the president from taking unilateral military action, I argue that this result suggests that it is even more important for Congress to have better deliberation and to try to impose a check on the president, which can create an unequivocal legal and political accountability for the president.

Therefore, I present the third empirical model to demonstrate that congressional rule-setting, including referral of a bill to committee, an adoption of open-rule floor debate, and deliberation over a non-annual budget bill, is the primary factor determining the quality of congressional deliberation.

BIOGRAPHICAL SKETCH

Chi-Ting Tsai was born in Taipei, Taiwan, in 1977. He earned his LL.B. from National Taiwan University Law School in 1999. After obtaining his M.A. in Social Science from National Taiwan University in 2002, he served for the Taiwanese Army as a judge advocate until 2004. He attended Cornell Law School, where he earned his LL.M. in 2005 and his J.S.D. in 2010. His academic concerns include constitutional law, administrative law, foreign affairs law, and empirical legal studies.

To My Parents, Cheng-wen Tsai and Yun-li Pien

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CHAPTER 1:
INTRODUCTION:
THE VIETNAM WAR AND THE DELIBERATIVE TURN IN WAR POWERS

This is a dissertation about how congressional deliberation over constitutionality of a use of force affects the war power relationship between the president and Congress. In particular, this dissertation will present empirical data on whether and how Congress and exert its attempt of control over presidential war power through deliberation, on the limits of congressional ability to regulate a war, on historical pattern of presidential unilateral use of force, and on the institutional conditions for a good congressional deliberation. My main argument is that congressional deliberation over the constitutionality of a use of force is a primary factor that influences Congress's ability to exert its will through the passage of legislation to check the president's use of force. In this introduction, I will (1) explain that the fundamental research motivation of this dissertation is a response to what I would call the "deliberative turn" in war power in the United States after the end of the Vietnam War, (2) employ as my research approach democratic deliberation theory to supplement to the conventional rational choice theory, and (3) present an overview of each chapter at the end of this introduction.

On November 26, 1963, the White House issued a national security action memorandum to several executive offices, including those of the Secretary of State and the Secretary of Defense, outlining ten guidelines regarding the United States's South Vietnam policy.¹ Paragraph 5 of that memorandum included the assertion that "[w]e should concentrate on our own efforts....on the critical situation in the Mekong

¹ National Security Action Memorandum No. 273 (11/26/1963) (Lyndon Baines Johnson Library and Museum) <http://www.lbjlib.utexas.edu/>

Delta. This concentration should include not only military but political, economic, social, educational and informational effort.”² In early February, 1964, Walt Rostow, then head of the State Department’s policy planning staff, suggested that President Johnson campaign for a legislative resolution that could be endorsed by a bipartisan group of congressional members. Rostow suggested that this could give Johnson a free hand to conduct the war in Southeast Asia and relieve his impending campaign from some major concerns regarding this issue.³

In late May 1964, William Bundy, then acting Assistant Secretary of Defense, completed a rough draft of a resolution giving Johnson the power to commit U.S. forces to the defense of any nation in Southeast Asia.⁴ A U.S. Navy ship was attacked in the Gulf of Tonkin on August 3, 1964. On August 5, Congress began debate on the matter, on August 7 it passed the Tonkin Gulf Resolution which authorized the President to take “all necessary measures to repel any armed attack against the forces of the United States....and to assist any member or protocol state of SEATO requesting assistance in defense of its freedom.”⁵ In addition to authorizing the president to use all the necessary means at his disposal as Commander-in-Chief, Congress also gave the president a blank check regarding the amount of budget he could use in executing the following war.⁶

Various critique and review were come up with in the public regarding congressional reckless judgment on the adoption of Tonkin Gulf Resolution. In his memoirs, Robert McNamara, then Secretary of Defense, wrote that one of the problems

² See STANLEY KARNOW, VIETNAM: A HISTORY 373 (1991).

³ *Id.*

⁴ *Id.*, at 376.

⁵ 78 Stat. 384 (1964)

⁶ See LOUIS FISHER, PRESIDENTIAL WAR POWER 116 (2003).

inherent in the adoption of the Resolution were that “Congress did not grasp the war’s potential and how the administration would respond in the face of it.”⁷ A report made by the Senate Foreign Relations Committee in 1967 stated that “Congress committed the error of making a personal judgment as to how President Johnson would implement the resolution when it had a responsibility to make an institutional judgment....[a]nd as to whether, under the Constitution, Congress had the right to grant or concede the authority in question.”⁸

John Hart Ely criticized Congress, saying that in the process of adopting the Resolution, and actually since the 1950s,⁹ it did not shoulder its constitutional responsibility to make a deliberative judgment collectively, but merely authorized the president to decide matters of war as an individual.¹⁰ He also proposed that a constitutional war authorized by Congress should be predicated on a sound judgment contributed by legislators and consisting of three due elements.¹¹ First, any legislative process pertaining to the authorization of the use of force should follow a due deliberative process. Second, any initiation of war, and the subsequent conduct of war, should comply with the guidance of congressional authorization made through the aforementioned process. Third, the court should also play some kind of role to ensure that Congress performs a profound political and legal judgment in order to maintain a constitutional act of war carried out by the president.

⁷ ROBERT S. MCNAMARA, IN RETROSPECT 141 (1995).

⁸ Senate Report 90-797 at 21-22 (1967)

⁹ See JOHN HART ELY, WAR AND RESPONSIBILITY 50-52 (1993).

¹⁰ *Id.*, at 47. (*arguing that what is at stake is the judgment that no **single** individual should be able to take the nation into war [emphasis added]*).

¹¹ *Id.*, at 47-60.

McNamara's reflection, the Senate's report, and Ely's arguments, in fact, all reflect the lessons that the American public learned in the wake of the Vietnam War, and also shed new light on some old debates on war powers. That is, to duly control presidential war power, members of Congress should see themselves serve collectively as a gatekeeper through a soundly deliberative process. This is a historical lesson acquired from the Vietnam War as a "deliberative turn" in war powers.

A deliberative turn, by definition, does not solely indicate how Congress would place checks on the presidential war powers via the legislative process. Rather, it is a general concept that reflects the discourse held in the public sphere,¹² which is to say that the decision should be generated from a rational, well informed, and inclusive process.¹³ Because deliberation exists not only in political institutions but also within social interactions in the broader public sphere deliberative turn actually is a plural project which simultaneously proceeds in various domains to which it applies.¹⁴ Among these different projects, since Congress, as Jürgen Habermas suggests, is the "nexus of public sphere,"¹⁵ rightly became one of the particular renovations target in this deliberative turn in war power. .

Congress itself reviewed the decision-making process underlying the authorization of the Tonkin Gulf Resolution. As the Senate's report indicates, the failures to identify the intention of the president and to make a responsible institutional judgment illumine responsibilities that Congress failed to meet. As the national

¹² See JOHN DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATION* (2000)

¹³ See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 287-328 (1996); also BRUCE ACKERMANN & JOHN FISHKIN, *DELIBERATION DAY* (2004); SIMONE CHAMBERS, *REASONABLE DEMOCRACY* (1996); JOHN ELSTER ED., *DELIBERATIVE DEMOCRACY* (1998); *DEMOCRACY AND DISAGREEMENT* (1996).

¹⁴ See Simone Chambers, *Deliberative Democratic Theory*, 6 *ANNUAL REVIEW OF POLITICAL SCIENCE* 307 (2003).

¹⁵ See JÜRGEN HABERMAS, *supra* note 14, at 168-93.

security action memorandum mentioned at the outset of this section demonstrates, President Johnson had already set on the idea of expanding the interference in Vietnam affairs. Had Congress performed a solid deliberation, would it have perceived that President Johnson was inclined to bring this nation into a full-fledged war, probably as early as 1963? Or, what if Congress had paid more attention to the resolution's sections that provided that "the President, as Commander in Chief, [could] take all necessary measures to repel any attack against the forces of the United States." Given a better reflection on the sweeping authorization language of the Resolution, would Senator Fulbright still have stated that his belief that the Resolution was "an accurate reflection of what I believe is the President's policy, judging from his own statements."¹⁶?

Judge Richard Posner answers "no" to these questions. He opines that "the opposition to the war in Vietnam... [was] the product of moral and political entrepreneurs tapping into wells of discontent among minorities and eventually getting the attention of the politicians," and that the advocates of deliberative democracy have "a desire to change specific political outcomes" whose "secret agenda" is to campaign for a more aggressive judicial review.¹⁷ Posner suggests, on the one hand, that Congress is an impasse-prone institution that cannot be relied upon to pursue a comprehensive debate unless minorities' voices are brought up successfully in the political process. On the other hand, deliberative democracy itself is not a means to generate a better political outcome, but is rather an alternative strategic route for some people to control their political agendas through judicial review.

¹⁶ 110 Cong. Rec. 18, 459 (1964)

¹⁷ See Richard Posner, *Smooth Sailing*, 1 LEGAL AFFAIRS (2004) (http://www.legalaffairs.org/issues/January-February-2004/feature_posner_janfeb04.msp)

Posner's challenge to the advocates of deliberative turn in war power raises various general questions regarding the underlying theory of deliberative democracy, the relationship between Congress and citizens, and most importantly the relationship between congressional deliberation and presidential war power: Does an advocacy for a more deliberative law-making process in the consideration of war and foreign affair issues only strategically arise when a minority could not gain a majority vote in Congress, or does such an advocate of deliberative democracy suggest a more interconnected dialogue among Congress, our systems of government, and the citizens in broader public sphere? Does Congress only deliberate passively to respond to a discontented opinion in the broader public sphere, or does Congress also actively and independently deliberate war and foreign affair issues? Is the premise underlying the theory of democratic deliberation that better deliberation can generate greater congressional control over presidential war power? And finally, if we want to ensure a more profound deliberation over war power within the legislative process, do the courts have any legitimate authority by which to facilitate a more deliberative legislative process?

In addressing these questions, this dissertation argues that a synthesis of deliberative democratic theory and rational choice theory can provide a more complete understanding of congressional deliberation because it can shed light upon whether and how congressional members independently deliberate, and how Congress interacts with the citizens in the broader public sphere over the policy of war-making matters. By focusing on the congressional deliberation over the constitutionality of a current or a possible presidential proposed use of force, I argue that to protect institutional authority from being encroached by presidential unilateral action, Congress itself has an independent motivation to deliberate over the constitutionality of a use of force, regardless of the impact that citizens in the public sphere may have. I do not suggest

that congressional members routinely consider constitutional issues regarding war and foreign affair matters, or that the so-called “electoral connection”¹⁸ between congressional members and constituency do not exist. Rather, my primary objective is to show that we should not lose sight of the fact that as an independent and collective body, congressional institution is the most important factor influencing congressional members’ deliberation over the constitutionality of a use of force in the legislative process. This is so because Congress both can impose a check on presidential war power through the passage or rejection of legislation and can create a more unequivocal legal and political accountability for the president.

To test this argument, I adopt a mixed quantitative and qualitative approach in order to analyze the relationship among congressional deliberation, congressional check on a use of force, and presidential decision on a use of force. In the chapters that follow, I pose four main research questions. First, is a “good” constitutional deliberation over a possible or current use of force in Congress more likely to impose a check on presidential use of force? Second, is this more likely to prevent the president from taking a unilateral use of force? Third, if either or both of these questions can be empirically confirmed, what kind of congressional law-making rule and political factors influence the quality of congressional deliberation? Lastly, what kinds of implications do those empirical analyses have on the canon of constitutional interpretation of war power and policy reform?

In response to these research questions, I propose three hypotheses for empirical analyses. First, if Congress has a higher level of deliberation over the constitutionality of a current or possible presidential use of force, then it is more likely to impose a higher level check on the president through the passage or rejection of legislation. Second, if Congress has a higher level of constitutional deliberation over

¹⁸ See DAVID MAYHEW, *THE ELECTORAL CONNECTION* (1974).

the use of force and imposes a higher level of check on the president, then it is more likely to prevent the president from initiating a war unilaterally. Third, if congressional rule-setting is more information facilitative (e.g. its members refer a bill to committee) and participation inclusive (e.g. no restriction on amendment proposal), then Congress is more likely to have a higher level of war deliberation, regardless of the impact of non-congressional rule setting (political factors) such as presidential approval rating, election year, divided government, and the percentage of congressional members from the president's party.

I think an exploration of these questions and hypotheses is natural because the ambiguous allocation of war power provided in the Constitution needs the president and Congress to cooperate and form contents of war-making and foreign affair policy of each event through their interaction. But since the general Commander in Chief Clause is often cited by the president as justification for his independent power to initiate a use of force, the public often expects Congress to act, react, and check the unilateral presidential use of force. Among the various tools at congressional disposal, law is still the most primary mechanism through which Congress can impose a check on the president and also place the president under a greater political accountability.

The sources of empirical research methodology and data for my empirical analyses are diverse. I focus on congressional floor debates recorded in *Congressional Record* (1989-2008) over different use of force events occurring from 1989 to 2003. To flesh out different military events occurring during this period, I collect data from the Correlates of War Project Dataset, and then cluster 229 congressional deliberations over the constitutionality of use of force and bills thereof into 14 military events according to the war timeline depicted by the Correlates of War Project Dataset. With regard to the qualitative measure of the quality of congressional floor debates, I

employ the Discourse Quality Index developed by Jürg Steiner et al. to code each congressional member's quality of a constitutional justification.

Additionally, to code the level of congressional control over the president through the passage or rejection of legislation, I develop a congressional control index: substantive and ex ante control denote a higher level of control, whereas procedural control and ex post denote a lower level of control. This congressional control index is the most important variable of my empirical models as it allows me to make a supplement to conventional empirical research on the presidential war power. In particular, conventional strategic research on presidential power focuses on whether and why Congress can prolong a possible initiation of force by the president through voting. But from a legal perspective, I argue that what Congress says in its collective decision is vital because presidential action is controlled by law but not voting itself. Therefore, the congressional control index is designed in order to code the contents of a law or rejection of a law.

In Chapter 2, “**Reason, Congressional Deliberation and War Power Constitution**,” I demonstrate that the Founders argued that in order to control presidential war and foreign affair powers, Congress should exercise with due deliberation in order to make a cool-headed decision for a just cause for a war. However, since the Founders did not provide a clear defined version on the principles of democratic deliberation and the conditions for “good” congressional deliberation, I further identify three elements of contemporary democratic deliberation: constitutional publicity, reciprocal political action, and universal discourse principle. These three elements of modern deliberative democracy theory are the theoretical root of the criteria that constitute not only high deliberative quality but also a greater congressional check on the president. Moreover, I will illustrate the calls for empirical investigation on congressional deliberation and its relationship with presidential war

power is mandated by the principle of deliberative politics itself and a response to the critiques on democratic deliberation.

Although deliberative theorists have comprehensively and normatively shown why democratic deliberation can result in better public policy, there are also many vocal calls for empirical investigation to supplement to normative arguments. Chapter 3, “**Groundwork for Empirical Research on War Power,**” is a research design for the three main empirical hypotheses and underlying theories thereof mentioned above to respond to such empirical research demand. Several important preparations for empirical analyses will be illustrated in this chapter. First, I suggest that the “event-count model” employed by conventional research on presidential war power is incomplete on the grounds that it cannot inform us how Congress attempts to provide a check on the president through legal regulation. Second, I indicate that as of now, there is no mixed qualitative and quantitative research on the relationship between U.S. congressional deliberation and the separation of powers, which has rightly become one of this dissertation’s research motivations. Third, the key elements of two important qualitative variables, Discourse Quality Index and congressional control index, will be fully explained in this chapter. Fourth, the underlying theories of three hypotheses I mentioned above will be elaborated in this chapter. Lastly, all of the variables included in the models for empirical analyses, the sources from which I collect the data of each variable, and their relationship with deliberative democracy theory will also be briefly explicated in this chapter.

Chapter 4, “**Congressional Deliberation, Presidential War Power and Ideal Congressional Deliberation Situation,**” presents the empirical results of the relationships between congressional deliberation and congressional legal control over the president, between congressional deliberation and decision thereof and presidential decision on taking unilateral use of force, and between congressional rules and the

quality of congressional deliberation. Three models will be presented in this chapter according to the hypotheses mentioned above. First, the empirical model demonstrates that a higher level of congressional deliberation over a use of force does influence Congress to attempt to impose a higher level of control over presidential war power. Second, the empirical model demonstrates that as long as Congress attempts to impose a control over a military deployment, the president systematically tries to resist that control by taking unilateral military action. Although a congressional attempt to place a check on presidential war power cannot prevent the president from taking unilateral military action, I argue that this result suggests that it is even more important for Congress to have a better deliberation and try its best to impose a check on the president, because this can create a unequivocal legal and political accountability for the president. Third, the empirical model demonstrates that congressional rule-setting is the most primary factor that determines the level of congressional deliberation. The model demonstrates that referral of a bill to committee, adoption of open-rule, and invocation of cloture together statistically generate a higher level of congressional deliberation.

Chapter 5, “**A Deliberative-Oriented Approach for War Power Constitution,**” presents the implications of the empirical results of congressional war power deliberation on constitutional interpretation of war power. What I want to emphasize is that though I reinterpret the contents of war power basing on the empirical evidences, these empirical evidences just serve as a minimum supplement to and reflection on the war power constitutional interpretation as a whole. I do not intent to argue that empirical analyses are absolute truth. As for the particular implications and reflections in this chapter, I will examine three legal issues often raised in the war power area in the light of the empirical evidences demonstrated in chapter 4: the procedural and substantive function of Declare War Clause, the form of congressional

war authorization and customary presidential war power, and justiciability and political question doctrine in war power litigation. My overall argument is that interpretation of the allocation of war power should be in accordance with procedural and substantive due law-deliberation and law-making processes on the grounds that the main function of Declare War Clause is a mandate for greater constitutional publicity. But in order to realize a truly deliberative war power Constitution and a more accountable government, certain congressional rule reforms are needed.

Chapter 6, “**Conclusion,**” provides an overview of the arguments and empirical analyses of this dissertation. I will emphasize the central thesis of my argument, which may be stated here. In order to promote a more politically accountable government and more balanced war policy making, we should establish a more democratic, deliberation-oriented congressional rule, thus creating both a more ideal speech situation for congressional deliberation and broader public sphere as a whole on the constitutionality of a war.

CHAPTER 2:
REASON, CONGRESSIONAL DELIBERATION, AND WAR POWER
CONSTITUTION

As I demonstrated in the previous chapter, after the end of Vietnam War, the public sphere as a whole, including Congress itself, believes that members of Congress should have played a more robust role to collectively make a more reasoned and well-informed judgment on the authorization for Vietnam War. This “deliberative turn” in war power, as I will illustrate below, is actually a revival of a concept that I call “control over the presidential war power through congressional deliberation,” which can be traced back to the very beginning of the American republic and was advocated by the Founders. However, though the Founders emphasized the importance of checking presidential war power through due congressional deliberation over a just cause for a war, they did not provide us with a clear legacy that delineates what the conditions of good congressional deliberation and contents of “deliberative” war power relationship between the political branches are. In order to provide an answer for this question regarding the principles of good congressional deliberation, I will identify in this chapter three elements for the conditions of a “good” deliberation as illuminated by modern deliberative democracy theory: (1) constitutional public reason, (2) reciprocal political action, and (3) universal discourse principle. These three elements will serve as the theoretical root not only of the criteria for what constitutes a good deliberation but also for what constitutes a balanced war power relationship between the president and Congress.

In the following sections, I will (1) illustrate the original understanding of the Founders’ expectation of control over presidential war power through congressional deliberation, (2) explicate the contents of three elements of “good” deliberation and

the meaning of reasoned and balanced war power from the perspective of modern deliberative democracy theory, and (3) describe the demands for empirical investigation of the relationship between congressional deliberation and presidential war power.

I. The Founders' Expectation: Control over Presidential War Power through Congressional Deliberation

To explore the original understanding of the Founders' advocacy of congressional control over presidential war power through deliberation, I focus on the Founders' historical interpretations of Declare War Clause. In general, I found that the Founders stressed, consistent with the central tenet of checks and balances, that the power to declare war is a concurrent and mixed power that mandates the president and Congress to deliberate over the just cause of a war and the appropriate content of such shared power.

During discussion in the Philadelphia Convention over the meaning of the current Declare War Clause, as constitutional historians know, the Clause was changed from as statement that Congress has power to “make” war to a statement that Congress has power to “declare” war. The reason for this change is this: although the president cannot commence a war, he is better qualified than Congress to repel sudden attacks, conduct a war, and negotiate peace.¹ Therefore, during the Convention, Mr. Butler stated that the function of Declare War Clause is to ensure that a war will be appropriately directed by the president, who can garner sufficient national support through a congressional declaration of war.² Proposing the vestment of a declaratory function in the Congress, Hamilton explained that the whole of military power,

¹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-9 (1911).

² *Id.*

including the raising and regulation of an army and navy, is lodged in the legislature for the periodic election of Congress, and not among the individual states, so that the nation as a whole should be able to prevent other nations from invading it under this separation of war-declaring and war-making framework.³

Jay further pointed out in the FEDERALIST PAPERS that Congress's deliberative function can serve to make certain what the just cause of war is:⁴

[Not] only fewer just causes of war will be given by the national Government, but it will also be more in their power to accommodate and settle them amicably. They will be more temperate and cool, and in that respect, as well as in others, will be more in capacity to act advisedly than the offending state. . . . The national Government in such cases will . . . proceed with moderation and candour to consider and decide on the means most proper to extricate them from the difficulties which threaten them.

Thus, the power of war, first, for reasons of unification under attack, should not be held by among the individual states, and, second, the institutional design of the federal government can prevent the whole nation from being dragged into a war for insufficiently considered reasons. Such an institutional design, which is provided in the text of the Constitution that the Congress shall have power to declare War and the President shall be Commander in Chief of the Army and Navy of the United States, further suggests that the initiation of a war cannot be duly vested in any one person, state, or institution.

This emphasis on the non-monopoly of war power by one person or institution was also best reflected in James Wilson's often-cited speech at the Philadelphia Convention:⁵

³ ALEXANDER HAMILTON, THE FEDERALIST PAPERS No. 24, 25.

⁴ JOHN JAY, THE FEDERALIST PAPERS No. 3, 4.

⁵ 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 583 (MERRILL JENSEN ED., 1976).

This [constitutional] system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress, for the important power of declaring war is vested in the legislature at large; this declaration must be made with the concurrence of the House of Representatives. From this circumstance we may draw a certain conclusion, that nothing but our national interest can draw us into war.

Therefore, the design of divided decision-making *bodies* manifestly signifies that it is to be the concurrent, but not monopolistic, nature of war powers that will keep the nation at peace.

In his speech on the Jay Treaty to the Congress, James Madison further explained that the nature of a separated power, including the Declare War Clause and Commander in Chief Clause, is actually a power that has a special need for the legislature's deliberation:⁶

[It] could not be unreasonable, if the clauses under discussion were thought doubtful, to lean towards a construction that would limit & control the Treaty-making power, rather than towards one that would make it omnipotent. . . . this House in its Legislative capacity, must exercise its reason; it must deliberate; for deliberation is implied in Legislation. . . . Where the Constitution contains a specific & peremptory injunction on Congress to do a particular act, Congress must of course do the act, because the Constitution, which is paramount over all the Departments, has expressly taken away the Legislative discretion of Congress. The case is essentially different where the act of one Department of Government interferes with a power expressly vested in another and no where expressly taken away . . . and if it be a Legislative power, it must be exercised with that deliberation & discretion . . .

This passage actually provides us with an important approach toward interpreting constitutional texts that touch on Declare War Clause through the lens of the government's deliberative function. First, since war is presumed to be something that

⁶ 1 THE FOUNDERS CONSTITUTION 10, DOCUMENT 21 (<http://press-pubs.uchicago.edu/founders/documents/v1ch10s21.html>)

can be triggered by the president quite easily,⁷ the framers had to be explicit in allocating separate war powers to the Congress and president, thus proclaiming a declaration of war's concurrent nature. Second, deliberation, especially congressional deliberation on the war and foreign affair powers, is the injunction provided by the Constitution on Congress to maintain the war powers in an orchestrated balance in coordination with the president. Third, if doubt over explicitly concurrent powers still continues after prudent deliberation, a reasonable decision favoring the Legislature is based on control and limit and not on one side of the war power balance (i.e. the president) omnipotent.

I think that the readings presented above of war or foreign affair power and the constitutional clause as a whole--readings that stress control and limit through congressional deliberation--are also consistent with and reflect a more general and structural tenet among constitutional branches: checks and balances. In fact, the separation of powers doctrines have aroused contentious academic debates regarding the purpose of such a separated powers design. In the most general sense, the debates over that doctrine all agree on its purposes: the encouragement of self-determination, the rule of law, and protection of individual liberty.⁸ The framers also recognized that effective and limited government requires both independence of and interdependence among the different branches.⁹ As Madison explained in *THE FEDERALIST*,¹⁰

⁷ For example, in a letter to Jefferson, Madison wrote, "The constitution supposes, what The History of all [Governments] demonstrates, that the [Executive] is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the [Legislature]." See 6 *THE WRITINGS OF JAMES MADISON* 312 (GAILLARD HUNT ED., 1906)

⁸ See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1534 (1994)

⁹ See Thomas O. Sargentich, *The Contemporary Debate about Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 434,5 (1987).

¹⁰ JAMES MADISON, *THE FEDERALIST PAPERS* No. 47.

The accumulation of powers legislative, executive, and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. . . . The preservation of liberty requires, that the three great departments of power should be separate and distinct.

Although affected by Montesquieu's doctrine of the "pure" separation of powers,¹¹ Madison, by examining the history of the inefficacy of absolutely separated powers and concentration of powers in the states' legislatures during the Confederation period, began to urge the delegates to the Philadelphia Convention, as Professor Cynthia Farina points out,¹² to consider a stable and workable government through "mixed" governmental powers.¹³

Madison further explained that preventing the concentration of power in one branch was "the watchword for a system of interrelationships through which political power would be diffused and checked."¹⁴ In the FEDERALIST PAPERS, he also wrote that¹⁵

[t]he great authority against a gradual concentration of the several powers in the same department, consists in giving to those who administer each

¹¹ See Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

¹² *Id.*

¹³ Therefore, probably one of the most prominent sentences in *The Federalist* squarely fleshed out Madison's mixed-government view:

Ambition must be made to counteract ambition. . . . But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A Dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. See JAMES MADISON, THE FEDERALIST PAPERS NO. 51.

¹⁴ See Cynthia Farina, *supra* note 12, at 480.

¹⁵ JAMES MADISON, THE FEDERALIST PAPERS NO. 51.

department, the necessary constitutional means, and personal motives, to resist encroachments of the others.

Therefore, Madison suggested that the entire power be granted to the national government as a whole rather than to any specific branch of it. As such, separation of powers, as a matter of course, becomes a functional doctrine that focuses on checks and balances among different branches. But that does not suggest that separation of powers loses its importance, in the sense that power should be appropriately allocated to different branches, but not for the sake of a rigidly legislative, executive, or judicial outline. Power is better conceived as a parcel consisting of several sub-divided units wherein no unit is capable of standing for the whole.

That functional perspective is also clearly described in a modern U.S. Supreme Court ruling:¹⁶

In determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

As such, a functional approach does not actually deem the allocation of powers to be a task that considers only the formal determinacy of law. Rather it considers the complicated needs of society in different contexts, which dictates the expected behavior of all the governmental powers involved.

Such a functionalist view was also consistently echoed in the framers' views on war powers. Other than Declare War Clause, the framers' general understandings of the Original Clause further enforce the idea that the appropriations powers of the House would serve as another of the most important measures to control military

¹⁶ *Nixon v. Administrator of Gen. Servs.*, 443 U.S. 425, 443 (1977).

power. As Jefferson wrote to Madison, it manifested the “separation of money and sword”¹⁷ perspective:¹⁸

We have already given in example one effectual check to the Dog of War by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.

Therefore, after looking into various historical interpretations of Declare War Clause held by the Founders combined with their illustration of the general principles of the checks and balances doctrine of governmental structure, I think these arguments all converge on an important thesis: Congress should control presidential war power through deliberation. This suggests that when interpreting war powers, this general thesis about the war power structure is a strong reminder that the Declare War and Commander in Chief clauses encourage the Congress and the president to cooperate and deliberate with each other and not necessarily engage in an all-or-nothing zero-sum interaction.

II. Principles of “Good” Democratic Deliberation

In the previous section, I demonstrated that although the Founders expected a concurrent war power wielded by the president and Congress through deliberation, they did not inform us about what the contents and conditions of a “good” deliberation are. I think that a clear delineation of the principles of good deliberation is crucial to both the institutional design of congressional rules and constitutional interpretations of the allocation of war power between the president and Congress. A mere deliberation itself does not guarantee us the generation of a reasonable argument and legitimate

¹⁷ See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 10-12 (2004).

¹⁸ 15 *The Papers of Thomas Jefferson* 397 (JULIAN P. BOYD ED., 1958)

decision thereof.¹⁹ Lots of challenges are left unanswered by the Founders. For example, what can be counted as a reasonable argument in a deliberative process given the many incommensurable values or private interests in our modern complex society? In terms of constant disagreement in modern deliberation, what kind of decision can be regarded as a legitimate decision grounded in fair cooperative terms for future concurrent political action and deliberation, given that disagreement should not obstruct our ongoing political action? In terms of unequally distributed of political power, what kinds of institutional rules could condition better deliberation in Congress?

By definition, these questions do not exhaust the challenges to which deliberative democracy theorists should respond. What I want to emphasize here is that if we purport to realize the Founders' expectation of "control through presidential war power through congressional deliberation," then we should seriously consider demands for illustration of shared reasonable principles for assessment of argument in congressional deliberation, standards for a legitimate and binding collective decision made under the situation of constantly moral disagreement within both and between the political branches, and ideal structural process for congressional deliberation. To

¹⁹ For example, if members of Congress only present her or his position based on the constituent's preferences, can such preference-aggregation decision framework be counted as deliberation? More generally, deliberative politics is a response to such utilitarianism rationality which could necessarily create political consensus for further action. For example, McKeavy demonstrates that every amendment to a status-quo policy will lead to another amendment process, which brings a policy toward a point farther than the ideal point. The political process is full of centrifugal force. In light of such a feature, majority rule is not a static maxim of a democratic institution. Moreover, John Rawls criticized that the equalization of everyone's preference under utilitarianism to justify the guidelines for our political actions does provide us a seemingly reasonable way to employ a disposition. However, utilitarianism's indifference to the individual's difference neglects the importance of an individual's agency and the possibility of value incommensurability. Such neglect would suppress other values in the political realm, and thus it would fail to gain the legality or legitimacy necessary for a policy. Rationality and reasonableness do not necessarily correspond to each other within a complex society. This implies that not only should our private reasons be included, objected to respectfully, and tolerated in the public sphere as widely as possible, but also it justifies our reasons in a more public sense. Therefore, what kind of elements can make a deliberation different from a mere economic rationality is deliberative theorists strive to answer.

respond to these demands, I will propose in this section three elements to serve as primary starting points for modern democratic deliberation: (1) constitutional public reason, (2) reciprocal political action, and (3) universal discourse principle. Each of these elements will be elaborated below.

A. Constitutional Public Reason

Collective political actions need to be taken in a common sphere wherein different moral arguments held by discrete moral agencies can be heard, criticized, and brought to accommodate each other. I believe that the Constitution, as a minimum reason shared by all Americans, rightly creates and reserves the common public sphere for such concurrent, deliberative, and collective political action. In the following passages, I will illustrate why I think such a constitutional public reason is a necessary starting point for democratic deliberation.

Moral disagreement is a constant in our modern complex society and politics. To rebut such disagreement for making a collective decision and taking political action, we need a space into which different political actors can participate and freely discuss with each other in order to search for a better argument that is based on reason and that can be justifiable everyone. This public reason as a base for political action is best reflected by John Rawls in *POLITICAL LIBERALISM*:²⁰

Our exercise of political power is proper and hence justified only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principle of legitimacy. And since the exercise of political power itself must be legitimate, the ideals of citizenship impose a moral, not a legal, duty — the duty of civility — to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason.

²⁰ JOHN RAWLS, *POLITICAL LIBERALISM* 217 (1993).

Therefore, Rawls suggests that a constitution is a public reason consisting of shared principles by which citizens can practice their own reason publicly and persuade others in accordance with the content of those shared principles enshrined in the constitution. As such, in the example of the United States, the Constitution becomes the minimum reason of which American public and political lives constitute.

Moreover, Rawls suggests that all citizens have a moral duty to continuously interpret those publicly recognized principles such as basic liberties, equality, and freedom.²¹

But why in our political lives are we willing to accept a constitution as a reasonable entity, withhold our comprehensive reasons (e.g. our individual concerns and rationales), and commit to the interpretation of that constitution? I think this is because public reason is not a transcendental value. Public reason should be internal to our beliefs and agreements rather than an extrinsic value imposed by coercive power. Hence, Rawls suggests that we have a burden of judgment limited by public reason, so that we can balance and assess different kinds of ends and value claims such that moral disagreements among us can become reasonable within a reflective equilibrium.²² Such a non-transcendental public reason further suggests that a constitution is a starting point for deliberation because constitutional public reason could gain authority in a continuously reflective process. Public reason establishes itself within an endless practical process. Re-practical reasoning can reinforce, deconstruct, and reconstruct the content of public reason; thereby we are willing within our public lives to withhold our comprehensive reason and commit to an ongoing constitutional interpretation.

²¹ Rawls also specified a list of the content for this minimum public reason. These are abstract and primary concept of basic social structure, which includes “basic rights and liberties, institutional opportunities, and prerogatives of office and position, along with income and wealth.” The purpose of the introduction of these primary goods is to establish an intersubjective dialogue, or what Rawls calls an interpersonal comparison, within a reasonably pluralistic society. *Id.*

²² See JOHN RAWLS, *supra* note 22, at 54-5.

In this vein, the American Constitution can serve as a starting point for democratic deliberation not through coercive enforcement via governmental power, but rather via several practical reasoning processes--*inter alia*, reinterpretation of its text, critique of its inadequate power, and a built-in amendment process--all of which perpetually engender Constitutional authority. As such, the central tenet of constitutional public reason becomes clear: the authority of public reason is internally established by a public criticism of external power; through this, public reason also acquires its legitimate power to enforce within this continuous reason-internalization process. Constitutional public reason can complement and stabilize the legitimacy of our collective decision through an ongoing process of moral-political construction. Therefore, I argue that a constitution is by nature a public resolution of an entrenchment of public reason that recognizes our history as value-plural, and thus the content of a constitution needs to be continuously interpreted and constructed by the public.

Nevertheless, even though I elucidate why a constitution can serve as a starting authority of minimum public reason for us to interpret, it does not address why a constitution can include non-deliberativists²³ into deliberative politics. I argue that this is because a constitution itself depicts a public space in which we are all implicated and from whose boundaries we cannot escape.²⁴ This is not because we are not free

²³ By non-deliberativists, I indicate not only those traditionally religious fundamentalists, but also political actors who simply do not open to reflection or other identity groups.

²⁴ I draw on this argument on Hannah Arendt's illustration of the nature of constitution:

The outward reality of freedom, as distinguished from the human capacity itself, indicates the space in which we move freely and which must be limited and protected by boundaries like all space fit to be inhabited by men. Freedom is this space between men which binds them together and at the same time separates them from one another. . . . [Consequently,] authority will come into being automatically wherever men . . . have established a common world and organized a body politic. . . . with its laws and institutions, which confronts each of them in his individuality as the authority.

from deliberation, but rather because democratic deliberation recognizes that it is not a politics of neutrality. As long as we appear before this public space, we are heirs to the principles and rules demarcated by our predecessors.²⁵ I do not suggest that these principles and rules constitute an enduring providence in our political life. Rather, democratic deliberation urges us to recognize that those basic principles of constitutional public reason therein are not neutral but are already incorporated among and into us.

Therefore, if we want to practice our private reason in the public sphere we have a moral duty to continuously transform those basic principles, including the principles of deliberative politics itself, by appealing to constitutional public reason simply because it is already here among us.²⁶ As such, deliberative theorists are always ready to say that non-deliberativists do not have an obligation to partake in the

See HANNAH ARENDT, *What is Freedom*, in BETWEEN THE PAST AND THE FUTURE 143 (1993).

²⁵ As Hannah Arendt indicated, the arbitrariness of constitutional principle is the first thing we ought to recognize in our political lives:

What save the act of beginning from its own arbitrariness is that it carries its own principle within itself, or to be more precise, that beginning and principle, principium and principle, are not only related to each other, but are coeval. The absolute from which the beginning is to derive its own validity and which must save it, as it were, from its inherent arbitrariness is the principle which, together with it, makes its appearance in the world. The way the beginner starts whatever he intends to do lays down the law of action for those who have joined him in order to partake in the enterprise and to bring about its accomplishment. As such, the principle inspires the deeds that are to follow and remains apparent as long as the action lasts.

See HANNAH ARENDT, ON REVOLUTION 214 (2006).

²⁶ In addressing overlapping consensus, John Rawls also argued that those basic social and political institutions are already given in the original position, and thus the subsequent process is not neutral, in the sense that it already includes reasonable pluralism and is not in favor of any comprehensive doctrine. However, political liberalism does not exclude the possibility of a dynamic political conception of justice, that is, the wide-background political culture and the overlapping consensus are complementary. As a result, the neutrality doctrine of political liberalism suggests that it does not presuppose (and thus advance) any comprehensive doctrine other than overlapping consensus as a default or priority doctrine. It is an impartial doctrine in the sense that each citizen is regarded as being free and equally allowed to advance her concept of “good” to change the breadth and depth of the content of overlapping consensus. As such, Rawlsian neutrality still has its minimum moral value intrinsic in the public reason, which ensures social cooperation in a mutually respectful manner.

deliberative process. But for those who attempt to deny some basic principles of constitutional public reason, such as equality and basic liberty through passage of legislation, it is critical to understand that in the tradition of American politics, non-deliberativists are obligated to justify their private reason through constitutional public reason. In consequence, I think constitutional public reason not only is a starting point for democratic deliberation, but also serves as an indispensable standard for different political actors in the public sphere to interpret and make a collective decision.

B. Reciprocal Political Action

In the last part, though I demonstrated why constitutional public reason is a starting point for democratic deliberation and an indispensable part of our political lives, the basic and abstract principles of constitutional public reason are inevitably limited in their capacity to resolve constant moral disagreements in deliberative politics. Constitutional public reason obviously is an insufficient element for a fairly cooperative action, given that “stand-off” is persistence in our democratic deliberation. In the following passages, I will argue that if we do not purport to have moral indeterminacy hindering our political action, a reciprocal political action is another necessary element for accommodating deliberative disagreement, and encourages future deliberation.

In the simplest sense, the meaning of reciprocity is best illustrated by Amy Guttmann and Dennis Thompson. They define reciprocity as the claims made by others “on terms that I can accept in principle,” and those that I make proportionately “on terms that you can accept in principle.”²⁷ I think the form of deliberative reciprocity is thus identical to that of Kantian reason, which requires each person’s reason to be public and beyond private interests. In particular, Kantian reason suggests

²⁷ See AMY GUTTMANN AND DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 55 (1996).

that the audiences of our speech should be the world at large²⁸ so that our reason would not be only self-regarding or partially other-regarding.²⁹ Insofar as humanity as a whole is taken into account, and insofar as no other external authority defines the reach of speech, the reason underlying our communication becomes public. As such, the form of deliberative reciprocity indicates that the reason we use is articulated from a first-person plural perspective.

Nevertheless, Guttmann and Thompson emphasize that deliberative reciprocity does not require us to justify the contents of public reason universally. Rather, the content of public reason only needs to be mutually acceptable³⁰ to all the political actors partaking in democratic deliberation on the grounds that public reason cannot exist alone without our situated context.³¹ In particular, Kantian universality assumes that reason can be adopted by all the people beyond their boundaries.³² However, I think such a demanding principle of public reason may have a paradoxical result: in terms of various unshared political common senses across different politics, people's

²⁸ See Immanuel Kant, *What is Enlightenment*.
(<http://www.english.upenn.edu/~mgamer/Etexts/kant.html>)

²⁹ Therefore, for example, although I present my opinion on public education to friends in a coffee shop, my speech is still public if I assume that my speech actually can reach beyond my friends. To the contrary, if a congresswoman asserts that a bill lacks legitimacy because it neglects the interests of her constituency, her speech could become a private reason (in Kant's sense), because she may intend to deliver her speech only to a limited group or area.

³⁰ See AMY GUTTMANN AND DENNIS THOMPSON, *supra* note 27, at 54.

³¹ Guttmann and Thompson also emphasize that the content of public reason should be beyond overlapping consensus as Rawls defined. In particular, they argue that if public reason aims at serving as the common ground of a society, a mere Rawlsian political deliberation is not sufficient, unless the overlapping consensus includes the mutually recognized moral principles of all citizens. Guttmann and Thompson hold the same view as Rawls, that the notion of public reason should be beyond one's narrow self-interests. However, they further argue that public reason should also reach those who hold different moral standpoints and be justifiable to those who reasonably disagree with them by using their own moral terms.³¹ As such, the concept of public reason has been relaxed and reformulated by Guttmann and Thompson in their principle of reciprocity, which may be more complete than that of Rawls'.

³² See Onora O'Neill, *Political Liberalism and Public Reason: A Critical Notice of John Rawls*, *Political Liberalism*, 106 THE PHILOSOPHICAL REVIEW 411 (1997).

wills may have no convergence in most situations, thus implying that most of the “reasons” we hold are only private ones.³³ Not only does such a paradox occur among different countries; it also exists within a country. Once we practice our reason, we cannot expect this practice to have been executed within an empty context.

Therefore, I think that what deeply concerns Thompson and Guttmann is that a strong principle of universality and public reason may suppress individual autonomy in the public or political sphere. The weight of each person’s concept of a good and moral argument thereof to which we should accord ourselves in the political and public sphere is a subject that we cannot afford to forget. Deliberative politics thus should condition these plural moral perspectives by creating a vibrant political action in the public sphere³⁴ based on reciprocity. Although the Kantian universal form of public reason presupposes everyone as being free and of equal agency, which naturally results in plural and conflicting perspectives, in the process of practical reasoning, without recognizing the difficulty of reaching a moral agreement, communication among us may become merely many demonstrations of individual perspectives.³⁵ Hence, what deliberative reciprocity pursues of the content of public reason is politically constructed³⁶ by a mutually acceptable justification (or by mutually acceptable justifications) rather than by absolute truth.

³³ *Id.*

³⁴ I draw this argument on Hannah Arendt’s comment on *vita activa*. Arendt’s *action* can be seen as a synthesis of speech *and* act. Once we understand as long as we appear in the public sphere delimited by our constitution, then everyone should be able to proffer their independent perspectives freely. That plural moral perspective view taking actually is a means to another concerted end—to complement the value of plural equality while at the same time mandating that we unearth our shared understanding. See HANNAH ARENDT, *HUMAN CONDITION* (1998).

³⁵ See AMY GUTTMANN AND DENNIS THOMPSON, *supra* note 27, at 54.

³⁶ In this aspect, the concept of deliberative reciprocity is consistent with Rawlsian political constructivism. In particular, in terms of the wide reasonable pluralism that exists within our society, it is also natural for us to expect that disagreements among all of us are also correspondingly plural. In Rawls’s view, even after a reflective procedure is concluded, various sources of disagreement emanating from different theoretical, experiential, and normative roots cannot converge at a

The emphasis on mutually acceptable justification also represents what deliberative politics values: not only persuasion in the decision-making process but also a concurrent political action after persuasion. But since deliberative reciprocity understands political disagreement to be a constant in deliberative politics, reciprocity also mandates that political actors should also establish fair terms for social cooperation and future deliberation under mutually acceptable disagreements. As different deliberative theorists have suggested, although we could expect a good deliberation to bring about a thicker consensus on a substantive moral agreement, a good deliberation may also sometimes polarize political actors and generate no agreement at all. However, moral disagreement should not hinder further political action. If deliberative politics aims at criticizing unequal share and inappropriate influence of political power in the public sphere, it should not privilege a status quo policy by definition. Under such circumstances, deliberative theorists will encourage political actors, especially political actors in the government, to bargain under a fair cooperative process, present their reasons in the public sphere, and then take a stand by a process of majority voting.

Based on the above illustrations, reciprocal political action can be seen as a two-part element. First, everyone should formally deliberate over an issue before taking a concurrent political action and also be able to present a reason justifiable to everyone. Second, in the case of no reciprocal justification, however, deliberative reciprocity requires political actors to construct a mutually acceptable alternative

comprehensive consensus. Therefore, we all have a duty to reflect on the overlapping consensus and to present our reasons to be justifiable reciprocally to others. As such, Rawls indicates that the political concept of justice is politically constructed rather than an absolute truth demonstrated by any comprehensive doctrine. Therefore, the political identity between “you and me” rests not on the endorsement of each person’s comprehensive views, but on our liberal, institutional principles. *See* JOHN RAWLS, *supra* note 20, at 31-2, 55-8.

through fair bargaining, and negotiation for deliberative disagreement should not hinder political action and privilege status quo.

C. Universal Discourse Principle

In the previous two parts of this section, I have stated that because constitutional deliberation in our political lives will inevitably generate political disagreement out of various moral perspectives held by different individuals, democratic deliberation should value the importance of reciprocal political action based on deliberative disagreement. Within this argument, I have strived to avoid splitting procedural and substantive conditions of good deliberation into a dichotomy. However, I think that any democratic deliberation has to be undertaken amid various institutional processes in the public sphere, a characteristic of the democratic process mandating that deliberative theorists not bypass touching upon the institutional principle for participation in the deliberative process. In the following passages, I will argue that a synthesis of Habermas's U-principle as well as D-principle, a universally agreed upon procedure of participation to ensure that every moral agent has the opportunity to discourse about and criticize on an action norms, is an indispensable procedural condition for democratic deliberation.

Habermas repeatedly levels the critique that a principal defect of the modern public sphere is a lack of deliberative reason in modern democratic politics owing to both a chaotic civil society and a closed institutional deliberative process in the political sphere. As such, the basic concern for Habermas is the structures of participation in democratic deliberation within a modern complex society. In particular, because of the large size, complex moral values, and overloaded governmental function of modern society, citizenship, deliberation, and collective

decision-making cannot appropriately link together. This generates weak public reason, powerless constituents, and unchecked political institutions.

Habermas's solution to this problem of participatory structure facing modern complex society is to transform the public sphere into an independent and interconnected "two-track" model.³⁷ That is, each citizen in the public sphere can participate in a decentered "subjectless" communicative process dispersed across the public sphere, and can meet each other at the public sphere's nexus, which in the United States is Congress. Therefore, a good deliberation and deliberative collective decision is contingent on an inclusive and complex procedural institution situated in the public sphere wherein various moral values³⁸ held by citizens can be communicated in common, thereby increasing the reflexivity of our collective actions.

³⁷ Habermas's critique of publicity under socialism and liberalism illustrates the need for both separation and interconnection within two-track public sphere. He states that neither socialism nor liberalism could ensure that public opinion would be both critical and rational. On the one hand, he opines that socialism overwhelmingly publicize the production and re-production resulting into the socialization of politics. If too much of our private communication is publicized, then the critical function of both the political sphere and of civil society is undermined, because the scope of the private sphere shrinks. Civil society should be separated from the control of the political sphere. On the other hand, Habermas opines that liberalism leaves too much will-formation and opinion-formation in the private sphere to be controlled by the private capital, which increases the secrecy within the public sphere and thus undermines the oversight function of the political sphere and of civil society in general. Civil society should be separated from the control of the social power elite. Neither model's publicity could preserve the critical function of the political sphere and/or of civil society. In light of this defect, Habermas thus argues that both the political public sphere and civil society should be differentiated from the capitalized sphere, and at the same time the political public sphere should serve as a complement to, and be complemented by, civil society, which becomes an open and vibrant two-track public sphere.

³⁸ Habermas regards these various moral values held by different citizens in the public sphere as a "lifeworld" that circumvents various objective experiences shared by different social actors depending on how we assign a theme to our situational context; thus, dynamic and relevant matters are included. In this objective perspective, Habermas acknowledges the importance of ethical values within a community. Yet he opines that after the emergence of modernity ethical values no longer can master our actions, but our actions can master the relevance of shared ethical values. In other words, the lifeworld is a series of taken-for-granted background settings that can all be "components" of our actions. Therefore, for Habermas, an important step toward deliberative reason is to differentiate the form from the content of our lifeworld.

To provide a main principle for the institutionalization of “subjectless” communication in “two-track” public sphere, Habermas suggests that D-principle is a necessary condition for the moral deliberative process:³⁹

Those action norms that are considered valid are only those to which all possibly affected persons could agree as participants in rational discourse.

The moral claim inherent in the D-principle concerns how we could treat each participant as a free and equal partner in the deliberative process. D-principle enjoins us to establish a deliberative process in which each individual who hold a different private reason from other individuals can freely and equally criticize others and be equally criticized by others, and thus each private reason can become publicly and politically rationalized.⁴⁰

However, Habermas understands that in reality we cannot expect to reach an anonymously collective decision, given the existence of deep moral conflicts in complex society. Therefore, Habermas also proposes U-principle as a solution for constant moral disagreement after deliberation:⁴¹

A moral norm is valid just in case the foreseeable consequences and the side effects of its general observance for the interests and value-orientations of each individual could be jointly accepted by all concerned without coercion.

This strong moral consensus theory seemingly reveals that democratic deliberation suffers the same defect that Kantian reason does, that is, public reason is an impartial

³⁹ JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 107 (1998).

⁴⁰ Habermas argues that the tripartite modes of validity claims can be categorized in accordance with three basic elements of the speech act: assertion, expression, and regulation. He opines that all of these three modes of validity claims are more or less inherent in our communicative actions toward justification on the grounds that speech acts indicate a communicative process in which both speaker and listener can take a “yes” or “no” position. That suggests that rational discourse is a process of public use of reason in which actors can criticize other actors’ argumentation along those three dimensions of the speech act.

⁴¹ JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 65 (1992).

and absolute moral truth, which would only become part of each person's demonstrations of her or his moral perspective. However, Habermas explicitly argues that U-principle can be deduced from D-principle. Given that D-principle is applied in moral-political deliberation, the moral norm in U-principle is also applied in a moral-political deliberation. Following this vein, he indicates that the criterion of a valid law should be enacted based on an argument that is consistent with a common moral-political law and set of principles, such as a constitution.⁴² Therefore, what U-principle values and stipulates is that the criterion of a legitimate decision outcome should be based on a full and autonomous moral agreement after a universal deliberation that is predicated on general interest.

Accordingly, once we understand the criterion for deliberation and decision thereof as a moral-political deliberation by appealing to a politically constructed standard in a constitution, a strong consensual account of deliberation will not prevent us from employing bargaining and a majoritarian decision-making process.⁴³ This is

⁴² This point is made in *BETWEEN THE FACTS AND NORMS*, in which Habermas differentiates facticity and validity in accordance with positive and common law. More specific, he argues that law as a medium not only can institutionalize these two kinds of actions to economize the actor's burden of interaction, but also can incorporate procedural mechanisms into it to facilitate the ongoing use of practical reason. Law, Habermas argues, then has both facticity and validity dimensions. In the most general sense, facticity of law exists at two levels. One is its positive activity and shared norm among social actors within the sphere of law, backed by coercive enforcement. The other is the enactment and positivity of law. The validity of law also exists at two levels in the most general sense. One comprises the legitimate conditions of democratic and legal procedures of legal enforcement for rational acceptability within the whole society. The other is a system of rights, which conditions the legitimacy of constitutional principles. Whatever tensions we discuss, the point is that legal validity can be assessed in terms of two dimensions, which Habermas calls the "dual validity of law": first, legal enforcement as a social fact embedded in our lifeworld is not valid unless it can be differentiated through rational communication within the whole society. Second, a positive law, even if it also occupies the validity side of law at the same time, is not valid unless it meets the rationalization requirement of law directed by the system of rights.

⁴³ Habermas also touches on the criteria of the bargaining process toward maintaining an ongoing social cooperation. Not surprisingly, he establishes the relationship between bargaining and deliberation via the D-principle. His central argument is that the legitimacy of the bargaining process itself should adhere to a discursively enacted legal norm, which would then indirectly bind our bargaining and compromising process at hand, and thereby render that bargaining process moral. He also argues that such a process should allow for inherent equality in bargaining power. Thus, a fair and legitimate compromise has to meet three conditions: (1) it benefits each party to the agreement, (2) it attaches no free rider, and (3) no party contributes more to the cooperative effort than they gain from it.

not only because political actors, as I mentioned in the previous part, could reach a deliberative disagreement before voting, but also because a demanding consensual theory can prevent those who are disadvantaged from being excluded from the moral-political deliberative process.⁴⁴ As such, Habermas reminds political actors that participatory process for democratic deliberation should be able to correspondingly reflect moral structural values in the public sphere.

If the process of democratic deliberation should be able to flesh out and give citizens opportunity to deliberate over those structural and complex moral values in a civil society with a two-track public sphere, laying down several general principles for institutional conditions in the legislature is therefore a crucial task. Hence, Habermas generally proposes four institutional principles for deliberation in Congress or Parliament regarding both congressional and non-congressional procedural mechanisms.⁴⁵ First, Congress should be open to the broader public sphere through which social critics can be introduced into congressional forum to be heard, addressed, or accommodated. Second, to realize such an open deliberation in Congress, its members should be aware of what the institutional techniques for ensuring public

⁴⁴ In addition to protecting the minority's right to discourse from being infringed upon by the majority, D-principle and U-principle also try to protect democratic deliberation from being undermined by political power. In particular, to protect our system of rights for both public and private autonomy we require legal enforcement of our communicative decisions through administrative power. Moreover, Habermas differentiates administrative power from communicative power and also elucidates the internal relationship between law and politics. In the most general sense, this internal connection reflects three different dimensions in correspondence with the tripartite structure of governmental power: lawmaking power, which is "established with the help of governmental power," executive power, which "organizes offices of public administration," and judicial power, which "relies on the sanctioning power of the state." Following his discourse theory and idea of separation of system and lifeworld, Habermas argues that those three governmental powers have different modes of discourse (respectively) through which communicative power can bind administrative power via law. As Congress is the locus of complicated communicative power in the public sphere, administrative power then implements the decision of communicative power through "pragmatically informed and purposive-rational" pragmatic discourse. The main difference between legislative and executive power is that the latter cannot "deal with normative reasons in either a constructive or a reconstructive manner." Communicative power thus can transcribe itself into law, and leashes executive power by transforming it into a mere "steering system" for the democratic procedure.

⁴⁵ See JÜRGEN HABERMAS, *supra* note 41, at 359-87.

opinion are, as these techniques can also guide congressional members in the decision-making process. Third, congressional members' collective decision should be predicated on a weightier justification. In other words, there should be an authentic deliberation. Fourth, various procedures in Congress should also facilitate independent deliberation and not be distorted by self-interest in the broader public sphere.

Based on this discussion, one can understand that the universal discourse principle I present here represents two kinds of a structure for congressional participation and deliberation in accordance with Habermas "two-track" public sphere. First, congressional deliberation should be interconnected with and responsive to a vibrant civil society. Second, members of Congress also have the accountability to create various procedural conditions that will facilitate an independent argument for a better argument based on politically constructed values shared by all of the citizens.

III. Calls for an Empirical Investigation of War Power Deliberation

In the previous section, I have demonstrated that a good deliberation should be conditioned by a sphere that has been depicted and publicly entrenched within a constitution, and that enables all of the political actors to introduce, interpret, and criticize various plural moral perspectives on an equal footing. This is done in accordance with shared constitutional principles through complex procedures established in a two-track public sphere--thereby reciprocal public reason or deliberative disagreement is able to be generated in order to promote social cooperation and future deliberation. But why are these principles crucial to the Founders' proposal that Congress should exert control over presidential war power through deliberation? As I will present below, there are also several criticisms of deliberative politics that have been made by non-deliberative political theorists and deliberative theorists alike, which may in turn undermine the validity of the argument

made by the Founders and modern deliberative theorists. However, as Jürg Steiner suggests, “the fact that the [deliberative] model is controversial makes it not less but rather more interesting to study in an empirical way.”⁴⁶ As such, it is necessary to understand why an empirical investigation of congressional deliberation is legitimate and, more importantly, how or why it relates to control over presidential war power. In the following passages, I will (1) explain why empirical investigation is indispensable from the perspective of deliberative democracy theory, (2) why constitutional deliberation over war power in Congress is indispensable for empirical analysis, (3) why to test the impact of congressional deliberation on a reciprocal use of force between the president and Congress is legitimate, and (4) why identifying the function of procedural institution in Congress through empirical analysis is crucial for war power deliberation.

A. Empirical Claim as Practical Reason

The first and foremost foundation for performing an empirical investigation of congressional deliberation is that the moral-political value of deliberative politics itself should be reciprocally reached to its rival such as rational choice theorists. As Guttmann and Thompson suggest, an empirical claim is one of the requirements mandated by the principle of reciprocity.⁴⁷ This requirement is also consistent with the central tenet of Kantian reason, that is, reason should be put into practice.⁴⁸ Although

⁴⁶ See JÜRIG STENINER, ANDRÉ BÄCHTIGER, MARKUS SPÖRNDLI, AND MARCO R. STEEBERGEN, *DELIBERATIVE POLITICS IN ACTION* 32 (2004).

⁴⁷ See AMY GUTTMANN & DENNIS THOMPSON, *supra* note 29, at 55-6.

⁴⁸ In the *FIRST CRITIQUE OF PURE REASON*, Kant explained the difference between practical reason and speculative reason as:

All statements enounced by pure reason transcend the conditions of possible experiences, beyond the sphere of which we can discover no criterion of truth, while they are at the same time framed in accordance with the laws of understanding, which are applicable

every moral claim cannot be completely proved through empirical demonstration, it at least should be practiced and thus reasonably plausible in our lifeworld. Accordingly, a consistent and relatively reliable and verifiable method of empirical investigation can be used to evaluate moral claims.

An empirical investigation into congressional deliberation is relatively objective in the sense that the content of the sample is recorded in a governmental document, which can easily be empirically tested by the public. Although coding the form and content of speech delivered by members of Congress is a subjective judgment, as long as the coding method is objectively recognized as a reliable method, the empirical analysis will not be unreasonable. As I will illustrate in the next chapter, the Discourse Quality Index developed by Jürg Steiner et al. is a publicly recognized research measure for the quality of congressional deliberation among the community of deliberative theorists.⁴⁹ Therefore, by applying Discourse Quality Index to explore the moral-political claim made by the Founders is a reasonable method with which to test whether the thesis of “control over the presidential war power through congressional deliberation” can be empirically confirmed.

only to experience; and thus it is the fate of all such speculative discussions that while the one party attacks the weaker side of the opponent, he infallibly lays open his own weaknesses.

Thus, what distinguishes the public use of reason from speculative or pure reason alone is whether we think about practical reasoning. A categorical reason is merely an a priori reason, which would lead us only to skepticism. Only when we practice our a priori reasoning will we expand our private horizon toward the public horizon, on the grounds that the reflection from and judgment of others would determine the rights and limits of our private reason.

⁴⁹ See Simone Chambers, *Democratic Deliberative Deliberation*, 6 ANNU. REV. POLIT. SCI. 307 (2003) also see Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANNU. REV. POLIT. SCI. 497 (2008).

B. Constitutional Deliberation outside the Court

The first criticism of the principle of good deliberation that I have proposed in the previous section, constitutional public reason, comes from deliberative theorists. Guttman and Thompson criticize Rawlsian reason for only recognizing principles provided in the Constitution as the public reason that we should endorse, which will exclude plural moral perspectives in the political realm and tend to generate moral indeterminacy for those who disagree with constitutional public reason.⁵⁰ Moreover, they argue that the abstract values of constitutional provisions would almost always generate the most contestable interpretations and moral disagreement.⁵¹ Therefore, Guttman and Thompson argue that to widen the scope of constitutional deliberation, constitutional deliberation not only should be taken outside the Supreme Court but also rests upon a comprehensive moral ground rather than upon mere constitutional ground.⁵²

Guttman and Thompson's critiques of constitutional deliberation can fit squarely into the debates over the role of constitutional review in the Supreme Court. In particular, although the role of constitutional review in the Supreme Court is a subject that is both controversial and the topic of endless scholarly debate, scholars of judicial supremacy would not deny the arguments made by constitutional and political scholars⁵³ that members of Congress and presidents could resolve separation of

⁵⁰ See AMY GUTTMANN & DENNIS THOMPSON, *supra* note 29, at 38-9.

⁵¹ *Id.*, at 34-5.

⁵² *Id.*, at 199-201.

⁵³ See e.g. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT (1997); MARK TUSHNET, TANKING THE CONSTITUTION AWAY FROM THE COURTS (1999); KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE (1996); MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS (2004).

powers issues under the Constitution through compromise and accommodation, often without judicial help.⁵⁴ For example, Louis Fisher argues that various issues of constitutional doctrines often arise between the president and Congress, which thus motivates members of Congress to engage in constitutional dialogues outside the Court and even reject constitutional interpretation made by the Court.⁵⁵

In the most general sense, I think Fisher's argument on congressional deliberation suggests that constitutional deliberation in Congress is a way to protect the legislature's institutional authority either when the Court's interpretation threatens its core power or when the Court rejects the opportunity of getting involved in a separation of powers issue between the political branches.⁵⁶ Following Fisher's line of thought, in war and foreign affair power areas, I think members of Congress should have more incentive to engage in constitutional deliberation on the grounds that the Court usually avoids reviewing the relevant war power issues out of prudential concerns.

Guttmann and Thompson may be right that constitutional deliberation itself could not necessarily resolve moral disagreement in democratic deliberation. However, as I suggest above, once that we appear in the public sphere delineated by a constitution, we inevitably become the heirs to the principles laid down by our

⁵⁴ See LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS A POLITICAL PROCESS* (1988); LOUIS FISHER, *SEPARATION OF POWERS: INTERPRETATION OUTSIDE THE COURTS* (1990); LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* (1997).

⁵⁵ A notable example is congressional refusal to accept the Supreme Court's ruling on the constitutionality of a legislative veto and still provided for legislative veto clauses in the laws. Other than constitutional interpretation by the governmental organizations, Fisher and Devins demonstrate that non-governmental organizations also play significant role in constitutional deliberation in the public sphere.

⁵⁶ In addition to protection of its own institutional authority, Congress deliberates over the Constitution, other scholars argue, because of "electoral connections," "policy entrepreneurs," or different institutional factors. See DAVID MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1975); DOUGLASS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* (1990); JOHN KINDON, *AGENDAS, ALTERNATIVE AND PUBLIC POLICIES* (1995).

predecessors, who themselves interpreted these principles in accordance with the constitution. As such, I argue that though constitutional public reason can and should be continuously transformed through democratic deliberation, it still plays a prominent role in democratic deliberation. This argument not only constitutes the fundamental research motivation of this dissertation, issuing a response to Guttmann and Thompson's critique of constitutional public reason, but also generates the primary empirical hypothesis that I will illustrate in the next chapter: a better constitutional deliberation in Congress can generate a more balanced congressional-executive war power relationship.

C. Responsible Political Game

The second criticism of another element of good deliberation, reciprocal political action, is posed by political philosophical theorists. Chantal Mouffe charges that deliberative theorists have illusory expectation for consensus.⁵⁷ In particular, she argues that any procedure and any shared principles inherent in it are created through exclusion. Here, she challenges Habermas's separation of procedure and lifeworld. That is, Habermas opines that the D-principle and the complex procedures thereof are together a product of rational dialogue that distinguishes an inclusive process that is consistent with a set of general interests that arise from our taken-for-granted background world. However, Mouffe argues that those complex procedures are always rooted in the lifeworld precisely because the justification of those procedures is based on those existing shared substantive forms that are part of our lifeworld. Hence, even if Habermas argues that consensus can converge on procedure, it is still built on substantial ethical commitments rather than on a moral-political argument.⁵⁸

⁵⁷ See Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism?*, 3 SOCIAL RESEARCH 749 (1999).

⁵⁸ *Id.*, at 749.

Moreover, Mouffe levels the criticism that deliberative politics is an impossible politics because “power and antagonism and their ineradicable character”⁵⁹ always exist. She charges that the public reason advocated by deliberative theorists is not a neutral and rational dialogue. Rather, Mouffe opines that discourse can be persuasive only via a “master signifier,” which suggests that the deliberative process is already conditioned by an external authority and a biased political power.⁶⁰ As such, any voting procedure after a good deliberation will still be the same as that after any other power political game. Deliberative politics would not be able to generate moral and legitimate substantive policy.

Deliberative democracy theorists never deny that power politics would be ruled out in deliberative politics. What deliberative theorists value is that political power game should be predicated upon a responsible democratic deliberation. More specific, precisely because deliberative theorists acknowledge that consensus is not easy to build and power politics would often come into play, deliberative theorists hypothesize that political actors still would present their best justification to the public sphere and try to persuade their constituents about the reason for playing a political power game. Moreover, as I have pointed out in the previous section, I do not assert that a decision made out of deliberative process is neutral. Deliberative politics asks political actors first to recognize that every decision we make is only provisionally consistent with the general interest; otherwise, political actors in the deliberative process would not be broadly open-minded. Therefore, deliberative theorists are not as naïve as Mouffe supposes. Decision made after deliberation would not be a perpetually consensual agreement.

⁵⁹ *Id.*, at 752 (1999).

⁶⁰ *Id.*, at 751.

Accordingly, deliberative theorists hypothesize that even if ideal deliberative disagreement and decision would be difficult to realize in real politics, it does not necessarily suggest that it does not exist partially.⁶¹ Therefore, from an empirical standpoint, deliberative theorists need an operational measurement to test whether a good deliberation could generate a more ideal policy outcome. As I will address in chapter 3, I develop a congressional control index to explore whether a higher quality of congressional deliberation would be able to generate a more concurrent and less unilateral presidential use of force.

I think that testing a reciprocal political action principle as it applies to war and foreign affair deliberation is vital because the Constitution does not provide clear guidelines regarding the allocation of war or foreign affair power between Congress and the president. Much of the content of relevant war power allocation should be left for a mutual deliberation between the political branches. Moreover, in light of many events of unilateral presidential uses of force in constitutional history, it is reasonable to infer that such an ambiguous constitutional allocation of war power is likely to generate a sheer power political game. Therefore, it is legitimate for deliberative theorists to inquire whether better congressional deliberation could generate a more balanced congressional control over the president through passage of legislation and also prevent the president from initiating a unilateral war.

⁶¹ Habermas often emphasizes that pragmatic discourse in the political realm is a mixed speech act. In particular, Habermas's "speech act" theory differentiates itself from strategic action, which he regards as facticity of, and a success-oriented action. More importantly, speech acts indicate how each moral "agent" relates herself through pragmatic rather than semantic analysis to her hearers and her lifeworld, which Habermas views as validation, and an understanding-oriented action. As such, there is no sharp distinction between strategic and deliberative discourse; it just a matter of degree.

D. Institutional Responsive Congress

The third criticism of my last element of good deliberation, universal discourse principle, is often made by political activists. Iris Young argued that a mild voice of reason could not force members of Congress to be responsive to citizens' voices. Similar to Mouffe's argument, she opines that the structure of congressional deliberation would only reflect the inequality with which justice is meted out in society.⁶² This is because procedural norms are always biased toward more powerful agents but not open for full and equal participation. Therefore, Young argued that the only way to make Congress responsive is to take direct political action conditioned by a strong civil society.⁶³

Nevertheless, the scenario drawn by Young above is precisely what the Founders worried about. In particular, the Founders were afraid that the function of congressional deliberation would be undermined by factions and populism. They opined that a reasoned decision cannot be made without a relatively insulated space. That is why they expected that a representative body elected from a wide territory could be beneficial to a cool-headed deliberation and decision. Hence, the design of the electoral system should be a means toward the realization of public reason but not an end for narrowly local interests or mere demonstration of reason.

⁶² See Iris Young, *Activist Challenges to Deliberative Democracy*, 29 *POLITICAL THEORY* 675 (2001).

⁶³ The difference between Mouffe's argument and Young's is that Mouffe still believes in representative politics but Young does not. Therefore, Young advocates a constructive political activism:

The activists is suspicious of exhortations to deliberate because he believes that in the real world of politics, where structural inequalities influence both procedures and outcomes, democratic process that appear to conform to norms of deliberation are usually biased toward more powerful agents. The activist thus recommend that those who care about promoting greater justice should engage primarily in critical oppositional activity, rather than attempt to come to agreement with those who support or benefit from existing power structures.

Id., at 671.

Deliberative theorists hypothesize that the tension between elite deliberation and populism can be relatively mediated by a well-designed deliberative process in Congress. In particular, members of Congress indeed have an obligation to deliberate, especially over those highly contested issues, independently from their constituents; yet representatives should also deliberate and accommodate their constituents, as much as possible, before voting. For deliberative theorists, what is important for the division of deliberation between the formal institution and the broader civil society is that members of Congress should pay equal respect during a deliberative disagreement. After profound deliberation with their constituents, the representatives still could vote the opposite of what the constituents think if they sincerely believe that the reasons they hold for voting in Congress the way they do are sufficiently reasonable.⁶⁴ Deliberative theorists hypothesize congressional rule setting could facilitate such a job.

Accordingly, following the above assumption, it is natural for deliberative theorists to investigate the effects of congressional rule and non-congressional rule setting have on the quality of deliberation. If the result shows that a more participation-inclusive and information-facilitative congressional rule does generate a better congressional deliberation, deliberative theorists would be able to argue that congressional institution can make a decision that is both independent and responsive, and not be as pessimistic as political activists are.

In sum, an examination of how universal discourse principle affects both the deliberation over and the law regarding the war and foreign affair powers is important for two reasons. First of all, deliberative theorists argue that procedural institution in Congress could condition congressional deliberation to be both responsive and rational in the public sphere, which is especially important in discussing a just cause for a war.

⁶⁴ See AMY GUTTMANN & DENNIS THOMPSON, *supra* note 29, at 137-40.

Second, precisely for this reason, the elements of procedural due process in lawmaking and deliberation that are crucial to condition congressional war and foreign affair decisions that are prudent, are thus worthy of being identified through an empirical analysis.

CHAPTER 3:

GROUND WORK FOR EMPIRICAL RESEARCH ON WAR POWER

As I suggested in chapter 2, deliberative democracy theorists already provide many normative arguments about the condition and content of democratic deliberation. At the same time, we also see that deliberative theorists are not satisfied with philosophical debates over democratic deliberation theory. A call for empirical investigation of democratic deliberation in real-life situations has become keener in the past decade. This chapter is a preparatory work for such an empirical response regarding the relationship among congressional deliberation, congressional check, and presidential use of force.

In the following sections, several important ground works for empirical analyses will be elucidated, including: (1) a brief literature review and critique of empirical research on presidential use of force and its implications for the construction of one of the principal variables, *congressional control index*; (2) another brief literature review and critique of empirical research on the quality of congressional deliberation and its implications for constructing another major variable, *discourse quality index*; (3) an explanation of the theory underlying the empirical hypotheses; and (4) an explanation of the sources of data and variables for the empirical analyses. I have two main critiques of the aforementioned literature reviews: (1) conventional research on presidential war power neglects what Congress actually says in a specific military event, which suggests that we should focus more on the contents of a law; (2) empirical research on the relationship between congressional deliberation and policy outcome is too static to observe how the executive branch responds to a congressional decision and how Congress further reacts to the executive response, thus suggesting

that a more comprehensive research on the pattern of congressional deliberation and decision thereof is needed.

I. Review and Critique of Empirical Research on Presidential Military Deployment

To explore the implications of conventional empirical research on presidential military deployment, the following review will mainly focus on the development of the empirical model employed in conventional research, the hypotheses underlying a presidential decision to military deployment, and the significant variables affecting the presidential decision on military deployment. I argue that the most important implication of these conventional studies of presidential military deployment is that event-count model, focusing only on the frequency of presidential use of force, neglects the patterns of how Congress attempts to place checks on the president through passage or rejection of legislation during the deliberative process.

A. Review of Empirical Research on Presidential Military Deployment

In surveying the past thirty plus years of empirical research on presidential use of force, one cannot disregard Barry Blechman and Stephen Kaplan's pioneering study of incidences of non-major military action ("short of war"), which has long served as a classic ground work for empirical study on military deployment. Blechman and Kaplan argue that those "short of war" incidents are presidential "political" military deployments for conveyance of national resolve, promotion of national interests, and commitment to the U.S.'s allies, and can meet the president's short- and long-term political agendas both nationally and internationally. The main contribution of Blechman and Kaplan's study is that it is the first to include, identify, and operationalize the concept of non-major military action into the empirical research on

presidential war power. However, given the limits of their datasets, they merely make simple descriptive results without exploring causal relationships.

Building upon Blechman and Kaplan's dataset, Charles Ostron and Brian Job adopt an event-count empirical model to analyze how "domestic political factors" influence a presidential decision on use of force. They argue that the president, as a "political leader," comprehensively "monitor[s] salient dimensions in the domestic, international, and political arenas" before dispatching the troops abroad. In particular, Ostron and Job argue that though international politics characters by definition affect influence the presidential decision on use of force, domestic political characters, including presidential approval rating, national elections year, and various weighted economic misery indices, are the primary factors that substantially affect the presidential decision on use of force.

Some studies show that electoral connection is the most significant factor influencing the frequency of presidential use of force. First, building on Blechman and Kaplan's dataset, Benjamin Fordham takes a somewhat different argument from that of Ostron and Job, and argues that domestic political and economic factors influence the presidential decision on use of force only indirectly. In particular, Fordham argues that the president only regards those domestic political and economic variables as proxies of his opportunity to be reelected. His event-count model demonstrates that if the national economic situation, namely, low inflation and high employment rate, is better, then the president has less incentive to use force abroad, as it would imperil his chances of being reelected. Second, the electoral connection argument is also demonstrated in Richard Stoll's research on presidential use of force. His event-count model demonstrates that the initiation of military force systematically peaks during the wartime reelection years and drops during peacetime reelection years.

Some research focuses on the relationship between congressional partisan component and the presidential decision on use of force. In particular, William Howell and Jon Pevehouse build upon a different event-count model dataset and refine congressional partisan composition into three different variables—unified government, percent president party, and president party power—to test the frequency of presidential use of force. They demonstrate that use of major force is significantly affected by congressional partisan component and argue that domestic political factors are the most prominent factors affecting congressional controllability over the presidential use of force.

B. Critique of Conventional Research on Presidential Use of Force

The conventional empirical studies on presidential use of force presented above inform us about the importance of inclusion of domestic political factors into an empirical model. However, for the reasons I elaborate below, I argue that an event-count model cannot account for a systematic pattern of dynamic power variation between the president and Congress after a presidential use of force.

All of the statistical models mentioned above employ an event-count model to analyze the ebb and flow of presidential war power relative to congressional power. Such a statistical model suggests that the event of a presidential use of force stands for the failure of the congressional attempt to provide a check on the presidential use of force. For example, Howell and Pevehouse model the presidential war power as an expansion of presidential power if Congress has a short time to linger on the president's decision before a military action. This veto-player perspective is also reflected in John Ely's argument.¹ He claims that Congress by design is intended to

¹ See JOHN H. ELY, WAR AND RESPONSIBILITY 3-11 (1993).

“clog the road to combat” by responsively slowing the president’s calls for military action.

However, viewing Congress only as a veto-player of each military action event ignores the fact that Congress also often cooperates with the president to initiate a military deployment. A presidential use of force is not necessarily a zero-sum interaction game between the president and Congress. Therefore, I think it is essential to observe the presidential-congressional war power relationship from two aspects, which could make empirical research on use of force being more approximated to complete: (1) the pattern of congressional attempts at checking a presidential use of force through rejection and passage of legislation and (2) the pattern of presidential responses to the congressional attempts at gaining control over presidential use of force.

Another critique I flesh out from the above review is that conventional studies do not inform us how the president and Congress respond to and manage a foreign crisis either before or after a use of force. By focusing on the frequency of military deployment, an event-count model can only treat each military event as discrete, and neglects the fact that each military event often consists of a series of congressional and presidential efforts to manage a foreign crisis through various non-military deployment measures. Therefore, I think it is vital not only to include military deployment decisions made by both the president and Congress into the empirical dataset, but also to include non-military deployment decisions into the scope of empirical analyses.

II. Review and Critique on Empirical Research of Congressional Deliberation²

There are a few empirical studies on the quality of congressional deliberation. The underlying theme of these empirical research efforts is the development of a discourse quality measurement unit applicable to each congressional member's speech, so as to either provide or test the relationship between congressional deliberation and the institutional rules or the quality of a congressional decision. In the balance of this section, I will briefly review the development and critique of those empirical studies of the measurement of quality of congressional deliberation and decision thereof. My overall critique is that current empirical research on congressional deliberation is too static to observe both political actors' responses in the public sphere to a congressional decision and how Congress reacts to political actors' responses to its decision in the public sphere through its deliberative process.

A. Review of Empirical Research on Congressional Deliberation

The first research call for study on congressional deliberation was proposed by Edward Lasher, who provides a series of hypotheses as "a preface to empirical analysis"³ of the quality of congressional deliberation. He hypothesizes that if the relevant information of an issue is more salient and accessible within the legislative process, then legislative decisions will better meet a more correct and legitimate decision. Although Lasher warns that an empirical test of this kind is not easy to construct or conduct, he still believes that "it is sufficiently important to clarify the

² As I pointed out in Chapter 1, this deliberative turn is both general and particular in practice. Broadly defined, deliberative democracy includes transformation of both formal institutions and civil society. In other words, all of the talks that occur in the public sphere can be deemed as deliberations, but are not merely limited to elite-elite, citizen-elite, or citizen-citizen talks. Empirical research on deliberative democracy tends to take one of these three lines. Because my research focuses on only congressional deliberation, I exclude the discussions of public talks.

³ Edward L. Lasher, *Assessing Legislative Deliberation: A Preface to Empirical Analysis*, XXI LEGISLATIVE STUDIES QUARTERLY 4, 501 (1996).

concept of deliberation”⁴ and to “make the study of deliberation as concrete as possible.”⁵

John Dryzek and Valerie Braithwaite go further by outlining a set of congressional discourses for Australian politics in accordance with different political values. They propose two major hypotheses regarding the relationship between the quality of deliberation and political values. First, Dryzek and Braithwaite posit that a higher quality of deliberation can be expected if people holding different political values demonstrate an engagement in the democratic process.⁶ Second, they suggest a correlation between both a higher quality of deliberation and political actors whose discourse is value-oriented and who usually enjoy substantial support from their constituency. Otherwise, different value-holders would imperil their reelected opportunity.⁷

Although Dryzek and Braithwaite provide several hypotheses about how the appreciation of the same political and social institution and value-oriented discourse tend to generate a higher quality of deliberation, they do not further identify how each actor’s discourse brings about such a higher quality. Katharina Holzinger supplements that work by applying speech act theory to her observation of two German cases: a mediation of a waste management conflict, and a parliamentary debate on embryonic stem-cell research.⁸ She categorizes speech acts into bargaining and arguing modes.⁹

⁴ *Id.*, at 503.

⁵ *Id.*

⁶ See John Dryzek & Valerie Braithwaite, *On the Prospects for Democratic Deliberation: Values Analysis Applied to Austrian Politics*, 21 *POLITICAL PSYCHOLOGY* 241-66 (2000).

⁷ *Id.*

⁸ See Katharina Holzinger, *Context or Conflict Types: Which Determines the Selection of Communication Mode*, 40 *ACTA POLITICA* 239, 240 (2005).

⁹ *Id.*, at 240-3.

Her hypothesis and frequency test are intuitive: more arguing modes would result in a higher quality of deliberation. In other words, a higher level of justification would generate a better collective decision. More importantly, her frequency test also shows that congressional debate does not necessarily involve complete argumentative speech. Thus, she concludes that institutional factors and the nature of an issue are crucial to predetermine the quality of democratic deliberation.

As Holzinger points out, discerning how institutional context influences deliberation is a natural first step in future empirical studies on congressional deliberation. Jürg Steiner, Andre Bachtiger, Markus Spornli, and Marco Steenbergen's empirical research on four parliamentary deliberations accepts the challenge in this field by developing the "Discourse Quality Index" in accordance with Jürgen Habermas's discourse ethics theory to test the influence of institutional factors and issue characteristics on congressional deliberation. In particular, following Habermas's division between facticity and legality, Steiner argues that a complete justification should relate a normative argument to the issue at hand. In other words, a higher level of deliberation means a justification is developed and defended through reflection on an actual case.

Steiner's empirical tests are two tiered. The first- tier test pertains to the relationship between institutions and issues on the one hand and deliberative quality on the other. The second- tier test regards the association between deliberative quality and its consequences. Among various empirical results, it is noteworthy that his empirical model shows that the United States presidential system does not necessarily generate strong deliberation in terms of the complexity of discourse justification, especially in comparison to the British and German parliamentary systems.¹⁰

¹⁰ *Id.*, at 122-5.

However, the discourses among the members of the United States Congress are more respectful.

B. Critique of Empirical Research of Congressional Deliberation

The review of empirical research on congressional deliberation presented above makes two important contributions to future research. First, it reveals that both institutional (e.g. a presidential as opposed to a parliamentary system) and political factors (reelection opportunities) influence the quality of congressional deliberation. Second, it suggests that a complete justification in discourse should consist of both normative and positive elements. For the reasons elaborated below, I argue that research on congressional deliberation can be more comprehensive if an empirical model can account for the interaction between Congress and the broader public sphere.

Although all of the studies on congressional deliberation mentioned above emphasize the importance of context or actual case reflection in deliberation, this goal is not fully realized in those studies, for they do not look into responses of other political actors, such as the president. I think an investigation into the event of a presidential response is more consistent with Habermas's division of facticity and legality.¹¹ In particular, the main purpose of congressional deliberation is to promote the legitimacy of Congress's own decision. One of the standards of legitimacy is not only other political actors but also private citizens must be willing to abide by the law passed by Congress. In consequence, and in the context of this dissertation, it is important to see how the president responds to congressional regulation of his war power.

¹¹ See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 28-40(1996).

Another critique I suggest here is that we should explore the characteristic of congressional deliberation when an issue is revisited by Congress.¹² As I suggest above, political actors in the broader public sphere would respond to a congressional decision, which would also force Congress to revisit and deliberate again upon its prior decision. Some deliberative theorists argue that democratic deliberation would have a better outcome if political actors have the chance to reflect upon their own decisions. Under the context of this dissertation, I think to look into the quality of congressional re-deliberation of a military event is important in terms of the extremely dynamic nature of the war power issue. Congress already has mechanisms that give congressional members chances to re-deliberate upon the war power issue through the annual budget process, which reflects the Founders' expectation that Congress can mainly assert control over war and foreign affair policy making through its budget power. Therefore, I argue that the scope of the empirical dataset of congressional deliberation should be enlarged by including congressional re-deliberation and re-legislation of a specific military event.

III. Measuring Separation of Power and Deliberation: The Congressional Control Index and the Congressional Discourse Quality Index

Based on the literature reviews in the previous two sections, I found that two important steps should be established in order to perform an empirical analysis regarding the relationship between congressional deliberation and presidential use of force: (1) a qualitative variable to measure the level of congressional control over the president provided in a law and (2) a qualitative variable to measure the level of congressional deliberation over the constitutionality of a use of force. The former

¹² See Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANNU. REV. POLIT. SCI. 498-500 (2008)

variable, which I name “congressional control index,” is vital to the extent that it does not treat the relationship between the president and Congress as a zero-sum game in the way that conventional research on presidential use of force does. The latter variable, which Steiner names “Discourse Quality Index,” is a variable to represent the quality of each speaker’s discourse. I will partially adjust Steiner’s Discourse Quality Index for the research purpose of this dissertation. In the following passages, I will illustrate the contents and underlying theory of these two variables in more detail.

A. Congressional Control Index

As I indicate above, the conventional research on congressional control over a presidential use force, only regards the relationship between the president and Congress as zero-sum game; thus it ignores the fact that Congress often collaborates with the president in managing a military event through legislation. I argue therefore that an alternative variable should be established to represent the degree to which Congress participates in and controls over a formation of military and foreign affair policy made by the president. As I list below, the “congressional control index,” which can duly reflect the above critiques, consists of two elements: (1) control orientation: procedural/ substantive control and (2) control timing: ex ante/ ex post control. I will elucidate the underlying theory of these two elements below.

1. Control Orientation: Procedural/ Substantive Control

In terms of the degree of congressional participation in the formation of a war and foreign affair policy with the president, I identify two elements for the level of congressional control over the content of policy: *procedural control and substantive control*. Procedural control stands for a lower level of congressional control over the presidential war and foreign policy making, whereas substantive control represents a

higher level of congressional control. This element is constructed in accordance with non-delegation doctrine and one of the conditions of good deliberation I identified in chapter 2: reciprocally political action.

As I indicated in chapter 2, I believe that the fact that disagreement over constitutional interpretation is a constant in our political life entails that reciprocity is the standard for a political action. Such a situation will prevent democratic deliberation and cooperation from falling apart and can in turn encourage future democratic deliberation. However, reciprocity does not necessarily suggest a consensus on a specific constitutional interpretation and policy, especially in terms of different moral values held by moral agents. Following the basic principle of democratic deliberation, I argue that even if there is no consensus on the substance of a policy, each political actor should at least have a chance to provide her or his opinion on an action in a deliberative process. Therefore, the bottom-line standard is that a procedural control over the president is indispensable for Congress, as it can give Congress an opportunity to be informed and to take a yes or no position.

From a legal perspective, the above bottom-line standard of reciprocal political action is consistent with the central tenet of non-delegation doctrine. In particular, the basic principle of non-delegation doctrine is to require Congress to make a substantive policy choice; further, it allows Congress to control the president through an “intelligible standard” provided in a law.¹³ However, in terms of the ever-changing and complex nature of war and foreign affair issues, it is natural to give the president discretion to provide war policy options and to make a public case for his own option first and then give Congress an opportunity to take a yes or no position in

¹³ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 367 (1984) (In determining what Congress may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination).

a deliberative process. In other words, the purpose of non-delegation doctrine is to ensure that Congress has a meaningful and deliberative participation procedure to present its reason for a policy choice to the public sphere. Therefore, it is fair to say that a minimum standard of congressional control over the presidential war and foreign affair powers is a procedure that facilitates Congress's own participation in and deliberation over a policy choice.

2. Control Timing: Ex Ante/ Ex Post Control

In terms of whether a presidential action is predicated on a law generated out of a deliberative process in advance, I identify another two elements for the level of congressional control over the presidential action: *ex ante and ex post control*. *Ex ante* control stands for a lower level of congressional control over the presidential war and foreign policy making, whereas *ex post* control represents a higher level of congressional control. This element is constructed in accordance with the original understanding of Declare War Clause and also the content of reciprocal political action mentioned above.

The principle of reciprocal political action attempts to ensure that each political actor's choice is based on a meaningfully deliberative action. If a policy deliberation is premised on a unilateral policy choice, it would not only decrease other political actors' incentive to cooperate in future deliberation, but also impair the promise of reciprocal political action. Moreover, if the president tries to acquire a congressional authorization before initiating a use of force, the constituents of each congressional member can discourse in the broader public sphere and with the president as well through "the nexus of public sphere, namely, Congress. This in turn gives the president more opportunity to understand what the better argument is regarding a war in the broader public sphere.

More important is the fact, in light of the British Crown's dominant national security power between the fifteenth and eighteenth centuries, that the Founders expected the fundamental reason for enacting Declare War Clause to be protection of the people from life and property loss as a consequence of the president's unilateral decision. In other words, the Founders suggested that one of the functions of Declare War Clause is to protect the great interests that could potentially be at stake. If this function could be realized, the president by definition should consult Congress by trying to persuade its members and acquire an authorization before taking a military action. Therefore, in the war power area, an ex ante congressional control over the presidential use of force is more ideally approximated to an ex post congressional control.

In sum, congressional control index features two elements. The first element of congressional control index, control orientation, states that the greater the procedural mechanism provided in a law, the less influence Congress will have over presidential power, whereas if a greater substantive policy choice is provided in a law, the greater congressional influence on presidential power will be. Also, the second element of congressional control index, control timing, denotes that the earlier the president must provide a justification to Congress and the broader public sphere, the stronger the congressional check imposed on the president will be, whereas the later the president must provide a justification to Congress and the broader public sphere, the weaker the congressional check imposed on the president will be. Hence, the coding of a congressional control index follows the outline below.

1. Control Orientation

(0) No Control

(1) Procedural Control

(2) Substantive Control

(3) Procedural and Substantive Control

2. Control Timing

(0) No Control

(1) Ex Post Control

(2) Ex Ante Control

The above two components are scalable. Therefore, I expect the coding categories to hang together reasonably well so that both of them can be combined to form a scale that can serve as an overall measure of the level of congressional control over the presidential power.

B. Discourse Quality Index

As the literature review on congressional deliberation suggests above, the development of a qualitative measurement of the quality of congressional deliberation is an indispensable step in testing the theory of deliberative democracy. Thanks to Jürg Steiner's Discourse Quality Index, one can use his Index as a basis and also adjust it to measure the quality of public deliberation in accordance with a specific purpose. In the following passages, I will describe (1) the observation unit of each congressional member's speech, that is, constitutional deliberation, and (2) the elements of my partially adjusted Discourse Quality Index.

1. Observation Unit of Speech: Constitutional Deliberation over War Power

The first question concerning the construction of the Discourse Quality Index is that of what constitutes my observation unit of each congressional member's speech during floor debates. I mainly follow Habermas's speech act theory and Steiner's Discourse Quality Index to code every utterance by every member of Congress delivered in a

floor debate.¹⁴ Moreover, since one of the most important premises of deliberation is common knowledge or inter-subjectivity, which suggests that actors should know each other's thoughts and take up their own thoughts in either a supportive or opposing way, I have to limit my observation unit of the speech act a specific issue.

The research purpose of this dissertation is to investigate the war powers distribution between the president and Congress; therefore, I will limit the observation of congressional deliberation to those speech acts concerning the constitutional interpretation of war and foreign affair powers between the political branches.¹⁵ Under this premise of observation, a speech act about when or how the president should withdraw troops, for example, will not be included in my observation, even though one can argue that war policy is also indirectly constitutional in nature. As a result, if a discourse of a congressional member is not relevant to war power constitutional deliberation, I will merely code her or his discourse as 0.

2. *The Partially Adjusted Discourse Quality Index*

Steiner's Discourse Quality Index is designed to measure congressional deliberation in order to compare how the political institutions of different countries influence the quality of congressional deliberation and decision-making in each case. That suggests that Discourse Quality Index is applicable to the research purpose of this dissertation. The original Discourse Quality Index consists of six elements: *participation, level of justification, level of content of justification, respect toward groups, respect toward demands, respect toward counterarguments, and constructive politics*. For the reasons I will explain in the following passages, I will illustrate an adjusted Discourse Quality

¹⁴ See JURG STEINER, *supra* note 18, at 55.

¹⁵ For the meaning of constitutional deliberation, see J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS 11 (2004) ("*Deliberation [indicates] reflection and debate over the scope of federal powers under the Constitution in the context of legislation.*")

Index that consists of only two elements used for this dissertation: (a) the level of justification and (b) the level of content of justification.

a. Level of Justification

Steiner refers to this category as “the nature of the justification for demands.”¹⁶ This category includes four levels of justifications: *no justification*, *inferior justification*, *qualified justification*, and *sophisticated justification*. Generally speaking, Steiner depicts these levels in accordance with the extent of rationales given by the speakers. In particular, a proposition that is given without any reason is deemed to have “no justification.” A proposition that is given with a reason, but where no linkage exists between the reason and proposition, is regarded as an “inferior justification.” If there is one reason given by the speaker, and the linkage between the reason and the proposition is explicit, then it is a “qualified justification.” If there are two or more “qualified justifications” provided by the speakers, they are treated as “sophisticated justifications.”

To meet the context of the research on congressional constitutional deliberation, I include in my definition of justification of a constitutional interpretation the requirement that the language be linked with the Constitution. In other words, as long as a member of Congress delivers her or his conclusion on a constitutionality issue, that speech would at least be coded as level 1; otherwise, it would be coded as 0. Accordingly, I slightly change the definition of this category as follows:

(0) *No justification*: no constitutional interpretation

(1) *Inferior justification*: a constitutional interpretation without citing any constitutional provision

¹⁶ *Id.*, at 57.

(2) *Qualified justification*: a constitutional interpretation with citation of a constitutional provision

(3) *Sophisticated justification*: two or more qualified justifications.

b. Level of Content of Justifications

Steiner differentiates three levels of the content of justifications in this category: *explicit statements concerning group interests, neutral statements, and explicit statements of the common good*. The distinction between group interests and the common good is whether “one or more groups or constituencies are mentioned in a speech.” Because Steiner’s research is about parliamentary debates on policy concerning women’s equality, it is natural to distinguish “common good” speech from “group interest” speech. For the reason I explain below, in the context of this dissertation, I will differentiate a speech regarding only one-branch authority from that regarding two-branch authority.

One of the premises of deliberative democracy is that all actors have a common interest and identity. This suggests that speakers are not motivated toward discussing issues with other actors if they do not share the same goal or value. Thus, Steiner treats the level of “common good” speech as higher than that of “group interest” speech. In the context of war powers debates, I think such “common good” speech is especially important because one of the basic functions of the Constitution, as provided in the Preamble, is to “provide for the common defense.” This “common defense” function mandates that a military action or war power as a whole should be wielded as a concurrent power by the government. In consequence, it is fair to differentiate a justification of a speech only regarding one-branch (either the president or Congress) authority from a justification of a speech regarding two-branch authority and treats the level of two-branch justification as higher than that of one-branch

justification, which can duly reflect the spirit of “common defense” provided in the Preamble. Accordingly, a slightly changed category of “level of content of justification” is listed as follows:

- (0) *No constitutional statement*: no constitutional justification
- (1) *One-branch constitutional statement*: a constitutional interpretation concerning only one-branch authority
- (2) *Neutral statement*: a constitutional justification without explicitly mentioning any branch’s authority
- (3) *Two-branch constitutional statement*: a constitutional interpretation concerning two-branch authority.

3. *Reasons for Exclusion of Other Elements of Discourse Quality Index*

The other elements of Discourse Quality Index, *participation, respect, and constructive politics*, will not be included in my adjusted Discourse Quality Index for several reasons. First, the original meaning of *participation* in Steiner’s Index stands for a speaker complaining that her or his speech is interrupted by another speaker. But in the record of the population employed in this thesis, there is no such “complaint” given by any member of Congress, which suggests that there is no statistical variation of this element. More importantly, since democratic deliberation is a premise for a law I think that the most important function of participation during the floor debate is whether a congressional member can take an action on the floor, namely, propose an amendment on the floor. In other words, I transform a subjective meaning of “participation” into an objectively institutional meaning. Therefore, I will code whether a floor debate rule is open-rule as another variable but not an element of Discourse Quality Index.

Second, the reason to exclude *respect* from the element of Discourse Quality Index is that at least two empirical studies on U.S. congressional deliberation already demonstrate that a congressional member's discourse in U.S. is systematically higher than that in any other nation.¹⁷ Hence, I think it is not necessary to explore the relationship between the degree of respect and the level of congressional control over the president.

Third, the original meaning of *constructive politics* is that a speaker makes an alternative proposal during a deliberation. I exclude this element from the Discourse Quality Index on the grounds that a speaker's alternative proposal is not necessarily based on his or her constitutional justification. Therefore, to focus on the relationship between congressional deliberation and the level of congressional check on the president, it is appropriate to exclude this element from Discourse Quality Index for the purpose of this dissertation.

IV. Hypotheses about Congressional Deliberation and the Balance of War Power

As I already suggested in Section II, the purpose of researching congressional deliberation is to understand the dynamic interaction between congressional deliberation and the broader public sphere. Therefore, after illustrating the contents of two important indices for measuring the level of congressional control on the president and the quality of congressional deliberation, it is natural in the next step to establish for further empirical analyses the hypotheses of the relationship among congressional deliberation, congressional check, and the influence of deliberation on the presidential use of force. Moreover, if there is a statistical relationship between congressional deliberation and presidential use of force, it is also legitimate to explore the effects of institutional and non-institutional factors as well upon congressional deliberation.

¹⁷ See generally Jürg Steiner, *supra* note 6, at 122-5; also Dennis Thompson, *supra* note 12, at 511-3.

I will propose three main hypotheses concerning my principal empirical research questions about (1) the relationship between the level of congressional deliberation and the level of control over the president, (2) the relationship between the level of congressional control over the president and the presidential decision on a use of force, and (3) congressional participation structure and the quality of congressional deliberation. One more point needs to be briefly explained here. The following hypotheses only concern the effect of congressional deliberation on the level of congressional legal control over the president, presidential response to congressional legal control over his war power, and the effect of the congressional participation structure on the quality of congressional deliberation. Therefore, other hypotheses regarding non-deliberation factors contributing to the level of congressional control, the types of presidential response, or the quality of congressional deliberation will be described in the next section along with the list of independent variables. In the balance of this section, I will elucidate my three main hypotheses and their underlying theory in the balance of this section.

A. Hypothesis about Congressional Deliberation and Legal Control over the President

The main specific research question regarding this hypothesis is this: Is Congress more likely to attempt the imposition of a check on the presidential use of force after a higher level of deliberation over the constitutionality of a current or proposed presidential decision on use of force? The hypothesis in response to this question is:

If Congress has a higher level of deliberation over the constitutionality of a current or possible presidential use of force, all else equal, then it is more likely to impose a higher level check on the president through the passage or rejection of legislation.

The theory underlying this hypothesis is that deliberative theorists argue that a higher level of deliberation is more likely to result in a more substantive agreement.¹⁸ It is the persistent moral disagreement in the modern public sphere that motivates a great number of political theorists to call for democratic deliberation and to consider it a need. A deliberative process not only is a solution for debate by different moral agencies holding different moral values, but also expects to economize and thus accommodate their substantive moral disagreement after a good deliberation.¹⁹ Therefore, it is reasonable to conclude that a higher quality of good deliberation probably would generate a thicker consensus on a substantive moral agreement.

In the war and foreign affair power areas, a higher quality of congressional deliberation over either the constitutionality of a use of force or the allocation of war and foreign affair powers between the political branches is especially important because most of the war and foreign affair powers fall, in within Justice Jackson's famous term, within a "zone of twilight," which needs members of Congress to mutually deliberate with each other and determine what the better allocation of war and foreign affair power is for each military event. Although it is possible within a war power debate that a higher level of constitutional deliberation often results from minority's discontent with their inability to change a possible future or status quo policy but not a mutual deliberation among members of Congress, such higher level of constitutional deliberation at least creates an opportunity to force the majority to address such discontent in a public forum and may also create the opportunity to economize the substantive disparity between the minority and majority. As a consequence, if the argument made by the deliberative theorists holds, it is reasonable to expect that a higher quality of congressional deliberation is more likely to result in a

¹⁸ See AMY GUTTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 79-94 (1996).

¹⁹ *Id.*

convergence on a substantive and ex ante control over the presidential war and foreign affair policy making.

B. Hypothesis about Congressional Legal Control over the President and Unilateral Presidential Action

The main specific research question regarding this hypothesis is this: Is a higher level of congressional deliberation and thus attempt to impose a higher level of check on the president more likely to prevent the president from initiating a war unilaterally? The hypothesis in response to this question is:

If Congress features a higher level of constitutional deliberation over the use of force and imposes a higher level of check on the president, all else equal, then Congress is more likely to prevent the president from initiating a war unilaterally.

This hypothesis rests on one of the most important normative hypotheses of democratic deliberation argued by deliberative theorists, that is, deliberative theorists hypothesize that a higher quality of democratic deliberation is able to persuade people who have different opinions to accept a better argument. In particular, deliberative theorists argue that since a better argument is not a priori given but be found amid common deliberation, a person's preference thus should and will be changed after a good deliberation. Recalling what I identified as good deliberation in chapter 2, the Constitution is a minimum public reason for the people to identify with and provide the shared principles or values to which political actors appeal. A better argument, from the perspective of deliberative democracy theory, thus should be reasonably accepted by all of the political actors participating into a good deliberation.

I think it is especially legitimate for this dissertation to empirically investigate the presidential response to an attempt by Congress to impose a check on a use of

force, because modern presidents always claim the prerogative as Commander in Chief to decide the policy of war and peace. Such a constantly sharp disagreement over the allocation of war power between the president and Congress therefore provides an occasion to test the normative argument of deliberative theorists. In particular, what makes deliberative democracy theory different from strategic theory is that it holds that every political actor should yield to a better argument. An action should be based on “the unforced force of the better argument”²⁰ but not a strategic calculation of countering the veto-pivotal members in Congress. When Congress deliberates over a policy of war and peace issue, the president can present his rationale through various formal and informal channels to persuade members of Congress to accept his argument if he thinks a congressional check over his war power is an unconstitutional encroachment on his prerogative. But if Congress decides to impose a legal check on his power based on a more persuasive argument, according to the normative argument of deliberative theorists, he should accept that more persuasive argument and not take a unilateral military action; otherwise, he can just veto it and give Congress and the broader public sphere another opportunity to deliberate. Therefore, I think it is crucial to explore the pattern of presidential response to a congressional check on his war power through empirical analysis.

C. Hypothesis about Congressional Participation Structure and the Quality of Congressional Deliberation

The main specific research question regarding this hypothesis is this: if either or both of the above hypotheses can be empirically confirmed, what kind of congressional law-making rule and political factors influence the quality of congressional deliberation? The hypothesis in response to this question is:

²⁰ See JURGEN HABERMAS, *supra* note 11, at 305.

If congressional rule-setting is more information facilitative (e.g. referral of a bill to committee) and participation inclusive (e.g. no restrict on amendment proposal), all else equal, then Congress is more likely to have a higher level of war deliberation, regardless of the impact of non-congressional rule setting (political factors) such as presidential approval rating, election year, divided government, and the percentage of congressional members of the president's party.

This hypothesis consists of two sub-hypotheses. First, if congressional rule-setting is more participation inclusive and information facilitative, then Congress is more like to have a higher level of war deliberation. Second, although congressional deliberation is likely to be affected by political factors, congressional setting is still the primary factor to keep congressional deliberation being stable and independent of ever changing political environment.

The theory underlying the **first sub-hypothesis** is also based on the normative argument of deliberative theorists that none of the political actors in the political process should be excluded from discourse. One should also note that deliberation itself is not the end of deliberative process; a collective decision or political action is an indispensable element of democratic deliberation. The complete participation of Congress should allow congressional members not only to talk but also to act. Such speech and act requirements thus suggest that if members of Congress could make an amendment to a draft bill during a floor debate, then the congressional rule can be regarded as being more participation inclusive. In this vein, if a member of Congress is not allowed to propose an amendment to a draft bill, then she or he may have less incentive to present an argument on the floor, thus in turn generating a lower level of congressional deliberation.

Moreover, some deliberative theorists argue that the primary function of congressional committees is to collect the information specific to a bill, therefore providing information for members of Congress to debate on the floor. However, modern “unorthodox”²¹ congressional rules often bypass committee and give partisan leaders more discretion to decide policy. This undermines the information gathering function of the congressional committee. Thus, it is reasonable to hypothesize and investigate whether a more information facilitative rule would contribute to a higher level of congressional deliberation.

The theory underlying the **second sub-hypothesis** above is two-fold. First, all democratic theorists agree that democratic representatives should be able to respond to and interpret the intention of their constituents. Hence, members of Congress attempt to reflect their constituents’ opinions during the floor debates. Second, though deliberative theorists argue that democratic representative should reflect what citizens think in the public sphere, deliberative theorists at the same time argue that democratic representatives should independently decide on their own according to a reasonable and better argument and try to deliberate with and persuade their constituents to accept their decision. Such arguments are also consistent with the Founders’ expectation that the institutional design of Congress could accomplish this two-fold goal of democratic representation and provide a Congress that is both independent and responsive through a wide-ranging election. Therefore, I think it is legitimate to explore whether congressional rule setting could ensure such independence and responsive functioning in a deliberation process.

An exploration of these two sub-hypotheses is important in war and foreign affair deliberation because war policy-making is especially in need of a just cause. A relatively insulated congressional deliberative process could prevent the nation as a

²¹ See BARBARA SINCLAIR, UNORTHODOX LAWMAKING (2000).

whole from being pulled into a war without searching for a better argument. In the same time, the crafting of war-policy cannot happen without wide support from the public sphere. Therefore, whether and how congressional rule setting is able to maintain simultaneously an independent congressional deliberation and an interconnected public sphere is therefore worthy to be explored through empirical analysis.

V. Variables and Dataset Collection

To test Section IV's empirical hypotheses, one more research design step is needed: a list of dependent and independent variables datasets. In the balance of this section, I will (1) illustrate all of the dependent variables that will be used in the empirical models in the next chapter and the sources from which I collect the data, and then (2) explain all of the independent variables that will be included in the empirical models and their sources. Independent variables listed below will be divided into institutional and political/ economic variables. Moreover, as I already reminded at the beginning of Section IV, based on other empirical researchers' analyses, lots of non-congressional deliberation factors would influence the relationship between congressional check and the presidential use of force, which I did not elucidate in the main hypotheses above. Therefore, I will also briefly explain the hypotheses or argument for the effects that those non-congressional deliberation factors have on the level of congressional check, the presidential use of force, or the quality of congressional deliberation as they pertain to each independent variable when it is needed.

A. Dependent Variables and the Dataset Resources

There are three kinds of dependent variables that will be used in accordance with the three empirical hypotheses listed above: (1) the level of congressional control over the

president provided in a military deployment and non-military deployment law or rejection of a presidential proposal, (2) the president's unilateral military deployment and non-military deployment actions, and (3) the level of congressional deliberation. Each variable will be explained in detail.

1. Congressional Control Level in both Military Deployment and Non-military Deployment Law

To define the military deployment law and non-military deployment law pertinent to a military event, one should first search a military event dataset and cluster the different congressional deliberations and bills thereof for each corresponding military event. I collect those military event datasets from the Correlates of War Project Dataset.²² This dissertation focuses on different use of force events occurring from 1989 to 2003.

As I already suggested in my critique of conventional empirical research on presidential use of force, conventional research does not look into the level of congressional check on the presidential use of force and congressional management of a foreign affair crisis; thus I collect both military deployment and non-military deployment bills pertaining to each military event and code the level of congressional check provided in each bill. I will focus on the bills passed or rejected by Congress from 1989 to 2008. According to the military event timeline depicted by the Correlates of War Project Dataset, I cluster 229 bills into 14 military events; 38 of the bills are military deployment bills, whereas 191 of the bills are non-military deployment bills. A list of 14 military events and their relating bills is provided in Appendices A through N. Lastly, the coding criteria for the level of congressional legal control have already been explained in the presentation of the congressional control index in Section III.

²² <http://www.correlatesofwar.org/>

2. Presidential Response to the Congressional Control

As I have mentioned above, research on congressional deliberation generally neglects how other political actors in the broader public sphere respond to congressional decisions; thus the observations of these researchers are too static. Therefore, it is worthwhile to explore the pattern of presidential response to the congressional control over a use of force. The dependent variable here is whether the president takes a unilateral action to impair a congressional attempt to check on his war and foreign affair powers. If he does take a unilateral action, then it is coded as 1; otherwise, it is coded as 0.

A unilateral presidential action, according to Philip Cooper, includes a mere dispatch of troops and the issuance of an executive order, national security directive, presidential memorandum, presidential proclamation, and presidential signing statement.²³ The coding strategy here is to examine whether a unilateral presidential action would alter the level of congressional influence, including whether it could change a substantive control into a procedural control, whether it could alter an ex ante control into an ex post control, and whether it could change a mandatory provision into an advisory provision.

I collect the executive orders from The National Archives Web site.²⁴ National security directives are collected from the Federation of American Scientists Web site.²⁵ Most, but not all presidential memoranda, and presidential signing statements can be found in The Public Papers of the President and The American Presidency

²³ See PHILIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* (2002).

²⁴ <http://www.archives.gov/>

²⁵ <http://www.fas.org/>

Project website.²⁶ A list of 14 military events and their relating presidential responses is also provided in Appendices A through N.

3. The Level of Congressional Deliberation Quality

The contents and coding categories of my adjusted congressional Discourse Quality Index have been explained in Section III. The contents of congressional floor debates are all recorded in *Congressional Record* (1989-2008). In total, I cluster 229 congressional deliberations over the constitutionality of use of force into 14 military events according to the war timeline depicted by the Correlates of War Project Dataset.

B. Independent Variables

I divided independent variables into two kinds: (1) institutional variables and (2) political and economic factors variables. Each variable will be briefly described as follows.

1. Institutional Variables

a. Character of the Use of Force

Several empirical studies of presidential use of force have suggested that the president tends to buy “political insurance”²⁷ from Congress when a use of force might result in a higher level of hostility and thus greater American casualties. Additionally, the existence of a higher level of hostility might make an issue more salient to the legislators, motivating them to deliberate upon the issue before them. Therefore, some

²⁶ <http://www.presidency.ucsb.edu/>

²⁷ See Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 999 (2006).

scholars argue that a more intense an expected hostility might be, the higher the level of congressional control over the president will have to be. Here, the coding of hostility level on a 1 through 5 scale provided by the Correlates of War Project will be applied. If a military event falls between hostility level 1 and 3, it will be coded as a minor force, whereas an event registered either 4 or 5 will be coded as a major force.

I also create an alternative coding category regarding the character of a use of force: whether a use of force is employed for peacekeeping or humanitarian operation. The reason to create this category is because after the end of the Cold War, peacekeeping and humanitarian operation became an influential military action, especially during the 1990s. Hence, I will also alternatively code whether a military action is either of these action.

b. Character of the Law

I will distinguish a budget bill from a non-budget bill for an annual budget process, as the distinction may alter the bill's impact on both the level of congressional check on the president and the quality of congressional deliberation.

With regard to the level of congressional control, the Founders expected that, other than Declare War Clause, members of Congress could efficiently control presidential war power through congressional budget power. Thus, it is reasonable to hypothesize that members of Congress would provide for a higher level of control over the president in a budget bill.

As for the quality of congressional deliberation, I distinguish deliberation over appropriations bill from that over "regular" law on the grounds that Congress only has a limited time to deliberate every year on an appropriations bill because of the pressure of time constraints. In addition, as some deliberative theorists suggest, appropriation processes can be regarded as a re-deliberation process, which may

contribute to a higher level of congressional deliberation. However, since the primary jurisdiction of an appropriation bill is different from the passage of a regular or annual authorization law, which may fall short of expert deliberation, I therefore think it is necessary to investigate whether the annual appropriation process has any significant impact on the quality of congressional deliberation as well. If a bill is an appropriation bill, it will be coded as 1; otherwise, it will be coded as 0.

c. The Time Each Law Needs for Passage

Although time is not necessarily a factor that affects the quality of deliberation and decision, some deliberative theorists argue that sometimes we should not make a quick decision but should rather take a longer time for another round of deliberation.

Therefore, it is worthy to investigate whether the duration of each bill's enactment process influences both the level of congressional deliberation and the level of control over the president. When I survey each passed law's legislative history, I will also record the duration of each enacting process. The time unit here is a "month." Thus, if a law is passed within one month, I will record it as one month.

d. Closed Rule

As I have suggested in Section IV, democratic deliberation does not regard deliberation itself as an end. It must allow political actors to take action; otherwise, it would decrease actor's incentive to deliberate. Thus, in Section IV, I hypothesize that an adoption of closed-rule in a House floor debate would generate a lower level of congressional deliberation. If Congress adopts a closed rule, it will be coded as 1; otherwise, it will be coded as 0.

e. Cloture

So far there is no research on the relationship between the invocation of cloture in the Senate and the quality of congressional deliberation. My initial hypothesis is that an invocation of cloture would generate a higher level of congressional deliberation. That is because in the modern Senate, an invocation of cloture usually suggests that most of the senators have already addressed an issue and reached a consensus on a specific issue. This indicates that information is already facilitated among senators, which may in turn generate a higher level of congressional deliberation. If a cloture is invoked, it will be coded as 1; otherwise, it will be coded as 0.

f. Referral of a Bill to Committee

I have also explained in Section IV that the primary function of a committee, to gather information on a pending bill, may significantly affect the quality of congressional deliberation in the floor debate. But the modern “unorthodox” lawmaking process often bypasses committee, which may decrease the level of congressional deliberation. Therefore, it is legitimate to explore whether referral of a bill to congressional committee would generate a higher level of congressional deliberation. If there is a referral of a bill to committee, it will be coded as 1; otherwise, it will be coded as 0.

g. Committee Hearing

Other than referral of a bill to congressional committee, some deliberative theorists and legislative process scholars also argue that a committee hearing would provide Congress more opportunity to gather information on a pending bill from the broader public sphere, which could subsequently facilitate a higher level of congressional deliberation. Hence, it is also reasonable to include this variable in the dataset to

explore the function of committee hearing. If there is a hearing held by committee hearing, it will be coded as 1; otherwise, it will be coded as 0.

h. Filibuster

From the perspective of deliberative democracy theory, the attempt by congressional members to prevent Congress from making a decision through a filibuster, suggests that the filibuster members do not have intention of mutually deliberating with other non-filibuster members. As democratic deliberation theory indicates, a lack of desire for mutual understanding is not a condition that generates good deliberation. Thus, it is fair to hypothesize that a filibuster would generate a lower level of congressional deliberation. I will introduce a filibuster dataset constructed by Overby and Bell to record whether a filibuster occurred during the deliberation of a bill.²⁸ If a filibuster occurred, it will be coded as 1; otherwise, it will be coded as 0.

i. Alliance

Some rational choice theorists argue that war policy deliberation is only appreciated by a nation and its allies but not by non-alliance nations. More importantly, some argue that congressional members usually do not have sufficient information about non-alliance nations. Therefore, it is not necessary for Congress to deliberate over a war policy and send a signal based on wrong information to the non-alliance nations.²⁹ If this argument holds, one can hypothesize that congressional members may attempt to impose a lower level of control over the president when a war policy pertains to a

²⁸ See Marvin Overby & Lauren Bell, *Extended Debate Over Time: Patterns and Trends in the History of Filibusters in the U.S. Senate*, Paper presented at the annual meeting of the Midwest Political Science Association, Palmer House Hotel, Chicago, IL Online <APPLICATION/PDF>. 2010-01-24 from http://www.allacademic.com/meta/p196768_index.html

²⁹ See Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512 (2006).

non-alliance nation. The Correlates of War Project Dataset provides the alliance and non-alliance relationship between each nation. I will code a U.S. alliance nation as 1; otherwise, I will code as 0.

2. Political and Economic Variables

a. Divided Government

If the President's party is the majority party in Congress, conventional wisdom demonstrates that he has greater discretion in the war powers field.³⁰ However, this assumption may also contradict some demonstrations offered by deliberative theorists that non-polarized environments result in a higher level of deliberation, and thus have a higher level of congressional control over a war and foreign affair policy. Such different arguments provide a legitimate motivation to examine which argument is possibly more statistically persuasive. A divided government will be coded as 1; a unified government will be coded as 0.

b. Ideological Disparity between the President and Congress

Every person's ideology definitely affects his or her communication with others. Other than the above "divided government" variable, I think ideological disparity between the president and Congress also represents the situation of polarization of the political branches. Thus, whether a communication can achieve an ideal result is contingent on the ideological difference between the communicators. Since deliberative theorists argue that greater ideological difference may generate a lower level of deliberation, I hypothesize that a greater ideological difference between the president and Congress

³⁰ See e.g. DAVID R. MAYHEW, *DIVIDED WE GOVERN* (2005); William G. Howell and Jon C. Pevehouse, *supra* note 28, at 218-219.

would generate a lower level of congressional check on the president. The data on ideological differences can be acquired from The Voteview Website.³¹

c. Presidential Approval Rating

Some scholars find that presidential approval ratings are a highly significant determinant of a presidential decision on the use of force.³² In particular, several researchers demonstrate that the president tends to initiate a war when his approval rating is low, which may create an opportunity for a “rally around the flag” effect. If this demonstration holds, it is also reasonable to hypothesize that when the presidential approval rating is lower, congressional check over the president is higher because members of Congress expect that the president may attempt to initiate a war. Therefore, I will also include this variable by using the Gallup approval rating for the President.³³

d. The Percentages of Congressional Members of the President’s Party

As Howell and Pevehouse suggest, the “divided government” variable contains the least amount of information about the relationship between the president and Congress, which demands that researchers include other alternative variables to denote the relationship between the political branches. One of the alternative variables employed by Howell and Pevehouse for presidential war power research is to record the percentages of congressional members of the president’s party. They find that a lower percentage of members from the president’s party in Congress would result in a

³¹ <http://voteview.com/>

³² See Charles W. Ostrom, Jr. & Brian Job, *The President and the Political Use of Force*, 80 AMERICAN POLITICAL SCIENCE REVIEW 542 (1986).

³³ The rating can be acquired from Roper Center for Public Opinion Research in Lexis database.

lower probability of a use of force. Therefore, I will also include this alternative variable into the dataset to see if the level of congressional check is also affected by the percentages of congressional members of the president's party. The data for this variable can be acquired from the American Presidency Project mentioned above.

e. Election Year

Because election results, whether for congressional or for presidential elections, may substantially affect the incumbent president's or congressional member's opportunity to be reelected, both Congress and the president will definitely take possible election results into account, and thereby affect the level of congressional control over a war and foreign affair policy. Moreover, inclusion of this variable into the dataset can also test whether the institutional design of Congress does in fact provide Congress with an independent competence to deliberate as the Founders expect, regardless of the effect of other political factors such as election. Hence, the uncertainty of the effect of election legitimately motivates me to include it as a variable here. Election year will be coded as 1; otherwise, it will be coded as 0.

f. Economic Factors

Some researchers have shown that poor economic performance is more likely to push the nation toward a war. Therefore, following Howell and Pevehouse's literature, I will also include the *Unemployment Rate*, *Annual GDP*, and the *Consumer Price Index* into the control variables. The data can be acquired from the Bureau of Labor Statistics.³⁴

³⁴ <http://www.bls.gov/>

CHAPTER 4:
CONGRESSIONAL DELIBERATION, PRESIDENTIAL WAR POWER AND
IDEAL CONGRESSIONAL DELIBERATION SITUATION

After illustrating my preparatory work for empirical research on war power, I will present in this chapter the results of the three main empirical models regarding congressional deliberation and presidential use of force. These models have been constructed according to the hypotheses and different variables I laid down in chapter 3. The relationships these three empirical models analyze include: (1) the relationship between the quality of congressional deliberation over the constitutionality of a current or presidentially proposed use of force and the level of congressional control over the president, (2) the pattern of presidential response to the congressional attempt of control over the presidential war and foreign affair power, and (3) the relationship between congressional rules and the quality of congressional deliberation.

In the following sections, I will illustrate both descriptive and regression results for each of these empirical models. Here, I briefly describe the main regression results of each. The first model shows that if Congress exhibits a higher level of deliberation, then it attempts to impose a higher level of check on the president through the passage or rejection of legislation. The second model shows that once Congress regulates a military deployment, the president systematically resists such regulation and takes unilateral action alone. Although neither deliberation nor legal regulation on war can necessarily prevent the president from unilaterally taking military action, I argue that a better congressional deliberation would create an unequivocal voice within Congress and an opportunity to invite the president to be charged with greater political accountability in the public sphere. Therefore, an empirical investigation into the relationship between congressional rule-setting and the

quality of congressional deliberation is legitimate. The third model demonstrates that although some political factors, including presidential approval rating and the advent of an election year, influence the level of congressional deliberation, congressional rule-setting is the primary factor to determine the level of congressional deliberation.

I. Modeling the Deliberation and Control of Presidential War Power

Does “good” deliberation necessarily generate a “good” outcome? In terms of the presidential-congressional relation in the war power field, as I mentioned in chapter 2, the Founders expected that a reasonable and balanced allocation of war-making power would be one in which Congress could be able to control the presidential war power through deliberation. Nevertheless, it is not congressional deliberation itself that controls presidential war power. Congress attempts to control over the president through rejection or passage of legislation. Law is the primary mechanism through which Congress attempts to impose a check on the president.

Therefore, as I suggested in chapter 3, the empirical analyses of the relationship between congressional deliberation and the presidential war power should be able to answer two empirical questions: (1) does Congress more likely attempt to impose a check on the presidential use of force after a good deliberation over the constitutionality of a current or proposed presidential decision on use of force? and (2) is a higher level of congressional deliberation and thus a higher level of congressional check on the president more likely to prevent the president from taking a unilateral use of force? The results of the first empirical question will be addressed in this section, and that of the second empirical question will be illustrated in the next.

In addition to the model regarding the relationship between the quality of congressional deliberation and the level of check on the presidential war power, I also listed in chapter 3 other variables— including the level of hostility (major v. minor

force), foreign assistance, and alliance— or alternative hypotheses made by other presidential war power researchers. In this section, after presenting my primary “deliberation” model, I will also include those alternative variables respectively into my “deliberation” model as a robustness check of my primary model.

Accordingly, in the balance of this section, I will (1) explain the variables included for the primary “deliberation” model and statistical model selection; (2) present descriptive and regression results of the primary “deliberation” model; (3) present the results of the robustness check of the primary model.

A. Variables for Congressional Deliberation and Control of Presidential War Power

Although all of the variables and hypotheses thereof were already described in chapter 3, I have not specified what variables are included for each hypothesis. Hence, I briefly explain the variables I employ for the first empirical question: Does Congress more likely attempt to impose a check on the presidential use of force after a good deliberation over the constitutionality of a current or proposed presidential decision on use of force?

The main **dependent variable** for this question is the level of congressional check on presidential power, namely, congressional control index, which I labeled as *CtrlScale*. Since this index consists of two scalable sub-categories, on top of testing the combination of those two sub-categories as an overall congressional control index, I will also test those two sub-categories respectively. In particular, the first category is *CtrlOrientation*, which stands for procedural control, substantive control, or both kinds of controls over the president. The second category is *CtrlTime*, which indicates whether any clause provides that Congress has the opportunity at least to be informed by the president or executive branch before a presidential or executive action.

The key **independent variable** here is the quality of constitutional deliberation, namely, Discourse Quality Index. Since Discourse Quality Index also consists of two sub-categories, the level of justification (labeled as *Justification*) and the level of content (labeled as *Content*), I will test them respectively.

Other **institutional independent variables** I enumerated in chapter 3 that may influence the level of constitutional deliberation might also influence the level of congressional control on presidential power. As a result, in the statistical models that follow, I will also use them in this model, including whether a bill is an annual authorization and appropriation bill (labeled as *LawCharacter*), whether a committee holds a hearing (labeled as *HComHearing/SComHearing*), whether a bill is referred to committee (labeled as *HCom/SCom*), and the state of both chambers' floor rules (labeled as *ClosedRule/Cloture*).

The **independent political and economic variables** I will include for this model are the divided government (labeled as *DividedGov*), the election year (labeled as *Election*), the presidential approval rating (labeled as *Approval*), the percentage of congressional members of the president's party (labeled as *PercentParty*), the ideological disparity between an incumbent president and Congress (labeled as *IdeoGap*), the gross domestic product (labeled as *GDP*), the unemployment rate (labeled as *Unemployment*), and the consumer price index (labeled as *CPI*).

B. Descriptive Results of Congressional Control Index v. Congressional Deliberation
In this part, I will report the descriptive results of the main dependent variables of the first model in this section, *ControlScale*, and its relationship with *Justification*. Two preliminary conclusions are found in this descriptive result. First, the mean of overall congressional control index (*ControlScale*) and its sub-categories (*CtrlOrientation* and *CtrlTime*) suggests that Congress tends to impose substantive and *ex post* policy

control over the president through passage of legislation. Second, an initial t-test shows that a higher level of congressional deliberation correlates with a higher level of congressional control over the president, which suggests that a further regression analysis is needed.

Table 4.1 shows that the average *Overall ControlScale* (*CtrlOrientation* + *CtrlTime*) is 2.56, varying from 0 to 5. Looking into the subcategories of *ControlScale*, the table shows that the average *CtrlOrientation* is 2.04, and *CtrlTime* is 0.52. Because the mean *CtrlOrientation* and *CtrlTime* of the original measurement are 1.5 and 1 respectively, the actually average of *CtrlOrientation* (2.04) and *Ctrltime* (0.52) may suggest that Congress attempts to impose a substantive and *ex post* policy control over the president through passage of legislation.

Table 4.1. Descriptive Results of Congressional Deliberation and Control Scale (Results by Military Deployment, Foreign Affair and Overall Cases)

| Descriptive Results (Overall Cases) | | | | | |
|-------------------------------------|-----|-------|-------|-------|-----|
| Variables | N | Mean | SD | Max | Min |
| Justification | 229 | 0.174 | 0.273 | 1.035 | 0 |
| Content | 229 | 0.157 | 0.25 | 1 | 0 |
| Major Justification | 229 | 0.253 | 0.436 | 1 | 0 |
| Major Content | 229 | 0.336 | 0.473 | 1 | 0 |
| Control Scale | 229 | 2.559 | 1.358 | 5 | 0 |
| Control Orientation | 229 | 2.044 | 0.972 | 3 | 0 |
| Control Time | 229 | 0.515 | 0.698 | 2 | 0 |

Table 4.1 (Continued)

| Descriptive Results (Military Deployment Cases) | | | | | |
|---|-----|-------|-------|-------|-----|
| Variables | N | Mean | SD | Max | Min |
| Justification | 38 | 0.277 | 0.337 | 1.026 | 0 |
| Content | 38 | 0.255 | 0.311 | 0.948 | 0 |
| Major Justification | 38 | 0.421 | 0.5 | 1 | 0 |
| Major Content | 38 | 0.474 | 0.506 | 1 | 0 |
| Control Scale | 38 | 2.553 | 1.554 | 5 | 0 |
| Control Orientation | 38 | 1.985 | 1.085 | 3 | 0 |
| Control Time | 38 | 0.658 | 0.745 | 2 | 0 |
| Descriptive Results (Foreign Affair Cases) | | | | | |
| Variables | N | Mean | SD | Max | Min |
| Justification | 191 | 0.154 | 0.254 | 1.035 | 0 |
| Content | 191 | 0.138 | 0.232 | 1 | 0 |
| Major Justification | 191 | 0.22 | 0.415 | 1 | 0 |
| Major Content | 191 | 0.309 | 0.463 | 1 | 0 |
| Control Scale | 191 | 2.56 | 1.32 | 5 | 0 |
| Control Orientation | 191 | 2.073 | 0.949 | 3 | 0 |
| Control Time | 191 | 0.487 | 0.687 | 2 | 0 |

Moreover, a comparison of the average *ControlScale* between the military deployment (2.55) and non-military deployment (2.56) cases seems to indicate that there is no significant difference between them. However, two sub-categories, *CtrlOrientation* and *CtrlTime*, appear to exhibit greater variance. In the case of military deployment, they are 1.89 and 0.66 respectively, whereas in the case of non-military deployment they are 2.07 and 0.49 respectively. More interestingly, according to one-sample test, the data shows that only the average *CtrlOrientation* and *CtrlTime* in the case of non-military deployment are significantly greater than those in the case of military deployment, but the average *CtrlOrientation* and *CtrlTime* of a military deployment case are not significantly greater than those of a non-military deployment case. That may suggest that the level of congressional attempt of control on the president's military deployment power may have a systematic situation, whereas control on the non-military deployment power may not. However, that still needs to be confirmed by further regression tests.

Table 4.2 shows the cross relationship between the level of congressional deliberation and the level of congressional control. I divided the level of congressional deliberation into high and low deliberations. According to a preliminary t-test, it does show that a higher level of congressional control (*ControlScale*) correlates with a high deliberation (*Justification*). The same patterns of correlation also exist between the two sub-categories of the level of congressional control scale (*CtrlOrientation* and *CtrlTime*) and the level of deliberation (*Justification*).

Table 4.2. Congressional Discourse Quality v. Congressional Control Index

Panel A. Congressional Discourse Quality v. Congressional Control Index

| | Congressional Control Index | | | | | | Total |
|-------------------|-----------------------------|----|----|----|----|----|-------|
| | 0 | 1 | 2 | 3 | 4 | 5 | |
| High Deliberation | 20 | 14 | 74 | 27 | 33 | 3 | 171 |
| Low Deliberation | 3 | 1 | 12 | 8 | 23 | 11 | 58 |
| Total | 23 | 15 | 86 | 35 | 56 | 14 | 229 |

Pearson $\chi^2(5) = 38.9172$; Pr = 0.000

Panel B. Congressional Discourse Quality v. Congressional Control Index (*CtrlOrientation*)

| Level of | Congressional Control Index | | | | Total |
|-------------------|-----------------------------|----|----|----|-------|
| | 0 | 1 | 2 | 3 | |
| High Deliberation | 21 | 25 | 70 | 55 | 171 |
| Low Deliberation | 3 | 6 | 15 | 34 | 58 |

Pearson $\chi^2(3) = 13.1243$; Pr = 0.004

Panel C. Congressional Discourse Quality v. Congressional Control Index (*CtrlTime*)

| | Congressional Control Index | | | Total |
|-------------------|-----------------------------|----|----|-------|
| | 0 | 1 | 2 | |
| High Deliberation | 121 | 40 | 10 | 171 |
| Low Deliberation | 17 | 24 | 17 | 58 |
| Total | 138 | 64 | 27 | 229 |

Pearson $\chi^2(2) = 37.5830$; Pr = 0.000

C. Model Selection and Main Model Results

The preliminary t-test and descriptive results above show that the level of congressional deliberation does correlate with the level of congressional attempt of control over the president. To further understand the predictability of their relationship, a model for regression analysis is needed. In the following passages, I will (A) explain the reason for and premise behind applying ordinal model regression for testing the relationship between congressional deliberation and congressional control, and (B) then report the results of the regression model.

1. Ordinal Model Selection

Since my main dependent variable, congressional control index, is ordinal and need not be divided into high and low congressional control, it is appropriate to apply ordinal regression to the main dependent variable in this research. In consequence, I examine on the one hand whether the assumption of ordinal logit model (the parallel regression assumption) is satisfied,¹ and what approach, on the other hand, (cumulative, stage, or adjacent ordinal variable) should be employed to construct such an ordinal dependent variable.²

First, I test the parallel regression assumption by using an approximate likelihood-ratio test. This test shows that, by including all of the variables I enumerated in the previous section, the parallel regression assumption can be rejected at the 0.01 level. Therefore, the assumption of parallel regression is not violated. Second, a cumulative approach to ordinal variables is usually applied in order to predict a continuous latent variable. However, since legislation is a public but not a

¹ See J. Scott Long & Jeremy Freese, *Regression Models for Categorical Dependent Variables Using Stata 197-9* (2006).

² See generally Andrew S. Fullerton, *A Conceptual Framework for Ordered Logistic Regression Models*, 38 *SOCIOLOGICAL METHODS & RESEARCH* 306 (2009).

latent observation, it is not appropriate to employ a cumulative approach.³ Moreover, because this study focuses on the final outcome of both chamber's floor actions, one need not model the differences between any other possible sequence--thus a stage approach to deriving a main dependent variable is not applied here.⁴ Finally, since the scale of congressional control neither actually represents continuous and latent distributions nor operates as a sequence of stages in this dissertation, it is ideal to employ the adjacent approach for the ordinal variable of this kind.⁵

2. Main Model Results

In the following two parts, I will not only report the relationship between congressional deliberation and congressional attempt of control on presidential power in military deployment case and non-military deployment case respectively, but also report the relationship between other important institutional or non-institutional variables and the level of congressional attempt of control over the president.

In short, the level of congressional deliberation positively influences the level of congressional attempt of control both in military deployment and in non-military deployment cases. In addition, certain institutional variables—including adoption of closed-rule, referral of a bill to House's committee, and deliberation over annual budget bill— would statistically influence the level of congressional attempt of control in military deployment cases, whereas the adoption of closed-rule would not influence the level of congressional attempt of control in non-military deployment cases. Lastly, among political and economic variables, including lower presidential approval rating and lower percentage of congressional members of the president's party in Congress,

³ *Id.*, at 306.

⁴ *Id.*

⁵ *Id.*

are positively correlated with the level of congressional attempt of control in military deployment cases, whereas only lower presidential approval rating would systematically generate a higher level of congressional control. I will explain these results in detail as follows.

a.. Military Deployment Case

i. The Effects of Deliberation and Institutional Variables on Congressional Control

The first model reported here posits the scale of congressional control over the president's military deployment power as a function of the level of constitutional deliberation and the deliberative institutional variables. Table 4.3 shows that the level of constitutional *Justification* is highly and positively correlated with the congressional control scale. Moreover, a bill referred to the House committee is also positively correlated with the level of congressional attempt of control over the president. Although I do not report the effect of the level of *Content* (Table 4.4) on the congressional control scale here, it also reveals a comparable pattern.

A further look into two sub-categories of *ControlScale* (Table 4.5, Table 4.6, Table 4.7, and Table 4.8) shows that, in fact, the levels of both constitutional *Justification* and *Content* have a significantly positive effect only on *CtrlTime* but not on *CtrlOrientation*. Therefore, a higher level of constitutional deliberation seems that only consistently generates *ex ante* or *ex post* control but has nothing to do with procedural or substantive control on the president in the case of military deployment. In other words, congressional members may be more concerned with having the president consult with Congress before a military deployment than with forming a substantive policy.⁶

⁶ The above finding is relatively inconsistent with Steiner's finding on the relation between the level of deliberative content and outcome. Specifically, Steiner's research reveals that a higher discourse quality of *Content* does not have a statistically significant effect on the deliberative outcome, while my dataset shows that the level of *Content* does have a significant effect. Of course, a different research subject can

As for the effects of other institutional variables, Table 4.3 and Table 4.4 also show that the congressional budget bill generates a positively significant effect on the scale of congressional control over the president's military deployment power. That suggests that the Founders' ideal, separation of money and sword,⁷ seems to have been successfully realized in the constitutional mechanism that they expected to create.⁸

It is also noteworthy that the holding of a committee hearing would significantly reduce the level of congressional attempt of control over the president's military deployment power. I argue that this is because the function of committee hearing in the modern Congress is more similar to an arena for "political ritual" but not deliberative sphere. My model could not understand why the inclusion of political context variables into this model causes the direction associated with a holding of committee hearing appearing so different from the other variables provided above. But as Sinclair suggests, with the utilization of an unorthodox lawmaking process and the involvement of increasingly complicated interests, a committee hearing becomes merely a tool to temper the tension among conflicting interests.⁹ As such, the function of the committee hearing is not to serve as a channel for the facilitation of moral-

be a reason for the different findings. However, another possible explication for such different findings may be more institutional. Steiner's case is a debate in the German Federal Mediation Committee, a constitutionally mandated organization with the authority to mediate differences between the Federal Diet and the Council. The organizational statute of the Committee provides that the Committee's deliberation is not open to the public. The record of its members' debate will not be disclosed until five years after the decision. Although a high-quality deliberation sometimes requires a non-public arena, it inevitably may increase the possibility of power politics and reduce the accuracy of some indicators of discourse quality. See JÜRIG STENINER, ANDRÉ BÄCHTIGER, MARKUS SPÖRNDLI, AND MARCO R. STEEBERGEN, *DELIBERATIVE POLITICS IN ACTION* 138-64 (2004).

⁷ See Louis Fisher, *Presidential War Power* 10-12 (2004).

⁸ The result shows that when a budget bill is enacted, the highest probability (63%) of the level of control is 4--that is, either "substantive and *ex ante* control" or "procedural, substantive, and *ex post* control."

⁹ See Barbara Sinclair, *Unorthodox Lawmaking* 229 (2000).

political deliberation, but to serve as an arena of political ritual in which compromise may be forged between conflicting interests.

ii. The Effects of Political and Economic Variables on Congressional Control

By further complicating the above model by controlling for and integrating the political and domestic economic context variables into the model showing that some core deliberative procedural variables are strengthened and several political and economic variables also have a statistically significant effect on the congressional control scale.

The results presented in Table 4.3 show that lower presidential approval rating and lower percentage of congressional members of the president's party will generate a statistically higher level of congressional control, whereas divided government has only a negatively marginal effect on the level of congressional attempt to control over the president. Moreover, it is worthwhile to note that high unemployment rates negatively correlate with the level of congressional attempt of control over the president's military deployment power. Both Ostrom et al. and Howell et al. find that "economic misery" results in higher levels of military activity and opportunities for the president to use military force. My finding here can provide an additional evidence for the claim that a systematically lower level of congressional attempt of control over the president during economic misery is another mechanism contributing to the higher level of military deployment.

Table 4.3. Congressional Control Scale and Discourse Quality of Constitutional Justification

| | | Dependent Variable= ControlScale | | | | | |
|---------------|--------------------|-----------------------------------|---|----------------------|---|-------------------------------|---|
| | | Military Deployment Cases | | Non-military Cases | | Overall Cases | |
| | | No Political and Economic Context | Political and Economic Context Included | No Political Context | Political and Economic Context Included | No Political Context | Political and Economic Context Included |
| | | | | | | Ideological Cleavage Included | |
| Justification | 5.215*** (3.27) | 14.919** (2.27) | 3.611*** (4.18) | 3.738*** (4.21) | 3.415*** (4.81) | 3.562*** (4.61) | 3.603*** (5.2) |
| LawCharacter | 4.565*** (3.63) | 8.206*** (3.50) | 0.681 (1.39) | 0.692 (1.18) | 1.281*** (2.82) | 1.295** (2.34) | 1.283** (2.22) |
| HComHearing | -2.167 (-0.87) | -5.177*** (-3.54) | -0.646 (-1.61) | -0.567 (-1.39) | -0.799** (-2.17) | -0.603 (-1.63) | -0.649** (-2.1) |
| SComHearing | -0.07 (-0.1) | -2.433 (-1.48) | -0.198 (-0.9) | -0.362 (-1.53) | -0.338** (-2.03) | -0.587*** (-2.63) | -0.354 (-1.43) |
| ClosedRule | 3.002** (2.02) | 6.875** (2.17) | 0.156 (0.61) | 0.135 (0.43) | 0.483 (1.58) | 0.559 (1.44) | 0.560 (1.55) |
| Cloture | 1.106 (0.66) | 5.183 (1.08) | 0.088 (0.3) | -0.236 (-0.77) | 0.232 (0.86) | -0.131 (-0.43) | -0.284 (-0.94) |
| HCom | 1.139*** (2.6) | 3.391*** (4.89) | 0.226** (2.21) | 0.276*** (2.45) | 0.322*** (2.75) | 0.378*** (2.73) | 0.411*** (3.05) |
| SCom | 0.376 (0.55) | 3.503 (1.24) | 0.024 (0.29) | 0.064 (0.7) | 0.041 (0.4) | 0.089 (0.71) | 0.117 (1.01) |
| DividedGov | | -12.731* (-1.65) | | -0.513 (-1.13) | | -0.907** (-2.07) | -0.358 (-1.12) |

Ordinal logit regressions estimated. ***=p<0.01; **=p<0.05; *=p<0.10

Table 4.3 (Continued)

| Dependent Variable= ControlScale | | | | | | | |
|----------------------------------|-----------------------------------|---|----------------------|---|----------------------|---|---------------------|
| | Military Deployment Cases | | Non-military Cases | | Overall Cases | | |
| | No Political and Economic Context | Political and Economic Context Included | No Political Context | Political and Economic Context Included | No Political Context | Political and Economic Context Included | |
| | | | | | | Ideological Cleavage Included | |
| Election | | -0.174 (-0.04) | | 0.062 (0.18) | | -0.281 (-0.83) | -0.329 (-0.92) |
| Approval | | 8.487 (0.67) | | -3.017** (-2.55) | | -2.333** (-2.08) | -2.695** (-2.21) |
| PercentParty | | -83.459* (-1.72) | | -8.372 (-1.47) | | -10.409** (-2.07) | 3.488 (0.85) |
| GDP | | -0.004 (-0.12) | | 0.002*** (0.27) | | 0.002*** (0.31) | 0.001** (0.2) |
| CPI | | 0.022 (0.46) | | 0.002 (0.32) | | -0.001 (-0.22) | -0.002 (-0.41) |
| Unemployment | | -2.647** (-2.33) | | 0.065 (0.49) | | -0.021 (-0.14) | -0.022 (-0.18) |
| IdeoGap | | | | | | | 12.035*** (3.19) |
| N | 38 | 38 | 191 | 191 | 229 | 229 | 229 |

Table 4.4. Congressional Control Scale and Discourse Quality of Congressional Content

| Dependent Variable= ControlScale | | | | | | | |
|----------------------------------|---------------------------|---|----------------------|---|----------------------|---|-------------------------------|
| | Military Deployment Cases | | Non-military Cases | | Overall Cases | | |
| | No Political Context | Political and Economic Context Included | No Political Context | Political and Economic Context Included | No Political Context | Political and Economic Context Included | Ideological Cleavage Included |
| Content | 6.148*** (3.11) | 19.145*** (2.90) | 3.981*** (4.32) | 4.197*** (4.37) | 3.657*** (4.54) | 3.87*** (4.5) | 3.87*** (4.79) |
| LawCharacter | 4.98*** (3.62) | 9.975*** (2.79) | 0.624 (1.28) | 0.635 (1.09) | 1.249*** (2.67) | 1.278** (2.28) | 1.266** (2.16) |
| HComHearing | -2.768 (-1.21) | -6.750** (-2.27) | -0.626 (-1.54) | -0.551 (-1.34) | -0.781** (-2.1) | -0.597 (-1.63) | -0.644** (-2.11) |
| SComHearing | -0.268 (-0.56) | -4.019 (-1.46) | -0.189 (-0.89) | -0.362 (-1.57) | -0.322** (-2.02) | -0.578*** (-2.72) | -0.346 (-1.47) |
| ClosedRule | 3.553** (2.06) | 7.859*** (2.88) | 0.2 (0.74) | 0.184 (0.55) | 0.531 (1.63) | 0.619 (1.48) | 0.616 (1.59) |
| Cloture | 1.047 (0.57) | 5.016 (1.51) | 0.106 (0.35) | -0.249 (-0.75) | 0.251 (0.92) | -0.142 (-0.46) | 0.292 (-0.94) |
| HCom | 1.163** (2.34) | 4.576*** (2.61) | 0.231** (2.2) | 0.281** (2.43) | 0.327*** (2.75) | 0.385*** (2.73) | 0.418*** (3.06) |
| SCom | 0.365 (0.5) | 3.38 (2.1) | 0.005 (0.06) | 0.042 (0.45) | 0.022 (0.21) | 0.067 (0.53) | 0.095 (0.8) |
| DividedGov | | -13.003** (-2.51) | | -0.431 (-0.91) | | -0.86* (-1.91) | -0.317 (-1.00) |

Ordinal logit regressions estimated. ***=p<0.01; **=p<0.05; *=p<0.10

Table 4.4 (Continued)

| | | Dependent Variable= ControlScale | | | | | |
|--------------|--|----------------------------------|---|----------------------|---|-------------------------------|---|
| | | Military Deployment Cases | | Non-military Cases | | Overall Cases | |
| | | No Political Context | Political and Economic Context Included | No Political Context | Political and Economic Context Included | No Political Context | Political and Economic Context Included |
| | | | | | | Ideological Cleavage Included | |
| Election | | | -2.922 (-1.35) | | 0.055 (0.16) | -0.309 (-0.9) | -0.356 (-0.98) |
| Approval | | | 2.224 (0.39) | | -3.184*** (-2.87) | -2.546** (-2.42) | -2.899** (-2.53) |
| PercentParty | | | -88.794** (-2.36) | | -8.284 (-1.46) | -10.382** (-2.08) | 3.392 (0.85) |
| GDP | | | -0.002 (-0.05) | | 0.002*** (0.29) | 0.002*** (0.32) | 0.001** (0.21) |
| CPI | | | 0.145 (1.00) | | 0.002 (0.33) | -0.001 (-0.19) | -0.002 (-0.36) |
| Unemployment | | | -3.438** (-2.11) | | 0.049 (0.39) | -0.035 (-0.25) | -0.035 (-0.28) |
| IdeoGap | | | | | | | 11.938*** (3.01) |
| N | | 38 | 38 | 191 | 191 | 229 | 229 |

Table 4.5. Congressional Control Orientation and Discourse Quality of Constitutional Justification

| Dependent Variable= CtrlOrientation | | | | | | |
|-------------------------------------|---------------------------|---|-------------------------------|---|-------------------------------|---|
| | Military Deployment Cases | | Non-Military Deployment Cases | | Overall Cases | |
| | No Political Context | Political and Economic Context Included | No Political Context | Political and Economic Context Included | No Political Context Included | Political and Economic Context Included |
| Justification | 1.743 (1.43) | 5.511** (2.18) | 2.457** (2.55) | 2.833** (2.58) | 2.111*** (3.06) | 2.547*** (2.86) |
| LawCharacter | 3.998*** (4.06) | 4.796*** (3.33) | 0.501 (0.82) | 0.522 (0.63) | 1.065** (2.01) | 1.111 (1.53) |
| HComHearing | -2.421 (-1.44) | -2.677 (-1.28) | -0.455 (-1.2) | -0.004 (-0.01) | -0.609 (-1.64) | -0.065 (-0.18) |
| SComHearing | -0.242 (-1.44) | -1.391** (-2.47) | -0.006 (-0.02) | -0.33 (-1.03) | -0.109 (-0.48) | -0.564** (-2.15) |
| ClosedRule | 1.489 (1.34) | 2.985 (1.38) | 0.348 (1.27) | 0.402* (1.84) | 0.482 (1.58) | 0.605** (2.21) |
| Cloture | -0.109 (-0.11) | 0.737 (0.39) | 0.25 (0.76) | -0.465 (-1.42) | 0.313 (0.99) | -0.361 (-0.92) |
| HCom | 0.935** (2.17) | 2.111*** (3.02) | 0.274** (2.27) | 0.282** (2.14) | 0.339** (2.54) | 0.372** (2.36) |
| SCom | 0.724 (0.78) | 2.861 (1.17) | 0.132 (1.21) | 0.196 (1.48) | 0.167 (1.14) | 0.252 (1.51) |
| DividedGov | | -4.913 (-1.19) | | 0.532 (1.00) | | 0.023 (0.06) |

Ordinal logit regressions estimated. ***=p<0.01; **=p<0.05; *=p<0.10

Table 4.5 (Continued)

| Dependent Variable= CtrlOrientation | | | | | | |
|-------------------------------------|---|-------------------------------|---|-------------------------------|---|--|
| Military Deployment Cases | | Non-Military Deployment Cases | | Overall Cases | | |
| No Political Context | Political and Economic Context Included | No Political Context | Political and Economic Context Included | No Political Context Included | Political and Economic Context Included | |
| Election | -0.321 (-0.18) | | -0.252 (-0.79) | | -0.518 (-1.62) | |
| Approval | 2.65 (0.49) | | -2.867** (-2.04) | | -1.934 (-1.61) | |
| PercentParty | -34.266 (-1.26) | | 0.228 (0.04) | | -2.831 (-0.62) | |
| GDP | 0.001 (0.09) | | 0.003*** (0.31) | | 0.003*** (0.32) | |
| CPI | 0.053 (0.78) | | 0.017*** (0.005) | | 0.017*** (3.44) | |
| Unemployment | -1.253** (-2.11) | | 0.151 (0.87) | | 0.104 (0.63) | |
| N | 38 | 38 | 191 | 191 | 229 | |

Table 4.6. Congressional Control Time and Discourse Quality of Constitutional Justification

| Dependent Variable= CtrlTime | | | | | |
|------------------------------|---------------------------|-------------------------------|---|-------------------------------|---|
| | Military Deployment Cases | Non-Military Deployment Cases | | Overall Cases | |
| | No Political Context | No Political Context | Political and Economic Context Included | No Political Context Included | Political and Economic Context Included |
| Justification | 7.156*** (3.26) | 3.424*** (4.18) | 3.706*** (4.77) | 3.543*** (4.86) | 3.742*** (5.69) |
| LawCharacter | 2.422*** (4.24) | 0.954*** (2.71) | 1.089** (2.04) | 1.298*** (3.89) | 1.547*** (2.88) |
| HComHearing | 0.026 (0.02) | -0.45 (-1.03) | -0.865 (-1.57) | -0.475 (-1.1) | -0.76* (-1.77) |
| SComHearing | -0.086 (-0.09) | -0.372 (-1.23) | -0.339 (-0.96) | -0.513 (-1.84) | -0.60** (-2.07) |
| ClosedRule | 3.749* (1.69) | -0.112 (-0.34) | -0.244 (-0.68) | 0.292 (0.72) | 0.32 (0.71) |
| Cloture | 0.796 (0.59) | -0.119 (-0.3) | 0.053 (0.13) | 0.01 (0.03) | 0.11 (0.34) |
| HCom | 0.658* (1.87) | 0.03 (0.26) | 0.115 (1.46) | 0.116 (1.01) | 0.20** (2.36) |
| SCom | -1.243 (-1.16) | -0.108 (-0.8) | -0.115 (0.498) | -0.151 (-1.22) | 0.161 (-0.96) |
| DividedGov | | | -1.61** (-2.21) | | -1.974*** (-2.73) |

Ordinal logit regressions estimated. ***=p<0.01; **=p<0.05; *=p<0.10

Table 4.6 (Continued)

| Dependent Variable= CtrlTime | | | | |
|------------------------------|---------------------------|-------------------------------|---|--|
| | Military Deployment Cases | Non-Military Deployment Cases | | Overall Cases |
| | No Political Context | No Political Context | Political and Economic Context Included | No Political Context Included Political and Economic Context Included |
| Election | | | 0.482* (1.93) | 0.142 (0.57) |
| Approval | | | -4.582** (-1.99) | -3.977** (-2.06) |
| PercentParty | | | -20.226*** (7.154) | -21.888*** (-3.21) |
| GDP | | | 0.001 (0.12) | 0.001 (1.42) |
| CPI | | | -0.025 (-1.57) | -0.03** (-2.2) |
| Unemployment | | | -0.045 (-0.21) | -0.199 (-0.94) |
| N | 38 | 191 | 191 | 229 |

Table 4.7. Congressional Control Orientation and Discourse Quality of Constitutional Content

| Dependent Variable= CtrlOrientation | | | | | | | |
|-------------------------------------|---------------------------|---|-------------------------------|---|-------------------------------|---|-------------------------------|
| | Military Deployment Cases | | Non-Military Deployment Cases | | Overall Cases | | |
| | No Political Context | Political and Economic Context Included | No Political Context | Political and Economic Context Included | No Political Context Included | Political and Economic Context Included | Ideological Cleavage Included |
| Content | 2.198* (1.71) | 7.923*** (2.60) | 2.630** (2.58) | 3.061*** (2.62) | 2.208*** (2.88) | 2.70*** (2.79) | 2.718*** (2.91) |
| LawCharacter | 4.127*** (4.06) | 5.864*** (3.66) | 0.465 (0.75) | 0.474 (0.58) | 1.045* (1.92) | 1.101 (1.51) | 1.095 (1.47) |
| HComHearing | -2.432 (-1.39) | -2.697 (-1.22) | -0.445 (-1.18) | 0.003 (0.01) | -0.601 (-1.63) | -0.068 (-0.18) | -0.097 (-0.29) |
| SComHearing | -0.19 (-0.21) | -1.398* (-1.82) | -0.004 (-0.01) | -0.342 (-1.07) | -0.103 (-0.46) | -0.57** (-2.21) | -0.456 (-1.54) |
| ClosedRule | 1.673 (1.39) | 3.658* (1.71) | 0.369 (1.31) | 0.429* (1.89) | 0.503 (1.62) | 0.640** (2.2) | 0.648** (2.32) |
| Cloture | -0.121 (-0.12) | 1.044 (0.45) | 0.265 (0.81) | -0.477 (-1.47) | 0.328 (1.05) | -0.374 (-0.98) | -0.46 (-1.19) |
| HCom | 0.948** (2.13) | 2.268*** (5.10) | 0.276** (2.26) | 0.285** (2.14) | 0.342** (2.53) | 0.377** (2.38) | 0.398** (2.33) |
| SCom | 0.756 (0.77) | 2.85 (1.12) | 0.119 (1.07) | 0.18 (1.34) | 0.156 (1.04) | 0.235 (1.38) | 0.25 (1.47) |
| DividedGov | | -4.123 (-0.91) | | 0.566 (1.04) | | 0.044 (0.1) | 0.344 (1.13) |

Ordinal logit regressions estimated. ***=p<0.01; **=p<0.05; *=p<0.10

Table 4.7 (Continued)

| Dependent Variable= CtrlOrientation | | | | | | |
|-------------------------------------|---|-------------------------------|---|-------------------------------|---|-------------------------------|
| Military Deployment Cases | | Non-Military Deployment Cases | | Overall Cases | | |
| No Political Context | Political and Economic Context Included | No Political Context | Political and Economic Context Included | No Political Context Included | Political and Economic Context Included | Ideological Cleavage Included |
| Election | -0.917 (-0.55) | | -0.265 (-0.82) | -0.546* | | -0.568* |
| Approval | 1.623 (0.31) | | -2.952** (-2.14) | -2.075* | | -2.286** (-1.97) |
| PercentParty | -33.339 (-1.28) | | 0.218 (0.04) | -2.842 (-0.63) | | 4.332 (0.76) |
| GDP | -0.001 (-0.02) | | 0.003*** (0.31) | 0.003*** (0.31) | | 0.003*** (0.25) |
| CPI | 0.104 (1.23) | | 0.017*** (3.43) | 0.017*** (3.44) | | 0.017*** (3.16) |
| Unemployment | -0.738 (-1.2) | | 0.141 (0.82) | 0.093 (0.58) | | 0.091 (0.58) |
| IdeoGap | | | | | | 6.164 (1.05) |
| N | 38 | 38 | 191 | 191 | 229 | 229 |

Table 4.8. Congressional Control Time and Discourse Quality of Constitutional Content

| | Dependent Variable= CtrlTime | | | | | |
|--------------|------------------------------|-------------------------------|---|-------------------------------|---|-------------------------------|
| | Military Deployment Cases | Non-Military Deployment Cases | | | Overall Cases | |
| | No Political Context | No Political Context Included | Political and Economic Context Included | No Political Context Included | Political and Economic Context Included | Ideological Cleavage Included |
| Content | 8.550*** (2.84) | 3.780*** (4.05) | 4.174*** (4.68) | 3.892*** (4.41) | 4.185*** (5.16) | 4.369*** (5.91) |
| LawCharacter | 2.577*** (3.86) | 0.902** (2.59) | 1.038** (2.02) | 1.289*** (3.75) | 1.54*** (2.95) | 1.566*** (2.77) |
| HComHearing | 0.184 (0.11) | -0.437 (-0.98) | -0.873 (-1.61) | -0.464 (-1.06) | -0.762* (-1.81) | -0.774* (-1.93) |
| SComHearing | 0.096 (0.09) | -0.359 (-1.23) | -0.33 (-1.01) | -0.491* (-1.78) | -0.582** (-2.15) | -0.242 (-0.84) |
| ClosedRule | 4.189* (1.7) | -0.067 (-0.19) | -0.186 (-0.47) | 0.357 (0.84) | 0.402 (0.82) | 0.455 (1.02) |
| Cloture | 0.910* (0.65) | -0.108 (-0.26) | 0.044 (0.1) | 0.022 (0.06) | 0.086 (0.24) | -0.183 (-0.56) |
| HCom | 0.653 (1.66) | 0.033 (0.28) | 0.12 (1.54) | 0.119 (1.04) | 0.203** (2.45) | 0.278*** (3.3) |
| SCom | -1.249 (-1.31) | -0.135 (-1.00) | -0.15 (-0.88) | -0.177 (-1.39) | -0.193 (-1.13) | -0.117 (-0.79) |
| DividedGov | | | -1.518** (-2.04) | | -1.884** (-2.59) | -0.656 (-1.1) |

Ordinal logit regressions estimated. ***=p<0.01; **=p<0.05; *=p<0.10

Table 4.8 (Continued)

| Dependent Variable= CtrlTime | | | | | | |
|------------------------------|---------------------------|-------------------------------|---|-------------------------------|---|-------------------------------|
| | Military Deployment Cases | Non-Military Deployment Cases | | Overall Cases | | |
| | No Political Context | No Political Context Included | Political and Economic Context Included | No Political Context Included | Political and Economic Context Included | Ideological Cleavage Included |
| Election | | | 0.490* (1.88) | | 0.108 (0.42) | 0.037 (0.13) |
| Approval | | | -4.819** (-2.16) | | -4.252** (-2.25) | -4.544** (-2.51) |
| PercentParty | | | -19.989*** (-2.78) | | -21.551*** (-3.14) | 11.075 (1.05) |
| GDP | | | 0.001 (0.13) | | 0.002 (0.15) | 0.005 (0.04) |
| CPI | | | -0.025 (-1.58) | | -0.03** (-2.16) | -0.033*** (-2.84) |
| Unemployment | | | -0.08 (-0.37) | | -0.226 (-1.03) | -0.238 (-1.32) |
| IdeoGap | | | | | | 28.347*** (2.94) |
| N | 38 | 191 | 191 | 229 | 229 | 229 |

b. Foreign Affair Case

i. The Effects of Deliberation and Institutional Variables on Congressional Control

In this part, I explore the pattern of congressional deliberation and its relation with congressional attempt of control over the presidential power in non-military foreign affair case. Generally, the level of both constitutional *Justification* and *Content* still has a positively significant effect on the level of congressional attempt of control over the president's foreign affair power. As for other institutional variables, a bill referral to the House committee still plays an important role in influencing the level of congressional attempt of control, whereas the congressional annual budget bill and the House's floor rule do not play as statistically significant a role as they do in military deployment case.

Table 4.3 shows that constitutional *Justification*, as it did in the military deployment case, is highly and positively correlated with the level of congressional scale in a non-military deployment foreign affair case. The same pattern also generates in overall military and non-military deployment cases. The quality of deliberation itself plays a crucial role to the level of congressional attempt of control over the president.

Additionally, the same situation that happens in the military deployment case also happens in the non-military deployment case: referral of a bill to the House's committee, the higher the level of congressional attempt of control over the president. Moreover, both chambers' committee hearings are negatively correlated with the level of congressional attempt of control. Although it is still unclear why a committee hearing would generate a lower level of congressional control over the president, given the "political ritual" reason mentioned above, the function of a committee hearing in the modern era is apparently not an arena for moral-political deliberation but rather for compromise over interests—thus it is reasonable to expect lower

congressional attempt of control. Lastly, while the closed-rule is positively correlated with the level of control in the military deployment case, it does not have any statistically significant effect on the scale of congressional control in the foreign affair case.

Further, a look into the sub-category of *ControlScale* in foreign affair case (Table 4.5 and Table 4.6) shows that, unlike the results in military deployment cases, the level of congressional *Justification* is positively correlated with both *CtrlOrientation* and *CtrlTime*. According to the change of probability test, the results show that a higher level of constitutional *Justification* tends to yield more *ex post* control and at the same time procedural and substantive mixed control over the president. This may suggest that in the field of foreign affairs as a whole, congressional members are willing to authorize the president to initiate a policy first, but attempt to control the president with some kind of “patrol” mechanism after the president makes his decision.

Table 4.4 also displays the relationship between the level of constitutional *Content* and *ControlScale*. I consistently find that the content of deliberation is a matter of the outcome. In foreign affair case, the patterns are comparable to those of constitutional *Justification*. Specifically, in foreign affair cases, only the level of *Content* and a bill referral to the House’s committee are positively correlated with the level of congressional control, whereas the holdings of both chambers’ committee hearings are still negatively correlated with the level of control.

ii. The Effects of Political and Economic Variables on Congressional Control

By further complicating the model by including political and economic variables, the deliberation and institutional variables presented above still yield the same results as they do in the above model without political and economic variables and in military deployment case. In addition, lower presidential approval rating would generate a

higher level of congressional control. Most importantly, I found that ideological disparity between the president and Congress is positively correlated with the level of congressional attempt of control when military deployment and non-military deployment cases are taken together and tested against those political and economic variables. A detail explanation of these results is as follows.

The impacts of political and economic variables on the level of congressional attempt of control over the president are slightly different from those in military deployment case. The model (Table 4.3) shows that only a lower presidential approval rating significantly results in a higher level of congressional control, but the percentage of congressional members of the president's party in Congress and other economic variables no longer play any important role in determining the level of congressional control.

More importantly, it is noteworthy that in overall military deployment and foreign affair cases,¹⁰ both the divided government and the percentage of president's party are negatively correlated with the level of congressional control. However, the divided government variable does not have any significant effect on the level of congressional control in the previous analyses. Recalling what Howell and Pevehouse admonish, the divided government variable itself "contains the least amount of information."¹¹ Moreover, as Paul Quirk and Bruce Nesmith indicate, the conflicting and complementary interests between the president and Congress do not vary whether the government is unified or divided. Therefore, how a divided government affects the operation of constitutional government as a whole is highly contingent upon other

¹⁰ Unless it is worthy of exploration, I do not regularly report the pattern of overall military deployment and non-military deployment cases and its relation with the level of congressional deliberation or congressional control in the body of this dissertation. Yet I still report the regression results in each table for reference.

¹¹ See William Howell & Jon Pevehouse, *While the Dangers Gather* 96 (2008).

political factors--such as policy interest, electoral interest, or ideological cleavage--but not divided government per se.¹² Based on the above reasons, I think it is legitimate to make robustness check of the effect of divided government by including the ideological difference between the president and Congress into the model, which can include a more comprehensive information about both political branches policy preferences and ideological cleavage.

Table 4.3 shows that the greater the liberal-conservative ideological disparity between the president and Congress is, the higher the level of congressional control is. Moreover, including ideological difference in the model does affect the original statistically significant relationship between some of the political variables and the level of congressional attempt of control over the president. In particular, the results show that divided government does not have a statistically significant effect on the level of control at all, whereas the ideological difference does not alter the effects of other institutional procedural variables.

The above finding of the effect of ideological disparity is inconsistent with the hypothesis of deliberative theorists. In general, deliberative theorists hypothesize that an issue which is salient to congressional member's electoral success, disagreement among the political actors tend to generate a lower quality of deliberation. That suggests that in turn may generate a lower level of congressional attempt of control over the president for lacking of substantive agreement in a polarized political context. I think there are two possible and somewhat complementary explanations can be made here from loose strategic and deliberative points. From a strategic point, no matter the ideological situation in which the president and Congress stand, both actors face pressure to make the passage of legislation for their regular business in order to

¹² See Paul Quirk & Bruce Nesmith, *Divided Government and Policymaking: Negotiating the Laws, in The Presidency and the Political System* 508-32(2005).

accumulate political capital for reelection. To cooperate under such greater ideological cleavage and mutual distrust circumstances, different ideological actors may strategically change their discourse to create a better negotiation atmosphere, and thus a more reasonable and balanced level of control may become a way to create non-zero sum cooperation.

However, the above strategic explanation does not necessarily provide a reason for why negotiation under such a situation sometimes is possible but sometimes is not. Some deliberative theorists argue that a polarized ideology does not necessarily result in a lower level of deliberation when facing those non-traditional ideological issues.¹³ Therefore, even the existence of a greater ideological cleavage does not necessarily preclude deliberation between polarized parties. They cannot deliberate over those traditionally ideological issues. No matter what explanations hold, inclusion of the ideological variable into the model does suggest in a manner consistent with Howell and Pevehouse's finding that divided government is not a sufficient variable with which to analyze the congressional-presidential relationship. In consequence, in terms that military deployment and foreign affair legislation are not traditionally ideological issues,¹⁴ I think neither the divided government nor the ideological cleavage itself could directly polarize the deliberation and balancing operation of the constitutional structure as a whole.¹⁵

¹³ For example, Steiner et al. find that congressional debate regarding ideological issue such as abortion tends to generate lower discourse quality. Moreover, John Dryzek and Valerie Braithwaite also reach the similar conclusion that a deliberation is rosier if its subject does not pertain to an identity issue. See Steiner et al., *supra* note 6, at 131-135; See John Dryzek & Valerie Braithwaite, *On the Prospects for Democratic Deliberation: Values Analysis Applied to Australian Politics*, 21 *POLITICAL PSYCHOLOGY* 241, 241-66 (2000).

¹⁴ In terms that the "rally around the flag" effect always occurred at the beginning of a war, this further illustrates that military deployment or foreign affair legislation as a whole is a more "political" but not necessarily moral undetermined issue in the traditional liberal-conservative dimension.

¹⁵ Another finding I did not report here concerning the relationship between GDP and the level of congressional check on the presidential war power on the grounds that its marginal effect is extremely low in the model. In particular, I found that a greater GDP generates a higher level of congressional

D. Robustness Check on the Deliberation Model

Although I had demonstrated in the previous part that the primary model regarding the relationship between congressional deliberation and congressional control over the president is statistically correlated, there are still several hypotheses argued by presidential war power researchers that I have not included in the primary deliberation model presented above. Hence, to test the robustness of my primary deliberation model, I further complicate my primary deliberation model by incorporating other important factors into the model.

In the following passages, three important alternative factors— the level of hostility, alliance relationship, and the type of foreign assistance— will be included in the model respectively. In short, the models show that none of these three alternative factors has any effect on the primary deliberation model. Moreover, the models also show that (1) the level of congressional attempt of control over a major force is systematically higher than a minor one; (2) there is no statistically difference of the level of congressional attempt of control over the president because of alliance or non-alliance relationship with U.S.; and that (3) congressional attempt of control over the military and humanitarian assistance is systematically higher, whereas Congress does not show a systematic attempt of control over the economic assistance.

control. This finding seems to be counterintuitive. If GDP accurately portrays the economic situation, then growth in GDP should stand for a better economic situation and thus higher presidential support from Congress and from the public as a whole. However, an ongoing war usually will boost GDP because of greater demand for war-related products regardless of other poor performance in economic indicators. Therefore, the meaning of GDP growth in the context of this research may imply the more severe situation of an ongoing war, and thus may generate higher level of congressional control. Again, this finding is too preliminary to report in the body of this dissertation. Thus, I just describe it here as a reference.

1. Major War v. Minor War and Congressional Control

Is Congress more concerned with major wars but give the president a pass on minor wars? Howell and Pevehouse demonstrate that Congress has stronger influence on the presidential decision of a use of major force but not on a minor use of force. Hence, I also take the level of hostility into account to test its influence on the level of congressional check. Following Howell and Pevehouse's definition, I categorize hostility levels 4 and 5 as indicating a major war, whereas hostility levels 1 through 3 as indicating a minor war.

The data shows that the average level of congressional control over the president during a major war is 2.87, as opposed to 2.23 during a minor war. That suggests that even the average control of major war falls within the same level as minor force. According to a one-sample mean test, the control scale of major force is less than 3, which cannot be rejected at .01 level, whereas the control scale of minor force is greater than 2, which cannot be rejected at the .05 level. Such result, which presents no statistically significant difference of the level of congressional attempt of control over the president between major and minor force in overall military and non-military deployment cases, is also confirmed by the regression test displayed in Table 4.9.¹⁶ Moreover, though I do not address the relationship between congressional deliberation and the level of control here, the results (Table 4.9) in this part, again, still show that the level of discourse quality is highly and positively correlated with the level of congressional attempt of control over the president in overall military deployment and non-military deployment cases.

¹⁶ A post-regression test reveals that the odds of a higher level of control increase by 50% when a major force happens, given that major force does exist, the highest probability of the control level would be 2, the same as a minor force. The same pattern-- no statistically different level of congressional on the president—can also be found in non-military deployment foreign affair cases.

Table 4.9. Congressional Control Scale and Major/ Minor War

| | Dependent Variable= ControlScale | | |
|---------------|---|-------------------------------|---------------------|
| | Military Deployment Cases | Non-Military Deployment Cases | Overall Cases |
| | Political and Economic Context are All Included | | |
| Justification | 16.196*** (3.50) | 3.667*** (4.14) | 3.469*** (4.49) |
| Force | 3.539** (1.99) | 0.673** (2.55) | 0.456** (2.15) |
| LawCharacter | 8.163*** (3.14) | 0.673 (1.12) | 1.294** (2.30) |
| HComHearing | -4.332*** (-4.97) | -0.557 (-1.43) | -0.571 (-1.59) |
| SComHearing | -1.134 (-0.61) | -0.281 (-1.20) | -0.508** (-2.18) |
| ClosedRule | 7.342*** (3.10) | 0.148 (0.45) | 0.569 (1.45) |
| Cloture | 7.758** (2.05) | -0.291 (-0.9) | -0.167 (-0.55) |
| HCom | 4.045*** (3.21) | 0.291** (2.49) | 0.384*** (2.82) |
| SCom | 3.179 (1.53) | 0.008 (0.08) | 0.053 (0.41) |
| DividedGov | -16.808*** (-3.09) | -0.282 (-0.54) | -0.762* (-1.68) |
| Election | -0.311 (-0.09) | 0.062 (0.19) | -0.299 (-0.90) |
| Approval | 10.058 (1.03) | -3.286*** (-2.81) | -2.481** (-2.23) |
| PercentParty | -97.559** (-2.32) | -5.654 (-0.84) | -8.679 (-1.59) |
| GDP | -0.001 (-1.74) | 0.002** (0.21) | 0.002*** (0.27) |
| CPI | 0.048 (0.59) | -0.001 (-0.22) | -0.003 (-0.48) |
| Unemployment | -3.202* (-1.73) | 0.032 (0.25) | -0.038 (-0.27) |
| N | 38 | 191 | 229 |

Ordinal logit regressions estimated. ***=p<0.01; **=p<0.05; *=p<0.10

Table 4.10. Congressional Control Scale and Humanitarian Operation or Alliance

| | Dependent Variable= ControlScale (Humanitarian Operation) | | | | | Dependent Variable= ControlScale (Alliance v. Non-alliance) | | |
|--------------------|--|------------------------------------|--------------------|---|------------------------------------|--|------------------------------------|----------------------|
| | Military Deployment Case | Non-military Deployment Case | Overall Case | Non-military Deployment Case and Assistances | Overall Case and Assistances | Military Deployment Case | Non-military Deployment Case | Overall Case |
| Justification | 17.169*** (5.03) | 4.426*** (5.01) | 3.748*** (5.28) | 4.574*** (5.07) | 3.721*** (5.33) | 16.104** (2.29) | 3.686*** (4.09) | 3.497*** (4.51) |
| Import | -0.012 (-1.23) | -0.002 (-1.05) | -0.002 (-1.38) | -0.002* (-1.68) | -0.002* (-1.92) | — | — | — |
| Export | -0.045 (-0.80) | -0.001 (-0.39) | 0.002 (0.5) | -0.002 (-0.11) | 0.002 (0.85) | — | — | — |
| MilitaryAssist | — | — | — | 1.506*** (4.23) | 1.142*** (2.74) | — | — | — |
| EconomicAssist | — | — | — | 0.609 (1.37) | 0.156 (0.60) | — | — | — |
| HumanitarianAssist | — | — | — | 0.887*** (3.48) | 0.781*** (2.81) | — | — | — |
| TradeBalance | — | — | — | — | — | -0.006 (-0.35) | -0.006*** (-3.39) | -0.004*** (-3.57) |
| Alliance | — | — | — | — | — | -1.446 (-0.58) | 0.308 (0.98) | 0.13 (0.46) |

Ordinal logit regressions estimated. ***=p<0.01; **=p<0.05; *=p<0.10

Table 4.10 (Continued)

| | Dependent Variable= ControlScale | | | | | Dependent Variable= ControlScale | | |
|--------------|----------------------------------|------------------------------------|--------------------|---|------------------------------------|----------------------------------|------------------------------------|--------------------|
| | (Humanitarian Operation) | | | | | (Alliance v. Non-alliance) | | |
| | Military Deployment Case | Non-military Deployment Case | Overall Case | Non-military Deployment Case and Assistances | Overall Case and Assistances | Military Deployment Case | Non-military Deployment Case | Overall Case |
| LawCharacter | 10.199*** (4.57) | 0.288 (0.45) | 0.996* (1.66) | 0.356 (0.57) | 1.016* (1.81) | 8.953** (2.28) | 0.619 (1.01) | 1.281** (2.24) |
| HComHearing | -4.938*** (-3.83) | -0.531 (-1.29) | -0.560 (-1.40) | -0.531 (-1.37) | -0.567 (-1.48) | -5.648** (-1.97) | -0.567 (-1.33) | -0.599 (-1.59) |
| SComHearing | -4.688* (-1.82) | -0.087 (-0.29) | -0.404* (-1.84) | -0.091 (-0.28) | -0.419* (-1.69) | -2.231 (-0.89) | -0.190 (-0.73) | -0.473* (-1.92) |
| ClosedRule | 7.361*** (2.87) | 0.18 (0.65) | 0.576* (1.69) | 0.235 (0.85) | 0.58* (1.75) | 6.776** (2.37) | 0.16 (0.52) | 0.576 (1.52) |
| Cloture | 2.483 (0.54) | -0.289 (-0.81) | -0.148 (-0.45) | -0.314 (-0.81) | -0.171 (-0.48) | 6.097 (1.34) | -0.296 (-0.97) | -0.18 (-0.61) |
| HCom | 4.013*** (3.65) | 0.277*** (2.60) | 0.386*** (2.93) | 0.309*** (2.75) | 0.411*** (3.01) | 3.675*** (2.61) | 0.273** (2.53) | 0.378*** (2.75) |
| SCom | 3.316 (1.42) | -0.029 (-0.30) | 0.034 (0.27) | -0.001 (-0.01) | 0.050 (0.38) | 4.312* (1.83) | 0.004 (0.04) | 0.049 (0.41) |
| DividedGov | -17.104*** (-2.77) | 0.222 (0.49) | -0.49 (-1.11) | 0.322 (0.64) | -0.414 (-1.00) | -15.637** (-2.00) | -0.333 (-0.77) | -0.791* (-1.85) |
| Election | 0.046 (0.01) | -0.043 (-0.11) | -0.417 (-1.14) | 0.018 (0.05) | -0.370 (-1.01) | 0.406 (0.15) | 0.025 (0.07) | -0.328 (-0.96) |

Table 4.10 (Continued)

| | Dependent Variable= ControlScale (Humanitarian Operation) | | | | | Dependent Variable= ControlScale (Alliance v. Non-alliance) | | |
|--------------|--|------------------------------------|----------------------|---|------------------------------------|--|------------------------------------|----------------------|
| | Military Deployment Case | Non-military Deployment Case | Overall Case | Non-military Deployment Case and Assistances | Overall Case and Assistances | Military Deployment Case | Non-military Deployment Case | Overall Case |
| | Approval | 7.363 (0.66) | -3.382*** (-3.27) | -2.443** (-2.52) | -2.959*** (-3.01) | -2.127** (-2.33) | 11.913 (1.11) | -3.358*** (-2.87) |
| PercentParty | -112.067*** (-2.84) | -2.467 (-0.45) | -6.986 (-1.54) | -2.513 (-0.43) | -7.101* (-1.68) | -95.896* (-1.92) | -6.828 (-1.17) | -9.489* (-1.86) |
| GDP | 0.003 (0.06) | 0.002** (0.23) | 0.002*** (0.29) | 0.002* (0.19) | 0.002*** (0.27) | -0.006 (-0.07) | 0.002*** (0.28) | 0.002*** (0.32) |
| CPI | -0.062 (-0.99) | -0.003 (-0.47) | -0.005 (-0.80) | -0.006 (-0.89) | -0.007 (-1.25) | 0.018 (0.17) | 0.005 (0.66) | 0.001 (0.12) |
| Unemployment | -4.057** (-2.36) | 0.025 (0.28) | -0.042 (-0.38) | -0.612 (-0.60) | -0.122 (-1.07) | -2.558 (-1.46) | -0.007 (-0.06) | -0.064 (-0.53) |

The result in Table 4.9 shows that in military deployment case, the Congress really is more concerned with military deployment for a possible major force than a minor one. The level of force is positively correlated with the level of congressional check on the president. This finding is consistent with the conventional wisdom that the president tends to buy “political insurance” from the Congress before dispatching the troops for a major force. However, that does not mean that such “policy” is a free pass for the president to do whatever he wants with unconditional compensation offered by the Congress because the results also show that there is no significantly different level of congressional attempt of control between major and minor forces provided in legislation relating to non-military deployment cases.

I think the aforementioned findings have two implications on the Declare War Clause. The first is that some scholars argue that the Declare War Clause implies that Congress only has power to authorize the president to engage in military conflict amounting to the scale of a war but not short of a war. Such an interpretation ignores the fact that Congress can decide to what extent or degree they authorize the president to engage in a possible military conflict or in different kinds of conflicts. Lower control over the president does not necessarily mean that Congress gives all of its war power away. Second, authorization itself cannot be exploited as a license for sweeping discretion in subsequent military-related action. Although Congress is willing to authorize the president to decide the conduct of a military action, it cannot be broadly interpreted as a legal basis for other war-related conduct because Congress usually will show their attempt to control over a specific foreign policy in the subsequent non-military deployment bills.¹⁷

¹⁷ I think the above finding also suggests that it is doubtful that the president has broadly independent war-initiation power. As shown in Appendix Table O.1, only in two out of fourteen events (invasion of Panama and prevention of Taiwan-China conflict), or two out of thirty-eight occasions, did Congress not express its judgment about whether the president should dispatch the troops abroad in order to engage in any possible kind of hostility. Congress did not fulfill its job in six out of fourteen events (Appendix Table O.2 and Table O.3) in which it did not make ex ante judgment on military

2. Alliance v. Non-alliance Relationship and Congressional Control

So far I have not taken the possible impact of international factors into account in my model. John Yoo and Jide Nzelibe hypothesize that because congressional members do not have sufficient information of a non-alliance country, they are not willing to make a decision under such an ambiguous circumstance and send a wrong signal to either the president or a non-alliance country.¹⁸ Therefore, in this part, I test what perception the Congress holds toward an alliance or non-alliance nation.

The results in Table 4.10 show that whether an alliance's interest is factored into a military conflict has no statistically significant effect on the level of congressional attempt of control over the president. Moreover, the results still show that congressional deliberation is highly and positively correlated with the level of congressional attempt of control over the president after including alliance and non-alliance relationship into the primary deliberation model.

The above finding is inconsistent with conventional research on the relation between congressional influence and alliance made by international relation scholar and rational choice theorists. First, international relations scholars hypothesize that Congress has more influence on the presidential decision if a non-alliance interest is involved, whereas Congress has less influence if an alliance's interest is involved. But the data here shows that alliance is not a concern for Congress. A possible explanation for such inconsistency relates to the end of Cold War. With a lower probability of military conflict existing between the U.S. and the former Soviet Union or Russia

deployment. Further looking into those six occasions, we can find that the Lebanon hostage incident and Post-First Iraqi War events both are actually ongoing events in which Congress had already been involved. Some of the events cannot be regarded as legislative inaction if Congress had more or less expressed their judgments in an earlier bill. Therefore, unless one can prove that Congress systematically gives away its ex ante control on the president in either "little wars" or "big wars," it is hard to justify the opinion that the president has broadly independent war initiation power.

¹⁸ See Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512 (2006).

afterward, even though balance of power is still at the center of international politics, collective security institutions such as U.N. or NATO have gained much more influence in the post-Cold War era.

Second, rational choice theorists hypothesize that lacking information about non-alliance nations, Congress tends to give the president more discretion to deal with the relationship between U.S. and a non-alliance nation.¹⁹ However, the findings above show an inconsistent result with what rational choice theorists hypothesize. In particular, since the model shows that the level of congressional deliberation still highly affects the level of congressional check, I argue that whether members of Congress could acquire sufficient information depends upon the will of Congress to deliberate over a specific event but not upon the alliance and non-alliance relationship. Moreover, as game theorists suggest, every decision maker usually makes a judgment on the next step by taking another actor's behavior but not necessarily that other actor's intention into account. It is the historical interaction between U.S. and another nation, domestic interest, or structure of international system that may affect the judgment of president and Congress.²⁰ As such, I think that if Congress has a stronger will to deliberate, it may be able to form a more reliable judgment that is

¹⁹ *Id.*

²⁰ Although I only address "military" alliance and non-alliance above, in Table 4.10, I also include whether and how "economic" alliance, or economic interdependency relationship influences on the level of congressional control. Since the statistical results are rather marginal and preliminary, I only report the results here as a reference. Table 4.10 shows that in military deployment cases, U.S. trade with a targeted nation is not a concern of Congress in deciding the level of control over the president. However, a greater trade deficit between the U.S. and a targeted nation would generate a lower level of congressional control. That may suggest the fact that the military balance of power is not a main concern for Congress does not necessarily mean that neither is economic balance of power. As international realist scholars suggest, the balance of economic power between two states also affects the capability of a nation to win a war between the two states. As such, given a lack of an "economic collective system" through which to "punish" a big trade surplus country generally, Congress may assume that the president must have greater discretion to address an unbalanced economic situation with a possible targeted nation. See MICHAEL GERACE: MILITARY POWER, CONFLICT, AND TRADE (2004).

predicated upon a set of complex international factors but not necessarily predicated upon the nature of the U.S. relationship with another nation.

3. Foreign Assistance and Congressional Control

In traditional U.S. foreign policy, foreign assistance is one of the main measures employed to stabilize and manage a foreign region and foreign crisis thereof.

Traditionally, U.S. foreign assistance can be divided into three categories: military assistance, economic assistance, and humanitarian assistance. In consequence, I include these three modes of assistance in my primary deliberation model and test whether and how foreign assistance influences the level of congressional control. The results show that the level of congressional attempt of control is positively correlated with military assistance and humanitarian assistance, but is not correlated with economic assistance. Moreover, the inclusion of foreign aid factors does not affect the primary deliberation model at all.

The results in Table 4.10 show that the level of congressional control is positively correlated with U.S. foreign military and humanitarian aid policy. These findings may suggest that Congress does believe that foreign aid plays an effective role in stabilizing a foreign region. However, to a certain extent, these findings are partially inconsistent with the conventional wisdom of international relations scholars who have formed hypotheses about the congressional role. The hypothesis is that congressional attempt of control over the presidential power is lower if the U.S. has a stronger commitment, either militarily or economically, to a targeted nation. That hypothesis may ignore the fact that foreign aid policy is usually a long-term but not short-term policy, which suggests that members of Congress have abundant opportunity to reflect their own previous decisions on foreign aid. Therefore, if Congress is able to deliberate over whether the U.S. wants to commit to a region and

what kinds of resources U.S. will commit, it then actually has the time and ability to judge which regions should be regarded as substantial regions of interest by the U.S, and thus relatively balances its power in relation to that of the president. Therefore, contrary to international relations scholars, I argue that Congress does not forfeit its overall foreign aid authority to the president.

Lastly, a possible explanation for there being no systematic control on economic assistance comes from the reason that economic assistance is not a major instrument used to prevent foreign crises in the post-Cold War era. In fact, the amount of economic assistance already began to decline in mid-1980 when the Cold War became *détente* and was not as intense as was in 1960s and 1970s. Instead, security assistance and humanitarian problems became main concerns of international society throughout the post-Cold War of the 1990s. Therefore, it is not surprising to see higher congressional attempt of control on both military and humanitarian assistance but not over economic assistance.

II. Presidential Unilateral War and Collaborative Political Accountability

As I indicated in chapter 3, current research on congressional deliberation neglects to consider how other political actors in the public sphere respond to congressional deliberation and decision thereof. In the war and foreign affair areas, it is especially important for researchers to investigate the systematical pattern of presidential action that emerges after congressional action. In this section, I reconstruct my model based on the unilateral politics model mainly constructed by William Howell and concept of Markov chain to explore the pattern of presidential action and congressional checking ability over the presidential power. In the following passages, I will (1) illustrate my model design for this exploration, and (2) report the results of regression analyses. I will also argue and illustrate that though neither deliberation nor legal regulation on

war can necessarily prevent the president from unilaterally deploying the troops, a higher level of congressional deliberation and war regulation can invite the president to be charged with greater political accountability, which would prevent a unilateral presidential military action become a presidential war-making law through congressional inaction.

A. Modeling Presidential Unilateral War

The main objective of the presidential unilateral war model presented here is to incorporate Markov chains and presidential unilateral politics into a model. Simply put, Markov chains indicate that a decision is made only by taking an event closest to the current point in time into account regardless of other events that occurred prior to that closest time point.²¹ In other words, a decision made at time point t is only conditional on the event that happened at time point $t-1$ but not $t-2$ or so on. By unilateral action, I mean either that a presidential action is not authorized by the Congress or that an action is contrary to what the Congress expressed in a bill. Through these two concepts, I categorized various types of presidential actions listed in chapter 3--including executive orders, national security directives, signing statements, proclamations, and vetoes--by juxtaposing each with the respective congressional actions closest to those presidential unilateral actions. It should be noted that not all of those presidential actions are coded as unilateral action if an action is already authorized by Congress at time point $t-1$.

From a legal perspective, one of the main downsides of the above model may be that it neglects the effect has by existing law enacted prior to time point $t-1$. However, in terms of dynamic relation between the president and Congress, only the most relevant and up-to-date law can reflect the latest inter-branch interaction.

²¹ See Jeff Gill, *Essential Mathematics for Political and Social Research* 392-5 (2006).

Moreover, even if the president takes an action in accordance with an alleged authority or law, Congress still can choose to retrospectively codify, reject, or adjust it. For example, though the first President Bush issued an executive order to block Yugoslav Government property according to the International Emergency Economic Powers Act, Congress still recognized and codified that in a later defense authorization act. Therefore, to Congress, any presidential action can be regarded as a possible depredation of the balance of power, which may prompt it to patrol along the legislative border.

The **dependent variable** in the following model is whether the president adopts a unilateral action, which I label *Unilateral*. A binary logistic model will be applied to such a dependent variable. Three kinds of **independent variables** are included. First, I still include the level of congressional deliberation into the model. The main justification for including this hypothesis was described in chapter 3: given that higher deliberation may generate a better argument, the president should also accept such a better argument after a higher level of deliberation and thus refrain from taking unilateral action alone.

Second, three **institutional independent variables** are included. The first one is whether a unilateral action is taken after Congress enacted a military deployment regulation (*Military*), which directs the president either not to dispatch the troops or to withdraw the troops before a specific date. It is intuitive to assume that the president will take an action contrary to Congress under such circumstances. The second institutional variable is whether a law is an appropriation and annual authorization law (*Lawcharacter*). It is included because the Founders assumed that Congress would tend to control the president's war and foreign affair powers through budget laws. If this "separation of money and sword" assumption holds, one may expect a unilateral action not taken by the president after an enactment of a budget bill.

Third, all of the “standard” **political and economic variables** included in the prior section--including the divided government, percentage of the president’s party, election year, presidential approval rating, and ideological disparity--are all included in the following models. Following Howell’s unilateral political action model,²² I also include *Filibuster* and *Unemployment* into the political and economic variables.

B. Model Results

I divide my models into two types: the first type includes unilateral military deployment action, and the second one drops unilateral military deployment action. Generally, the model shows that the president systematically resists the congressional regulation of his military deployment power by taking a unilateral action. In addition, a higher level of congressional deliberation does not prevent the president from taking unilateral action in a military deployment case, whereas a higher level of congressional deliberation could prevent the president from taking unilateral action in non-military deployment case. Lastly, variables play much more a statistically significant role in a presidential unilateral war. I briefly describe the model in detail as follows.

In **unilateral military deployment** case, as Table 4.11 shows, the level of congressional *Justification* is not statistically correlated with presidential unilateral action, which suggests that a higher level of congressional deliberation does not have any influence on the president. As for institutional variables, whether Congress provides for military deployment and redeployment in a law, not surprisingly, would positively trigger the president’s unilateral action. However, none of the rest of the institutional variables, including the level of congressional control (*ControlScale*), and annual budget law (*LawCharacter*), is statistically correlated with presidential

²² See William Howell, *Power without Persuasion* (2003).

unilateral action. I think such a historical pattern of systematically presidential resistance with congressional war regulation sheds a substantial amount of new light on the argument for customary presidential war power, which will be addressed in chapter 5.

Table 4.11. Unilateral Presidential Military and Non-military Action

| | Dependent Variable= | |
|--------------------------|-----------------------------------|-----------------------------------|
| | Presidential Unilateral Action | Presidential Unilateral Action |
| | (War Included) | (War not Included) |
| ControlScale | 0.062 (0.55) | 0.021 (0.17) |
| Justification | 0.666 (1.55) | 0.605** (2.02) |
| LawCharacter | -0.353 (-0.72) | 0.118 (0.25) |
| MilitaryDeployRegulation | 0.719** (2.05) | 0.673 (1.44) |
| DividedGov | 0.724* (1.66) | 1.009** (2.41) |
| Election | 0.077 (0.19) | 0.263 (0.66) |
| Approval | -3.792** (-2.06) | -3.803** (-2.03) |
| PercentParty | 8.474 (1.16) | 12.041 (1.54) |
| Filibuster | -1.105*** (-2.98) | -0.999** (-2.43) |
| Unemployment | -0.068 (-0.63) | 0.051 (0.36) |
| IdeologicalGap | 6.135 (1.32) | 12.572** (2.46) |
| Constant | -6.206 (-0.94) | -12.465* (-1.82) |
| N | 191 | 229 |

Binominal regressions estimated. ***=p<0.01; **=p<0.05; *=p<0.10

So far as political context variables are concerned, the model shows that presidential approval rating (*Approval*) is negatively correlated with unilateral action. In other words, when the presidential approval rating is lower, the president tends to take a unilateral action. Moreover, the divided government is only marginally correlated with a unilateral presidential action, and none of the rest of political context variables--including the percentage of president's party (*PercentParty*), the ideological cleavage (*Ideogap*), and the election year (*Election*)--is statistically correlated with presidential unilateral action.

In cases of **unilateral non- military deployment**, the result shows that the level of congressional *Justification* is positively correlated with the presidential unilateral action. With regard to three institutional variables in the model — *ControlScale*, *LawCharacter*, *Military*— none is statistically significant with unilateral action. However, the data shows that there are also stronger relationships between unilateral action and political context variables. Specifically, divided government and ideological disparity are both positively correlated with presidential unilateral action, whereas the presidential approval rating is negatively correlated with it. In other words, a greater ideological cleavage, a lower presidential approval rating, or a divided government tends to generate unilateral action by the president. Lastly, neither the percentage of congressional seats held by the president's party nor whether it is an election year has any statistically significant effect on the president's unilateral action. In terms of the stronger political effect on unilateral presidential action in a non-military deployment case, I argue that the overall pattern of presidential unilateral action is a synthesis of political calculation to counter congressional constraint by employing a highly public action.

C. Heighten Political and Legal Accountability

Do the above findings, in which no evidence appears to indicate that either deliberation or congressional regulation can prevent unilateral action by the president, disappoint both deliberative and legal theorists? In terms of the nature of democratic deliberation and the dynamic interaction of separation of powers, my answer is no. Yet I argue that to allow a highly dynamic interaction between the president and Congress, the latter should shoulder its responsibility to both present a better argument in the public sphere and try to place a check on the president, which could charge the president with a greater political and legal accountability.

First of all, democratic deliberation expects that all of the actors--whether citizen or in the government--engage in the public sphere ceaselessly and collaboratively to deliberate, legislate, and re-legislate the contents, legality, and legitimacy of a law. By definition, the president should partake in such ceaseless constitutional dialogue. If a higher level of deliberation occurring in Congress positively results in a presidential unilateral action, then, arguably, both the president and Congress are aware of a constitutional issue that actually lies in between them. Just as Congress should take action after deliberation, the president should take action and make his own case as well. If such action at least is publicly and widely known, I believe it does not necessarily violate democratic deliberation generally. However, that does not suggest that all kinds of presidential unilateral action are legally, politically, and morally allowed. If the president tends to take unilateral action along with a lower level of congressional deliberation, that could result a most disappointing moment for deliberative theorists. The empirical results show that perhaps one of the most disappointing findings for both legal and deliberative theorists is that the result does show that the president systematically takes unilateral action to impair congressional attempt of regulation on presidential military deployment, and seems to

reveal that Congress does not have an efficient tool to counter such unilateral military action immediately.

But what can Congress do if congressional members do not have an efficient tool to counter such unilateral military action? My answer is still the same: deliberate. The central tenet of democratic deliberation is “deliberate before you act.” Any action should be predicated on a norm generated out of a deliberative process. This central tenet not only suggests that deliberation is a premise of law, but also reminds us that while an action is controlled by law, deliberation itself is not. Thus, two kinds of political accountability are derived from the aforementioned central tenet of democratic deliberation: reason-giving and acceptance of a better argument and decision thereof. The president can provide his opinion on a bill during the consideration of a bill through various channels. If his rationale is not accepted by Congress, he is both legally and politically accountable for compliance with a law that Congress has predicated on a weightier argument; otherwise he can veto the bill.

Therefore, even if the empirical model demonstrates that a higher level of congressional deliberation cannot prevent the president from taking unilateral action, I argue that it is even more important and legitimate to promote “good” deliberative conditions in Congress on the grounds that a better justification not only can be presented to the public sphere but also creates an opportunity for Congress to charge a unequivocally legal and greater political accountability for the president to abide by. Moreover, though congressional action is not necessarily a sufficient tool to counter unilateral presidential action, as a matter of law, congressional action taken in each unilateral presidential military action event at least would create an opportunity to prevent the future president to cite congressional inaction as a precedent for justifying the content of Commander in Chief power. In consequence, I further present the third

model in the next section to explore what kind of congressional law-making rules and “political and economic factors” influence the quality of congressional deliberation.

III. Modeling the War Power Constitutional Deliberation in Congress

As I mentioned in chapter 3, I hypothesize that the structure of congressional participation is the primary factor to influence the quality of congressional deliberation. In particular, I divided congressional structure by regarding two dimensions: (1) the effect of congressional rule-setting on deliberation and (2) non-congressional rule-setting (political factors).

The hypothesis underlying the first of these dimensions is that a more participation- inclusive and information- facilitative rule-setting would result in a higher level of congressional deliberation. The hypothesis of the latter dimension is that though political and economic factors may influence the level of congressional deliberation, congressional rule-setting is still the primary factor that determines the level of congressional deliberation. The following results show that these two hypotheses are both empirically confirmed.

In addition to testing the effects of “core” variables, I will also include two more alternative variables into my primary model as a robustness check. These two alternative variables are, respectively, whether more veto-player (referral of a bill to multiple committees and filibuster) and partisan factor (Republican Congress v. Democratic Congress) would influence the level of congressional deliberation. Accordingly, in the balance of this section, I will (1) describe the variables included in the following models; (2) briefly illustrate the descriptive results of the main dependent variable, that is, the level of *Justification*; (3) report the condition for a “good” congressional deliberation; (4) report of two robustness checks.

A. Variables for Testing Congressional Deliberation

Although all of the variables and hypotheses thereof were described in chapter 3, I have not specified what variables are included for each hypothesis. Since I already illustrated the possible influence that each variable has on the level of congressional deliberation, I only briefly explain the variables I employ for the empirical models below.

The main **dependent variable** is the level of congressional deliberation (Discourse Quality Index). As I described in chapter 3, following Steiner, I divide this variable into two categories: the level of *Justification* and *Content*. These two categories will be tested respectively.

The **independent institutional variables** included in the following models are: whether a bill is an annual authorization and appropriation bill (labeled as *LawCharacter*), whether a committee holds a hearing (labeled as *HComHearing/SComHearing*), whether a bill is referred to committee (labeled as *HCom/SCom*), and the state of both chambers' floor rules (labeled as *ClosedRule/Cloture*). These are all of the core institutional procedural variables from the last section. I also take into account the duration of Congress's deliberation upon a bill. In other words, I include *Time* as a variable to record the duration of this deliberation from a bill's introduced to the Congress until its members cast a vote on that bill on the floor.

The **independent political variables** I will include for this model are the divided government (labeled as *DividedGov*), the election year (labeled as *Election*), the presidential approval rating (labeled as *Approval*), the percentage of congressional members of the president's party (labeled as *PercentParty*), referral of a bill to how many committees (labeled as *HComNumber/ScomNumber*), and filibuster (labeled as *Filibuster*).

B. Descriptive Results

In this part, I report the descriptive data of the main variable, *Justification*, and the institutional independent variables. Here, I briefly explicate the calculation of *Justification* before reporting its descriptive statistics. The value of *Justification* is the mean of the level of constitutional justification in total divided by the total number of members who actually spoke on the floor for each bill. For instance, if five of the twenty members on the floor address the constitutionality of a bill and their total level of constitutional justification is twelve, then *Justification* value for that bill is 0.6 (12/20) but not 2.4 (12/5.) Moreover, since I cluster different legal provisions in accordance with different military events I clustered, a bill sometimes may have two or more “average *Justification*.” For example, the average *Justifications* of Department of Defense Appropriations Act for Fiscal Year 1994 were 1.053 with regard to Somalia and 0.774 pertaining to Haiti.

1. *Constitutional Justification Distribution*

Not surprisingly, out of the 229 observations, there are 147 observations with a constitutional justification level of 0. That is due to the stringent definition of, only when a member of Congress explicitly addresses the constitutionality of a bill will be counted as justification, the “constitutional deliberation” in this dissertation. Quantitatively speaking, such a distributional situation indicates that both Skewness (2.60) and Kurtosis (9.67) of the distribution are severely positive skewed.²³ As Figure 4.1 shows, 75% of the observations concentrate at the left part of the graph, which suggests that the dependent variables here are in violation of the assumption of normal distribution.

²³ Of course, it does not make any sense that the average constitutional justification level is less than 0 in this case.

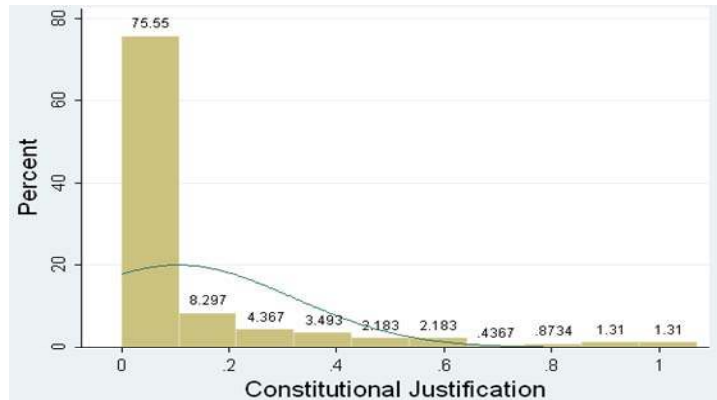


Figure 4.1 Distribution of Constitutional Justification

To resolve the above non-normal distribution problem, I divide the data into two categories: high and low deliberation. Following what Jürg Steiner et al. did for their pioneering study of congressional deliberative quality,²⁴ I split the *Justification* into low and high justifications, the latter of which is labeled as *MajorDeliberation*, at the mean (0.17) of the *s Justification*. Therefore, *MajorDeliberation* is coded as 1 if *Justification* is greater than 0.17. Transforming *Justification* as such will also permit us to observe the overall deliberative patterns congressional deliberation through binominal regression model.

2. Main Descriptive Results

In addition to reporting the descriptive results of the level of congressional deliberation, I also report the descriptive results of other institutional variables, as these latter variables constitute the core institutional conditions that I have attempted to identify as the conditions that facilitate a “good” deliberation. The results are as follows.

Table 4.12 shows that the overall average justification of constitutional deliberation is about 0.17, varying from 0 to 1.03. It is worthwhile to note that there is

²⁴ See Jürg Steiner, André Bächtiger, Markus Spöndli, and Marco R. Steebergen, *supra* note 6.

considerable variation in this variable as the standard deviation is greater than 0.27. To compare the justification pattern between deliberations over military deployment and those over foreign affairs, I describe their summary statistics in Table 4.13 and 4.14 respectively. Note first that in 38 military deployment cases, the average constitutional justification is about 0.27 with a standard deviation over 0.34, whereas the average constitutional justification in 191 foreign affair cases is 0.15, lower than the overall average justification. That difference may further confirm my hypothesis that congressional members have different attitudes toward the president’s Commander-in-Chief power and foreign affairs power. This in turn informs us to distinguish the line between these two powers.

Table 4.12. Overall (Military Deployment and Non-Military) Summary Statistic of Variables

| Variables | N | Mean | SD | Max | Min |
|--------------------------------|-----|----------|----------|----------|-----|
| Justification (Square root) | 229 | .1741697 | .2728357 | 1.035374 | 0 |
| LawCharacter (Appropriation=1) | 229 | .7729258 | .4198587 | 1 | 0 |
| HComHearing (Hearing=1) | 218 | .2889908 | .4543369 | 1 | 0 |
| SComHearing (Hearing=1) | 219 | .2648402 | .442259 | 1 | 0 |
| Cloture (Cloture=1) | 222 | .2072072 | .6468457 | 8 | 0 |
| Closedrule (Closed=1) | 217 | .6543779 | .4766703 | 1 | 0 |
| Time (Month) | 229 | 4.423581 | 3.023238 | 17 | 1 |

Another noteworthy matter is the proportion of appropriations bills to other bills (*LawCharacter*). About 80% of foreign affair cases are appropriations bills, whereas in military deployment cases, the proportion of appropriations bills drops by 15% (65 %). Furthermore, there seems to be a greater variance in the proportion of hearings on military deployment cases to those on foreign affair cases held respectively by the House and the Senate (*HComHearing/ SComHearing*). It seems worthy both of note and of further exploration that only about 13% of the hearings

were held in military deployment cases in the Senate and about 34% of the hearings were held in military deployment cases in its counterpart, the House. As for the “time” variable, there seems to be no obvious variance among overall, foreign affair, and military deployment cases. Yet, the standard deviations of *Time* in overall, foreign affair, and military deployment cases are very considerable (about or greater than 3).

Table 4.13. Foreign Affairs (Non-Military Deployment) Deliberation Summary Statistic of Variables

| Variables | N | Mean | SD | Max | Min |
|---------------|-----|----------|----------|-----|----------|
| Justification | 191 | .1537776 | .2542618 | 0 | 1.035374 |
| LawCharacter | 191 | .7958115 | .4041668 | 0 | 1 |
| HComHearing | 186 | .2795699 | .4499992 | 0 | 1 |
| SComHearing | 181 | .2928177 | .4563178 | 0 | 1 |
| Cloture | 184 | .2282609 | .6950765 | 0 | 8 |
| Closedrule | 185 | .6594595 | .475177 | 0 | 1 |
| Time | 191 | 4.554974 | 2.942585 | 1 | 17 |

Table 4.14. Military Deployment Deliberation Summary Statistics of Variables

| Variables | N | Mean | SD | Max | Min |
|---------------|----|----------|----------|-----|----------|
| Justification | 38 | .2766666 | .337327 | 0 | 1.026158 |
| LawCharacter | 38 | .6578947 | .4807829 | 0 | 1 |
| HComHearing | 32 | .34375 | .4825587 | 0 | 1 |
| SComHearing | 38 | .1315789 | .34257 | 0 | 1 |
| Cloture | 38 | .1052632 | .3110117 | 0 | 8 |
| Closedrule | 32 | .625 | .4918694 | 0 | 1 |
| Time | 38 | 3.736158 | 3.364635 | 1 | 17 |

Two main floor procedural variables (*Cloture* and *ClosedRule*) have different variances in foreign affairs and military deployment cases respectively. Specifically, the Senate seems to invoke cloture (10%) less in military deployment case than it does in foreign affair cases (22%). But there is no obvious variance for *ClosedRule* in both

military deployment and foreign affair cases. Again, this is just the most preliminary observation in this section. Their interactions with the main dependent variable, the level of *Justification*, are explored in the following parts.

C. Main Model Results

In the following passages, I will report the primary conditions for a “good” deliberation model, and then I will report the results of alternative models by including alternative variables into my primary model as robustness check in part D. The main model shows that the institutional conditions for a higher level of congressional deliberation include the adoption of open-rule, the referral of a bill to committee, the deliberation over a non-annual budget bill, and no use of a filibuster. In the following passages, I will (1) report the effect of institutional and political factors have on the quality of *Justification* in more detail and then (2) report the effect of institutional and political factors have on the quality of *Content*, another sub-category of Discourse Quality Index.

1. The Effects of Institutional and Political Variables on the Level of Justification

The overall pattern of both military deployment and non-military deployment deliberations shows that even though congressional deliberation to a certain extent is affected by political factors, the institutional variables are still the primary factors that affect the level of congressional deliberation. However, there are still some differences between military deployment and non-military deployment cases.

Table 4.15. Discourse Quality of Constitutional Justification and Congressional Participation Structure

| Dependent Variable = MajorDeliberation | | | | | | |
|--|---------------------------|---------------------|---------------------|----------------------------|---------------------|---------------------|
| | No Political Context | | | Political Context Included | | |
| | Military Deployment Cases | Non-military Cases | Overall Cases | Military Deployment Cases | Non-military Cases | Overall Cases |
| LawCharacter | -1.093 (-0.96) | -0.953** (-2.38) | -0.945** (-2.31) | -1.707 (-0.96) | -1.005** (-2.25) | -1.047** (-2.08) |
| HComHearing | -2.219 (-1.47) | -0.722 (-0.93) | -0.942 (-1.32) | -3.778 (-1.43) | -0.785 (-0.96) | -0.946 (-1.28) |
| SComHearing | 0.856 (0.57) | -0.059 (-0.1) | -0.027 (-0.05) | 0.885 (0.57) | 0.143 (0.24) | 0.146 (0.29) |
| ClosedRule | -1.437*** (-3.72) | -0.836** (-2.12) | -0.927** (-2.77) | -3.257** (-2.63) | -0.854** (-1.98) | -0.977** (-2.88) |
| Cloture | 1.512 (0.95) | 0.629** (2.45) | 0.612** (2.55) | 0.192 (0.05) | 0.685** (2.38) | 0.691** (2.27) |
| HCom | 0.614** (1.97) | 0.221 (1.16) | 0.275 (1.51) | 0.073 (0.18) | 0.252 (1.51) | 0.293* (1.9) |
| SCom | -0.416 (-0.55) | 0.075 (0.34) | -0.025 (-0.12) | -1.445 (-1.47) | 0.122 (0.54) | 0.025 (0.12) |
| Time | -0.138 (-0.07) | 0.011 (0.16) | -0.017 (-0.3) | 0.105 (0.49) | 0.021 (0.31) | -0.01 (-0.18) |
| DividedGov | | | | 6.838 (1.53) | -1.669 (-1.41) | -1.293 (-1.23) |

Binomial regressions estimated. ***=p<0.01; **=p<0.05; *=p<0.10

Table 4.15 (Continued)

| Dependent Variable = MajorDeliberation | | | | | | |
|--|---------------------------|--------------------|-------------------|----------------------------|--------------------|-------------------|
| | No Political Context | | | Political Context Included | | |
| | Military Deployment Cases | Non-military Cases | Overall Cases | Military Deployment Cases | Non-military Cases | Overall Cases |
| Election | | | | -4.285** (-2.39) | -0.007 (-0.02) | -0.023 (-0.08) |
| Approval | | | | -12** (-2.25) | -0.607 (-0.37) | -0.487 (-0.3) |
| PercentParty | | | | 52.145* (1.68) | -9.442 (-1.02) | -6.332 (-0.8) |
| Constant | 1.065 (0.82) | -0.543 (-0.73) | -0.061 (-0.09) | -15.063 (-1.22) | 5.336 (1.15) | 4.067 (1.09) |
| N | 38 | 191 | 229 | 38 | 191 | 229 |

a. Military Deployment Case

The results in Table 4.15 show first of all that in a military deployment case, the referral of a bill to the House committee would generate a higher level of congressional deliberation. This result is consistent with the finding in Section I that referral of a bill to the House committee would generate a higher level of congressional control over the president.

Moreover, Table 4.15 also shows that an adoption of closed-rule would systematically generate a lower level of congressional deliberation. This result is consistent with my hypothesis in chapter 3 that democratic deliberation is a speech and act theory: if one is prohibited from taking a political action after a discourse, she or he does not have incentive to make a higher quality of discourse. However, in Section I, the empirical model shows that the adoption of closed-rule for the House's floor action tends to generate higher congressional control over the president. This finding thus is inconsistent with the finding in that section. Specifically, closed-rule tends to result in lower discourse quality, thus leading to the natural inference that closed-rule may generate lower control over the president. But the result shows that it generates a higher level of control. Nevertheless, this seeming paradox finding is actually not necessarily incompatible with the finding in Section I for at least two reasons.

First, this research only focuses on those constitutional deliberations involving separation of power issues. As such, I inevitably omit other kinds of discourses, which do not necessarily constitute constitutional deliberation. Congressional members may control the president out of other pragmatic reasons, but not for separation of power reasons. Second, deliberative democracy theory does not assume that those procedural variables of the legislative process would be the controlling factors that determine deliberative outcome. As Habermas suggests, deliberation is a hybrid speech act that consists of both communicative and strategic actions. If a committee reports a bill

back to the floor with higher control on the president, it is not surprising that closed-rule would naturally be selected in order to ensure that the deal sticks. Actually, this finding does not necessarily disappoint deliberative theorists. As strategic theorists suggest, the restrictive nature of closed-rule may conversely give the information holder incentive to share private information informally.²⁵ As such, those non-information holders would be more willing to defer to the decisions made by those pivotal members, as long as non-information-holders are kept informed informally while meanwhile holding the opportunity to take public action. In consequence, I think a more fundamental problem for such phenomena here becomes how to balance the relationship between an informal and formal control held by members of Congress. I will try to address this issue in chapter 5.

By further including political factors into the model, the results (Table 4.15) show that institutional variables still play a relatively important role in determining the level of congressional deliberation. In particular, an adoption of closed-rule would still generate a lower level of congressional deliberation, but referral of a bill to committee becomes no significant correlation with the level of congressional deliberation. Moreover, two political variables are correlated with the level of congressional deliberation: the presidential approval rating and whether it is an election year. In particular, the results show that a non-election year and a lower presidential approval rating would generate a higher level of congressional deliberation. Therefore, based on the evidence that congressional deliberation is influenced by both institutional variables and political context, I think it is fair to conclude that during a deliberation over military deployment, Congress is both independent of and interconnected with the broader public sphere.

²⁵ See Nolan McCarty, *Proposal Rights, Veto Rights, and Political Bargaining*, 44 AMERICAN JOURNAL OF POLITICAL SCIENCE 506-522 (2000); also Nolan McCarty, *Presidential Pork: Executive Veto Power and Distributive Politics*, 94 AMERICAN POLITICAL SCIENCE REVIEW 117-29 (2000).

b. Non-military Deployment Case

In a non-military deployment case, the results (Table 4.15) show that institutional variables play dominant roles in determining the level of congressional deliberation. In particular, both chambers' floor rules are correlated with the level of congressional deliberation. In the House, the adoption of closed-rule still systematically decreases the level of congressional deliberation as it does in military deployment case. In the Senate, an invocation of cloture would systematically generate a higher level of congressional deliberation in non-military deployment case. More importantly, whether a bill is an annual appropriations and authorization bill also affects the quality of congressional deliberation in the foreign affair deliberations. Specifically, the results (Table 4.15) show that an appropriations bill results in lower congressional deliberation. This may suggest that debate limitation, set up by the process incorporated in Congressional Budget and Impoundment Act, is one of the possible procedures contributing to the lower quality of congressional deliberation. However, some deliberative scholars encourage Congress to adopt different mechanisms to reflect on the same subject periodically.²⁶ As legislators deliberate upon authorization and appropriations bills every year, these bills also have some kinds of re-deliberative features. However, it seems that annual reflection does not necessarily generate a higher level of congressional deliberation. I think there are two possible explanations for such phenomena. First, appropriation and authorization bills are under different committee jurisdictions, which makes information-sharing among different committees more difficult. Second, the spending limit set up in the Congressional Budget and Impoundment Act may cause members of Congress to deliberate over various pragmatic issues rather than moral-political problems during the debates over the annual budget bill. I will try to address this issue in chapter 5

²⁶ See Amy Guttmann & Dennis Thompson, *Democracy and Disagreement* 199-229 (1996).

regarding the validity of military deployment authorization through the annual appropriation bill.

After including political factor variables (Table 4.15), the model shows that institutional variables still play an important role in predicting the level of congressional deliberation, whereas none of the political variables has any significant effect on the level of congressional deliberation. In particular, the House's closed-rule continuously serves as a consistent factor in predicting the probability of a lower level of congressional deliberation. Moreover, the invocation of cloture also serves as a consistent predictor for a higher level of congressional deliberation. Lastly, the annual authorization or appropriations bill also remains as statistically correlated with a lower level of congressional deliberation.

2. The Effects of Institutional and Political Variables on the Level of Content

The two models presented above pertain to the level or form of the quality of constitutional *Justification* and its relation with both the Congress's institutional effect and the connection within broad public sphere. As I described in Chapter 3, I also include another variable, *Content*, in my model to discern whether the above variables also have an effect on the content of the justification approach employed by legislators. The main descriptive statistical results of *Content* are displayed in Table 4.16. Generally speaking, the overall effect of institutional variables here is slightly different from the level of *Justification*. In military deployment cases, the legislators attempt to rest their justifications more on the institutional relations between the president and Congress, whereas in the non-military foreign affair cases, the legislators are concerned more with only one branch's authority.

It seems that institutional variables do not have a consistently institutional effect on the discursive content of the legislators as it has on the level of *Justification*.

In the **military deployment** cases, as is shown in Table 4.17, the House's floor rule still has as statistically significant an effect on the *Content* as it has on the constitutional *Justification*. The adoption of closed-rule would generate a higher probability of one-branch authority discourse. Moreover, after including political variables into the model, the results show that the adoption of closed-rule would still generate a higher probability of one-branch authority discourse. However, the results (Table 4.17) show that a non-military case has no statistical consistency with the core predictors here.

In a **non-military deployment** case, it seems that the hypothesis of congressional independence is not that salient. The results (Table 4.17) show that both chambers' floor rules are relatively sensitive to political context variables, compared to the above *Justification*. In particular, the adoption of closed-rule does not have any significant correlation with the *Content* of constitutional deliberation when those political context variables are included in the model. Additionally, referral of a bill to a House committee would result in a significantly higher probability of addressing the two branches' relationship.²⁷

²⁷ In order to explore further whether there is any effect of political context variables on congressional independency hypothesis and *Content* in the above overall and non-military deployment cases, I introduce two interactions terms. The one is "*Cloture* x *Politic*" and the other is "*ClosedRule* x *Politic*." The results in Appendix Table O.4 show that *Cloture* significantly interacts with the political context variables, and thus the probability of two-branch discourse, whereas *ClosedRule* does not. Specifically, the odds of being *MajorContent*, without the political interaction terms, increase by 94 percent once cloture is invoked, whereas in the model including the political interaction term, the odds increase about 150 percent. This suggests that, with the invocation of cloture, as long as if there is neither an election nor a divided government, the deliberative *Content* has the highest probability to fall within a higher quality level. Accordingly, one may assume that political context has more impact on the effect of cloture in relation with the deliberative content than the cloture itself in both overall and non-military deployment foreign affair cases.

Table 4.16. Descriptive Results of Constitutional Content

| | Military Deployment Cases | | | | | Non-military Deployment Cases | | | | | Overall Cases | | | | |
|-----------------------------|---------------------------|-------|-----------|-----|-------|-------------------------------|-------|-----------|-----|-----|---------------|-----------|------|-----|-----|
| | N | Mean | SD | Min | Max | N | Mean | SD | Min | Max | N | Mean | SD | Min | Max |
| Content (Square root) | 38 | 0.255 | 0.31 1 | 0 | 0.948 | 191 | 0.138 | 0.23 2 | 0 | 1 | 229 | 0.15 7 | 0.25 | 0 | 1 |

Table 4.17. Discourse Quality of Constitutional Content and Congressional Participation Structure

| | Dependent Variable = MajorContent | | | | | |
|--------------|-----------------------------------|--------------------|-------------------|----------------------------|--------------------|--------------------|
| | No Political Context | | | Political Context Included | | |
| | Military Deployment Cases | Non-military Cases | Overall Cases | Military Deployment Cases | Non-military Cases | Overall Cases |
| LawCharacter | -0.271 (-0.25) | -0.654 (-1.28) | -0.601 (-1.44) | -0.429 (-0.28) | -0.767 (-1.37) | -0.694 (-1.45) |
| HComHearing | -2.479* (-1.68) | -0.146 (-0.27) | -0.382 (-0.77) | -4.711* (-1.72) | -0.227 (-0.41) | -0.408 (-0.78) |
| SComHearing | -0.322 (-0.22) | -0.228 (-0.36) | -0.227 (-0.38) | -1.406 (-0.83) | -0.078 (-0.12) | -0.117 (-0.2) |
| ClosedRule | -1.577*** (0.61) | -0.308 (-0.94) | -0.49 (-1.44) | -2.689** (-2.03) | -0.373 (-1.05) | -0.545* (-0.78) |
| Cloture | 0.952 (0.61) | 0.487 (1.5) | 0.456 (1.61) | -0.963 (-0.32) | 0.748*** (2.59) | 0.702*** (2.75) |
| HCom | 0.778* (1.82) | 0.196 (1.38) | 0.251 (1.72) | 0.945 (1.14) | 0.252** (1.97) | 0.298** (2.29) |
| SCom | 0.31 (0.64) | -0.13 (-0.07) | -0.046 (-0.25) | -0.792 (-1.07) | 0.041 (0.2) | 0.013 (0.07) |
| Time | -0.021 (-0.1) | -0.03 (-0.43) | -0.42 (-0.66) | 0.145 (0.63) | -0.016 (-0.24) | -0.032 (-0.51) |
| DividedGov | | | | 6.115 (1.45) | -1.503* (-1.76) | -1.19 (-1.39) |

Binomial regressions estimated. ***=p<0.01; **=p<0.05; *=p<0.10

Table 4.17 (Continued)

| | Dependent Variable = MajorContent | | | | | |
|--------------|-----------------------------------|--------------------|---------------|----------------------------|--------------------|---------------|
| | No Political Context | | | Political Context Included | | |
| | Military Deployment Cases | Non-military Cases | Overall Cases | Military Deployment Cases | Non-military Cases | Overall Cases |
| Election | | | | -3.8* | 0.45 | 0.378 |
| | | | | (-1.89) | (1.47) | (1.55) |
| Approval | | | | -9.182 | 0.202 | 0.27 |
| | | | | (-1.54) | (0.16) | (0.19) |
| PercentParty | | | | 43.555 | -9.053 | -7.12 |
| | | | | (1.47) | (-1.2) | (-1.01) |
| Constant | 0.041 | -0.264 | 0.01 | -14.726 | 4.665 | 3.767 |
| | (0.04) | (-0.42) | (0.02) | (-1.26) | (1.27) | (1.12) |
| N | 38 | 191 | 229 | 38 | 191 | 229 |

D. Robustness Check on the “Good” Deliberation Condition Model

Although I had demonstrated in the previous part that those primary institutional variables are statistically correlated with the level of congressional deliberation, regardless of the impact of those political factors, I have not tested other alternative hypotheses that deliberative theorists argue may also affect the quality of congressional deliberation. In the following passages, I will include these alternative hypotheses in the primary model above as a robustness check on my original model. I will (1) test whether institutional or political veto-player variables would influence the level of congressional deliberation and then (2) test whether partisan component variables would influence the level of congressional deliberation. In short, the models show that (1) a filibuster would decrease the quality of congressional deliberation in non-military deployment case, and that (2) a Republican Congress is more sensitive to those political factors variables.

1. Veto-player and Deliberation

Veto players are two-fold: institutional and political. Specifically, an institutional veto-player is designed and pre-given by the Constitution or a formal rule, whereas a political veto-player is mainly contingent upon the random behavior of congressional member.²⁸ Deliberative theorists hypothesize that more veto players in the decision-making process would result in a higher level of congressional deliberation.²⁹

However, in the above model, two of the political veto-player variables in the political context variables, the divided government and the percentage of president’s party, do not have any statistically significant effect on the level of deliberation.

²⁸ See JÜRIG STENINER, ANDRÉ BÄCHTIGER, MARKUS SPÖRNDLI, AND MARCO R. STEEBERGEN, *supra* note 6, at 98-128.

²⁹ *Id.*, at 78-81.

Table 4.18. Committee as Veto-player and Discourse Quality of Constitutional Justification

| | Dependent Variable=MajorDeliberation | Dependent Variable=MajorContent |
|--------------|---|------------------------------------|
| | Overall Cases | Overall Cases |
| LawCharacter | -1.226*** (-2.69) | -0.821 (-1.48) |
| HComNumber | 0.299 (1.5) | 0.154 (0.94) |
| SComNumber | 0.473 (0.7) | 0.281 (0.44) |
| HComHearing | -0.921 (-1.26) | -0.368 (-0.7) |
| SComHearing | 0.103 (0.2) | -0.116 (-0.2) |
| ClosedRule | -1.218*** (-3.37) | -0.685 (-1.77) |
| Cloture | 0.636* (1.7) | 0.625 (1.7) |
| HCom | 0.281* (1.73) | 0.286 (2.14) |
| SCom | 0.008 (0.04) | 0.005 (0.03) |
| Time | -0.013 (-0.26) | -0.032 (-0.55) |
| DividedGov | -1.195 (-1.26) | -1.034 (-1.47) |
| Election | 0.006 (0.02) | 0.4 (1.71) |
| Approval | -0.892 (-0.55) | -0.05 (-0.04) |
| PercentParty | -5.942 (-0.78) | -6.304 (-0.95) |
| Constant | 3.536 (0.96) | 3.167 (0.98) |
| N | 229 | 229 |

Binomial regressions estimated. ***=p<0.01; **=p<0.05; *=p<0.10

Table 4.19. Filibuster and Discourse Quality of Constitutional Justification

| | Dependent Variable=MajorDeliberation | |
|--------------|--------------------------------------|----------------------|
| | Non-military Cases | Overall Cases |
| LawCharacter | -1.048** (-2.19) | -1.069** (-2.1) |
| Filibuster | -1.283** (-2.47) | -0.52 (-1.56) |
| HComHearing | -0.711 (-0.87) | -0.937 (-1.28) |
| SComHearing | 0.129 (0.24) | 0.15 (0.31) |
| ClosedRule | -0.956** (-2.19) | -1.024*** (-2.94) |
| Cloture | 0.687** (2.18) | 0.681** (2.22) |
| HCom | 0.248 (1.42) | 0.294* (1.9) |
| SCom | 0.121 (0.55) | 0.023 (0.11) |
| Time | 0.02 (0.28) | -0.015 (-0.26) |
| DividedGov | -1.499 (-1.36) | -1.228 (-1.22) |
| Election | 0.011 (0.03) | -0.028 (-0.09) |
| Approval | -0.637 (-0.41) | -0.522 (-0.32) |
| PercentParty | -8.85 (-0.96) | -6.136 (-0.77) |
| Constant | 5.153 (1.11) | 4.074 (1.08) |
| N | 191 | 229 |

Binomial regressions estimated. ***=p<0.01; **=p<0.05; *=p<0.10

Table 4.20. Discourse Quality of Constitutional Justification and Congressional Participation Structure v. Republican and Democratic Congress

| | Dependent Variable= MajorDeliberation (Republican Congress) | | Dependent Variable= MajorDeliberation (Democratic Congress) | |
|-------------|--|-----------------------|--|--------------------|
| | Non-military Cases | Overall Cases | Non-military Cases | Overall Cases |
| | LawCharacter | -0.68 (-0.86) | -0.412 (-0.55) | -1.285* (-1.77) |
| HComHearing | -0.114 (-0.06) | -0.444 (-0.3) | -0.513 (-0.52) | -0.537 (-0.72) |
| SComHearing | -1.944 (-1.33) | -1.445* (-1.88) | 1.215 (1.31) | 0.538 (0.56) |
| ClosedRule | -2.182* (-1.95) | -1.784*** (-3.55) | -1.109 (-1.24) | -1.057 (-1.33) |
| Cloture | 1.024 (1.63) | 0.582 (0.88) | -0.199 (-0.28) | 1.023 (1.48) |
| HCom | -0.153 (-0.32) | -0.107 (-0.29) | 0.351* (1.66) | 0.404** (2.12) |
| SCom | 0.639* (1.66) | 0.438 (1.35) | -0.218 (-0.42) | -0.378 (-0.72) |
| Time | 0.071 (0.58) | -0.139 (-0.18) | 0.022 (0.22) | -0.017 (-0.18) |
| DividedGov | -15.321*** (-6.62) | -11.248*** (-4.37) | -0.625 (-0.28) | -1.279 (-0.76) |

Binomial regressions estimated. ***=p<0.01; **=p<0.05; *=p<0.10

Table 4.20 (Continued)

| | Dependent Variable= MajorDeliberation (Republican Congress) | | Dependent Variable= MajorDeliberation (Democratic Congress) | |
|--------------|--|------------------------|--|-------------------|
| | Non-military Cases | Overall Cases | Non-military Cases | Overall Cases |
| | Election | 0.935 (1.3) | 0.286 (0.48) | -0.733 (-1.34) |
| Approval | -11.883*** (-2.77) | -9.937 (-1.99) | -2.136 (-1.25) | -0.926 (-0.47) |
| PercentParty | -258.483*** (-5.96) | -196.509*** (-4.71) | -3.137 (-0.24) | -5.641 (-0.58) |
| Constant | 142.395*** (6.08) | 109.108*** (4.55) | 3.193 (0.44) | 4.635 (0.88) |
| N | 191 | 229 | 191 | 229 |

To confirm the existence of an alternative kind of veto-player, I further include another institutional veto-player proxy—the number of congressional committees involved in the decision process in both chambers— into the model to explore such alternative kind of veto-player’s possible effect on constitutional deliberation. As Barbara Sinclair notes, bills introduced since 1975 have had a very high probability of being referred to multiple committees, because many conflicting interests are usually affected by such a modern complex bill.³⁰ As such, multiple committee referrals may suggest a more difficult decision-making process for members of Congress to reach a thicker consensus. Therefore, it is worthwhile to examine the relation between the multiple committee referrals and the level of constitutional deliberation.

The results in Table 4.18 show that none of the numbers of referral committees has any effect upon constitutional *Justification*. Moreover, as Table 4.18 shows, same pattern can also be found in the level of deliberative *Content*. In consequence, the number of referral committees in Congress seems to have no obvious effect on the level of constitutional deliberation. More importantly, those core institutional variables are again still observed as being statistically significant, and are unaffected by the inclusion of the alternative veto-player variables in the models.

Another more case-specific variable to see if veto-player has any effect on the constitutional deliberation is the existence of the filibuster.³¹ The finding in Table 4.19 shows that a filibuster has a significantly negative effect on the constitutional

³⁰ See Barbara Sinclair, *Unorthodox Lawmaking* 11-14 (2000).

³¹ One may adopt *Cloture* as a proxy of filibuster; however, in the modern Senate’s floor action, cloture is more often used as a tool to manage the legislative schedule than a rule to end the extended debate. The dataset in this research shows that there are only four invocations of cloture pertaining to filibuster. Therefore, I introduce Marvin and Bell’s dataset into my model to be more case-specific. See Marvin Overby & Lauren Bell, *Extended Debate Over Time: Patterns and Trends in the History of Filibusters in the U.S. Senate*, Paper presented at the annual meeting of the Midwest Political Science Association, Palmer House Hotel, Chicago, IL Online <APPLICATION/PDF>. 2010-01-24 from http://www.allacademic.com/meta/p196768_index.html.

Justification in the non-military deployment foreign affair cases. However, a filibuster has no statistically significant effect on the deliberative *Content*. Again, a filibuster has no statistical effect on the original pattern observed in the model; institutional variables still play the primary role in determining the level of congressional deliberation.

2. Republican Congress and Democratic Congress

Does a Republican Congress systematically differ from a Democratic Congress in the level of military and foreign affair deliberation? I think that exploring this question is legitimate to the extent that one may need to know whether the above conditions for “good deliberation” would be affected by the partisan component. In particular, since a different majority party would try to control Congress, especially the House, by establishing a new congressional rule in accordance with its partisan agenda,³² it is worthy to explore whether different partisan rules would result in different deliberation conditions. The overall results show that after dividing the dataset into Republican and Democrat subsets, a Republican Congress seems to be easily “captured” by the political factors, while a Democratic Congress tends to be more affected by the characteristics of the annual budget process. However, there is no statistically significant difference at the level of constitutional deliberation between Republican and Democratic Congresses.

Table 4.20 shows that, during a Republican Congress, the level of constitutional *Justification* in the overall military and non-military deployment cases, is negatively correlated with the adoption of close-rule, a divided government, the presidential approval rating, and the percentage of congressional members of the president’s party, but it is no longer correlated with the invocation of cloture. Among

³² See BRYAN W. MARSHALL, RULES FOR WAR 61-86 (2005).

these variables, it is noteworthy first to observe the effect given by those political context variables rather than the procedural variables. A post-regression test shows that the odds of generating high-level constitutional *Justification* decrease by 100% in all three political context variables--that is, when a Republican Congress faces a Democratic president, a higher presidential approval rating, or a higher composition of their counterparty in the Congress.

Such a highly political sensitive effect, or what I would call “political capture,” may be attributed to two major congressional rule reforms made by a Republican Congress. When the Republican Party assumed a position as the majority party between the 104th Congress and the 106th Congress, its congressional members promised to adopt less restrictive rules during the election, and did change several rules in Congress after the election. The result in the House, however, actually was the centralization of the Speaker’s power and a decentralized role of the committee chairs because of term limits and the abolition of proxy voting in the committees.³³ For example, then-Speaker Newt Gingrich, though he successfully mobilized the Contract with America agenda gave the Republicans a successful majority,³⁴ was a more involved partisan leader in the legislative substance and “captured” the congressional leadership into more complex political interests. This in turn affected the role of public reason in the deliberative atmosphere.

Another possible reason, according to Charles Tiefer, that may have contributed to the “political capture,” is the conservative Republican political agenda in the 2001-2006 Congress, which was realized through extreme use of closed-rule on the floor and exclusive conference meetings.³⁵ Given the aforementioned two possible

³³ See BARBARA SINCLAIR, *supra* note 21, at 103-4.

³⁴ *Id.*, at 104.

³⁵ See Charles Tiefer, Congress’s Transformative “Republican Revolution” in 2001-2006 and the Future of One-Party Rule, 23 JOURNAL OF LAW AND POLITICS 233 (2007).

reasons for “political capture,” it might be easy to understand why political factors variables are highly correlated with the level of congressional deliberation: If the purpose of the rule is to increase partisanship or ideological make-up rather than to facilitate reciprocal dialogue in the course of deliberation, the positively deliberative function of institutional rules would be forfeited by such political capture.

The reason for a lower level constitutional deliberation in the budget and appropriation process during the Democratic-controlled Congress,³⁶ might be attributed to the Budget Reconciliation Act of 1990 (“BRA90”) and the Budget Enforcement Act, which required a five-year deficit cut requirement. The constraint of the total budget cut and spending caps for each item exhausted the efforts of congressional members in negotiating of the balance of domestic entitlement programs and foreign affair functions.³⁷ For example, during the three consecutive years of debates over defense and foreign affairs authorization and appropriation for fiscal year 1994 to 1996, one of the central issues raised by congressional members was the appropriateness of spending projections under the rule of zero-based budgeting. From the perspective of deliberative democracy theory, this suggests that, for the legislators, pragmatic deliberation seemed to be more important than moral-political principles in the course of the budget process. Given such a strong effect on the budget process by BRA90, it is reasonable to conclude that none of the institutional variables can predict the level of constitutional deliberation before the expiration of “BRA90.” The results in Table 4.21 show that both the adoption of closed-rule and invocation of cloture became significantly correlated with the level of constitutional deliberation again after

³⁶ This argument is beyond the scope of this research because to make the argument in this passage should also perform a comparison between foreign affairs and domestic program, given the scope this research, I cannot provide the empirical evidence of such comparison.

³⁷ See WILLIAM I. BACCHUS, *THE PRICE OF AMERICAN FOREIGN POLICY: CONGRESS, THE EXECUTIVE, AND INTERNATIONAL AFFAIRS FUNDING 98-9* (1997).

the expiration of BRA90 in 1995, which can partially support my above inference that the process of “BRA90” would strongly affect the issues being considered in the process.

IV. Summarizing the Evidence

In this chapter, I demonstrated three main empirical models in attempting to answer three main empirical questions. First, is a higher level of congressional deliberation more likely to generate a higher level of congressional control over the presidential war power? Second, is a higher level of congressional deliberation and congressional control more likely to prevent the president from taking a unilateral military action? Third, what kind of institutional conditions in Congress would be more likely to generate a higher level of congressional deliberation? In this summary section, I briefly present the most important findings from in the previous section as follows.

A. The Effect of Congressional Deliberation on Congressional Check on the President’s Power

The results reveal that the level of congressional deliberation, including congressional *Justification* and *Content*, have a statistically strong and positive effect on the level of congressional check (*ControlScale*) on the president’s military deployment and foreign affair powers. However, their effects on the sub-categories of *ControlScale* are different with respect to these two powers. Specifically, a higher level of constitutional deliberation only systematically generates *ex ante* control on the president (*CtrlTime*) but not procedural or substantive control (*CtrlOrientation*) in the case of military deployment power. As for non-military deployment foreign affair power, a higher level of deliberation systematically yields not only *ex post* and at the same time procedural and substantive mixed control over the president.

Table 4.21. Discourse Quality of Constitutional Justification

| after the Expiration of BRA90 | Dependent Variable=MajorDeliberation (post-1995) | |
|-------------------------------|---|----------------------|
| | Non-military Cases | Overall Cases |
| LawCharacter | -1.474** (-2.19) | -1.224* (-1.69) |
| HComHearing | -0.016 (-0.02) | -0.566 (-0.9) |
| SComHearing | 0.817 (0.97) | 1.106 (1.53) |
| ClosedRule | -1.695*** (-4.5) | -1.635*** (-5.52) |
| Cloture | 1.405*** (4.15) | 1.017** (2.1) |
| HCom | -0.107 (-0.2) | -0.107 (-0.19) |
| SCom | 0.448** (2.49) | 0.475*** (3.2) |
| Time | -0.04 (-0.38) | -0.045 (-0.5) |
| DividedGov | -2.378 (-1.16) | -2.038 (-1.24) |
| Election | 0.592 (1.3) | 0.462 (1.46) |
| Approval | 2.061 (0.65) | 1.622 (0.67) |
| PercentParty | -20.077 (-1.36) | -15.775 (-1.32) |
| Constant | 10.009 (1.35) | 7.914 (1.32) |
| N | 191 | 229 |

Binomial regressions estimated. ***=p<0.01; **=p<0.05; *=p<0.10

In addition to the relation between congressional deliberation and the level of control, I find that two of the House's institutional process variables are also correlated with the level of control. The one is that a referral of a bill to the House committee consistently generates a higher level of congressional control over the president. The other is that the adoption of closed-rule also yields a higher level of control. However, the holding of a hearing in a House committee would reduce the

level of control. Although these variables, as I find in the last section, are crucial to the hypothesis of congressional independence and an ideal speech situation in Congress, these variables traditionally are also important agenda-setting tools in the legislative process. Therefore, when these variables are interpreted in the models presented in this section, we may need to take strategic action, or power politics, more into account.

By including “standard” political and economic context variables into the models, I find that they have different effects on military deployment and foreign affair powers, but that the quality of congressional deliberation is still highly and positively correlated with the level of control on the president. Among those results, I find that the presence of a divided government and the percentage of congressional seats held by the president’s party do not necessarily provide enough information about legislators’ preferences. Rather, an ideological cleavage is an important alternative predictor of the level of congressional control.

B. The Effect of Congressional Control on the Unilateral Presidential War

In a military deployment case, the empirical model demonstrates that the level of congressional deliberation is not a significant factor in making the president cooperate with Congress in crafting war policy. In particular, as long as Congress tries to regulate military deployment, re-deployment, or withdrawal, the president will systematically impair such regulation. The president defies a congressional military deployment regulation through various unilateral tools at his disposal, including a unilateral dispatch of the troops, an executive order, a signing statement, or a proclamation.

In a non-military deployment case, the empirical model demonstrates that a higher level of congressional deliberation generates a greater probability of unilateral presidential action. This kind of presidential unilateral action in foreign policy making

is also a synthesis of political calculation through a highly public act to counter congressional constraint. In particular, the empirical model demonstrates that a lower presidential approval rating and a divided government together statistically signal the probability of unilateral presidential action. Hence, it is fair to conclude that unilateral presidential action in foreign policy area is a kind of deliberative action to the extent that the president tries to pressure Congress by generating pressure from the constituency and that Congress is fully aware of a constitutional issue.

C. The Conditions for Good Congressional Deliberation

The analyses in the prior section demonstrated that the institutional process has crucially strong effects on the level of constitutional *Justification* and a relatively weak (compared to *Justification*) effect on the level of constitutional *Content*. For the level of constitutional *Justification*, when I only consider the core institutional variables, the results consistently show that the House's closed-rule plays a negative role in the constitutional deliberation of both military deployment and non-military deployment foreign affair cases, whereas the Senate's cloture plays a positive role in the constitutional deliberation of foreign affair cases but not in the decision to authorize military deployment.

Political context factors (divided government, presidential approval rating, election year, and president's party percentage) affect only the deliberation over the constitutionality of military deployment in Congress but not the deliberation over non-military foreign affair cases. However, the inclusion of those political context factors does not change the robust effect of institutional variables on the level of constitutional *Justification*.

Up to this point, while the data in this chapter lend strong support to my key hypothesis concerning the relationship between congressional deliberation and

congressional control over the presidential war power, quantitative analyses inevitably omit normative assessment, such as its implication for different legal doctrines. The analysis, by definition, should not be suspended here. In chapter 5, I will examine several important legal controversies that often appear in war and foreign affair power cases, including Declare War Clause, the scope of Commander-in-Chief Power, customary presidential war power, political question doctrine, acquiescence doctrine and congressional delegation.

CHAPTER 5:
DELIBERATIVE-ORIENTED INTERPRETATIONS AND REFORMS OF
WAR POWER CONSTITUTION

The empirical analyses in chapter 4 have provided a plethora of information about whether and how Congress attempts to exert its control over the president through deliberation as the Founders expected, the limits of congressional ability to regulate a war, and historical patterns of presidential unilateral action. However, quantitative analyses inevitably omit normative assessment, especially their implications for different legal doctrines. As a matter of constitutional interpretation, these analyses provide much insight for reflection on various disputes over interpreting the allocation of war power under the Constitution. However, since these empirical analyses have their own limiting nature, the reflection I am going to present based on these empirical evidences in this chapter is just a minimum supplement to the entire debates over various constitutional interpretation of war power allocation between the president and Congress.

In this chapter, I will examine three main legal issues often raised concerning the subject of war power allocation based on the empirical evidence that I demonstrated in chapter 4: (1) the procedural and substantive function of Declare War Clause, (2) the form of congressional war authorization and customary presidential war power, and (3) justiciability and political question doctrine in war power litigation. My overall argument is that interpretation of the allocation of war power should be in accordance with procedural and substantive due law-deliberation and law-making processes. But to realize a veritably deliberative war power according to the Constitution and a more accountable government, certain congressional rule reforms are needed. In particular, I argue that (1) the function of Declare War Clause

requires that the president should not independently initiate a war unless a sudden attack would occur within one month; (2) in terms of systematic presidential resistance with congressional war regulation throughout history, congressional acquiescence is not a valid source of customary presidential war power; and (3) the courts should be a forum more easily accessed by both congressional members and citizens concerning war power litigation.

I. The Function of Declare War Clause and Congressional Authorization for War

Although the United States declared war against foreign nations only seven times in its history, the meaning and function of the Declare War Clause remains one of the most controversial legal issues in the field of war power research. I will explore two legal issues traditionally raised under the Declare War Clause: (1) the function of Declare War Clause, (2) the relationship between Declare War Clause and Commander in Chief power and (3) the legal justification for a humanitarian operation or intervention. As for the first issue, I argue based on the empirical evidence that the most important function of Declare War Clause is a mandate for “greater publicity” because both Congress and civil society have a strong desire for mutual deliberation with each other in the decision-making process concerning military deployment. With regard to the second issue, I argue that Commander in Chief Clause is an independent presidential war power to repel a sudden attack that will occur within one month. Concerning the third issue, I argue that a humanitarian operation cannot be solely justified on the grounds of its usually low hostility or authorization of an international organization.

A. The Procedural and Substantive Function of Declare War Clause

Although there are two methods usually employed by Congress to initiate a war, declaration of war and statutory authorization of a war, the Supreme Court in *Bas v. Tingy*¹ argued that these two kinds of war-initiation methods have identical characteristics as far as the function of Declare War Clause is concerned. In particular, *Bas* Court argued that though an undeclared but congressionally authorized war may be more limited in terms of its objective and scope, it is still a public war authorized by a legitimate power.² However, the *Bas* Court did not further address much of the meaning of a “public war” in terms of its implication for the function of the congressional decision-making process in the initiation of a war.

In the following passages, I will argue that, based on the empirical evidence, Declare War Clause mandates that (1) a public war should be debated by members of Congress under an adoption of open-rule for a greater publicity requirement in the broader public sphere, and that (2) as long as Congress does not provide for other specific conditions regarding the general scope, time, or objective of a war, the substantive nature and scope of a declaration of a war is identical to an authorization of a war.

1. The Procedural Function of Declare War Clause: A “Greater Publicity” Requirement

Although the *Bas* Court indicated a public war should be authorized by legitimate power, an emphasis on a formal congressional authorization itself does not necessarily

¹ See 4 U.S. (4 Dall.) 37 (1800).

² *Id.* (The Supreme Court distinguished an undeclared war from a declared war by arguing that an undeclared war is an imperfect war with limited objective, time, and place, whereas a declared war is a perfect war that authorizes all members of a state to commit hostilities upon all members of the other state.)

constitute a sufficient condition of a public war. In particular, from the perspective of deliberative democracy theory, I argue that a public war is predicated not only on a formal congressional authorization, but also on a mutual deliberation that searches for the greater publicity of a war in the broader public sphere.

In *Bas*, the Court wrote in its opinion that whether to declare a formal war against another nation is a matter of congressional choice out of various prudential concerns. Such a prudential rationale is consistent with the Founders' original intention that an initiation of a war should be based on a just cause, which requires a due deliberation among members of Congress. However, a due deliberation among congressional members does not suggest a thoroughly insulated deliberation in the political public sphere. Congressional deliberation is also interconnected with the broader public sphere. Recalling James Wilson's speech to the Philadelphia Convention, he said that the nature of constitutional system is not to involve us in war by any man and single body of men,³ and thus suggested that an initiation of war needs to be reinforced by a legitimately public reason or better argument that arguably can be accepted by all of the political actors in the broader public sphere. In other words, to ensure that a cause of a war initiation is just and thus prudential, Congress should endeavor to create a circumstance under which different political actors can mutually deliberate with each other in the "nexus of public sphere," namely, Congress, and search for a greater publicity to the greatest extent. Therefore, based on both an original understanding and modern deliberative democracy theory of the Constitution, I argue that the function of Declare War Clause is a mandate for government as a whole to meet with a requirement of greater publicity for a just cause of a war. Therefore, I understand that both declared and undeclared wars equally demand this greater publicity in order that they may be understood to be justly caused. .

³ 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 583 (MERRILL JENSEN ED., 1976).

I think that this “greater publicity” interpretation of the function of Declare War Clause can also, to certain extent, be supported by the empirical evidence I presented in chapter 4. In particular, most of the political context variables—including election year and presidential approval rating, exhibit a pattern of statistically significant effects both on the level of congressional deliberation and congressional control on the president in military deployment case. Although this pattern is not necessarily a direct evidence of deliberation between Congress and civil society, it strongly suggests that legislators are sensitive to what attitude their constituents hold toward such subject matter. I think such a closely interconnected relationship between the political public sphere and civil society can be seen as a moment that different political actors collaboratively deliberate with each other to search for the underlying publicity of a war. Therefore, although an initiation of war can only be formally made by the government, the function of such a process is to provide legislators not only a means of deliberation with the president but more importantly, to explore and include the opinion of the broader public sphere into that process.

To institutionally realize the above greater publicity condition in Congress, as a policy suggestion point, I argue that military deployment decision should be made under an open-rule congressional process. My reason for proposing such open-rule setting is because the empirical evidence in chapter 4 systematically shows that a lower level of constitutional *Justification* in military deployment debate resulting from an adoption of closed-rule. More importantly, as I already argued in chapter 3, deliberative democracy theory is a theory for political action but not mere deliberation. In consequence, if the House adopts open-rule for the military deployment debate on the floor, arguably, congressional members from across the nation have the opportunity to take political action (i.e. amendment) in a floor debate, which may give

those non-bill-referral committee members incentive to have reciprocal communication with their constituents respectively.

Moreover, an adoption of open-rule for floor debate over military deployment also provides Congress itself with an important internal check on a bill's referral committee. As legislative process scholars suggest,⁴ the House's defense committee is often composed of preference outliers, compared to members of other committees. This further indicates to us that open-rule both can be a possible efficient measure for a chamber to place a check on the special interest capture of defense committee and facilitates a more comprehensive deliberation thereby meeting the greater publicity requirement. In short, I would interpret the meaning of a public war as to ensure that congressional deliberation over initiation of a war should be accountable to a nationwide constituency under the function of Declare War Clause.

2. The Substantive Function of Declare War Clause

In the last part, based on the empirical evidence revealed in chapter 4, I demonstrated that the procedural function of Declare War Clause is a requirement of greater publicity of a war for both declaration and statutory authorization of a war. In accordance with such greater publicity rationale, in the following passages, I further argue that the substantive function of statutory authorization of a war is identical to that of a declaration of war. In particular, based on the empirical evidence demonstrated in chapter 4 that congressional regulation over military deployment systematically attempts to impose an ex ante control over a military deployment but not other substantive policy authorization and regulation, I argue that declaration of a

⁴ See e.g. KENNETH SHEPSLE, *THE GIANT JIGSAW PUZZLE: DEMOCRATIC COMMITTEE ASSIGNMENTS IN THE MODERN HOUSE* (1978); Arthur Denzau & Robert Mackay, *Gatekeeping and Monopoly Power of Committees: An Analysis of Sincere and Sophisticated Behavior*, 27 AM. POL. SCI. REV. 740 (1983); See KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* (1991); Richard Hall & Bernard Grofman, *Process and the Conditional Nature of Committee Bias*, 84 AM. POL. SCI. REV. 1149 (1990).

war does not empower the president additional authority to conduct unauthorized war-related action.

In the *Bas* case, the Court mentioned that an undeclared war is an imperfect war with limited objective, time, and place, whereas a declared war is a perfect war that authorizes all members of a state to commit hostilities upon all members of the other state. Developing based on *Bas*, some scholars also cite *Little v. Barreme*⁵ and *Talbot v. Seeman*⁶ and argue that the scope of declaration of war is greater than that of an undeclared war. In particular, they argued that a declared war is substantially a general and comprehensive delegation by Congress and all citizens to the president of the power to commit hostility, as opposed to authorization of war constrains the president only to conduct a war according to authorization provided in a law.⁷

To argue that congressional authorization of a war is a limited delegation, from an empirical standpoint,⁸ I think one should explore the pattern of members of

⁵ See 6 U.S. (2 Cranch) 170 (1804) (*The President did not have “any special authority” to order the seizure of non-American ships and ships departing French ports. Even if the Flying-Fish had been an American ship, it still would not have been subject to seizure.*).

⁶ See 5 U.S. (1 Cranch) 1 (1801) (*Congress may authorize general hostilities, and in such case the general laws of war will apply, or partial hostilities, when the laws of war, so far, as they are applicable, will be in force.*).

⁷ See ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 1632 (1976).

⁸ From a legal interpretation point, I think the distinction between undeclared and declared war is not totally consistent with the Supreme Court’s opinion in *Brown v. United States*, in which a majority opinion ruled that declaration of war does not exclude the power of Congress to decide, as a policy matter, whether to authorize and regulate presidential war-related conduct within the U.S. territory. As such, one could only conclude that the Supreme Court opines that, on the one hand, declaration of war does not constitute a general delegation to the president regarding domestic war-related conduct. On the other hand, it is still doubtful that *Brown* implied that the president has more sweeping discretion with regard to war-related conduct physically outside the United States. Thus, the aforementioned concern illumines a need to reinterpret the effect and function of the declaration and authorization of war in a more coherent way both within and outside the territory. This concern is similar to what we have already seen in the war on terror, when the government would use extraterritorial extradition to avoid the effect of constitutional ambit and violate a prisoner of war’s rights under the Geneva Convention by asserting that the president had more sweeping power outside the territory. See *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); Justice Marshall wrote that “when war breaks out, the question, what shall be done with enemy property in our country is a question rather of policy than of law. . . . [Therefore,] the power of confiscating enemy property is in the legislature.” *Id.*, at 128-9; Another

Congress attempt to control over the president in military deployment decisions. Based on the empirical model demonstrated in chapter 4, the relation between the level of congressional deliberation and two sub-categories of *ControlScale* in military deployment cases, Congress only shows a systematic pattern of *ex ante* control over the timing of military deployment but not of other substantive technique controls and other general war-related conduct over a military deployment. This pattern suggests that legislators are only concerned with when, but not necessarily with how, troops should be dispatched when they consider deploying the military, or with other substantive objectives of a military action. Therefore, based on empirical evidence, I would argue that though congressional authorization of a war is a limited delegation, it is limited in the sense of authorization only of a possible military action, but it has nothing to do with the goal of a military action and other war-related policy thereof. In other words, one cannot necessarily understand whether an authorization of war is limited in other objectives because Congress has not yet decided on other issues pertinent to such an authorization.

I think the aforementioned interpretation of congressional authorization is reasonable in terms of the dynamic nature of a military action. Neither Congress nor the president could predict what would happen after an initiation of war. Both the president and Congress have to deliberate cooperatively over the possible military and foreign policy goal when they acquire more information after a military action begins. I think this kind of limited information concern for Congress is not different in the case of declaration of war. Although I do not have chance to use quantitative analysis to compare congressional deliberation and control between cases of congressional war

narrower interpretation of the holding of *Brown* is that when citizen's property rights are possibly involved, legislative authorization should refer to capture of property. As a result, the Supreme Court narrowly interpreted that declaration of war does was not in the ambit of the act of Congress.

authorization and declaration of a war in this research,⁹ the dynamic nature and limited information circumstance under which a declared of a war is made by Congress is identical to, or even more nasty than, that of congressional authorization. Therefore, in terms of the scope of authorization,¹⁰ a declaration of a war—compared to that of a congressional authorization for war, unless Congress provides for other substantive matter such as no ground troops should be introduced in a statutory authorization—should not be deemed as a greater authorization of discretion to the president.¹¹

⁹ A look into the historical documents pertaining to the congressional declaration of war shows that a common function of those declarations is that they constitute authorization for military deployment and mobilization for that deployment under other congressionally authorized acts. But they do not provide for other substantive matters in those declarations of war.

¹⁰ Although I argue that the purpose of an authorization of war declaration, in principle, is the same as that of a congressional authorization for a war, this does not exclude the possibility of “legal domino” effects of a declaration of war on several standby domestic laws that give the president additional statutory authority not available in peace time. For example, the president may authorize electronic surveillance to acquire foreign intelligence without a court order up to 15 days following a declaration of war by Congress. See 50 U.S.C. §§1811, 1829, 1844 (2000). However, one should notice that such greater discretion for the president is not the result of a declaration of war *per se*, but rather that of other special domestic laws enacted prior to the declaration.

¹¹ Several scholars, to the contrary, strongly claim that the function of Declare War Clause is neither the same as that of a modern authorization for a war nor an allocation of war power to Congress. Among them, John Yoo presents an extremely broad scope for presidential war power. Yoo argues that the original understanding of Declare War Clause in the 18th century was juridical rather than legislative. In particular, he finds that the Founders regarded a war declaration only as a legal notice under international law, by which the “declaration” could trigger international laws governing rules of neutrality and belligerence. To address this argument, I refer to the empirical pattern of congressional perception toward international institutions mentioned in chapter 4. With regard to the relation between the level of congressional check on the president and humanitarian assistance, the data shows that Congress systematically exerted less control over matters of humanitarian assistance. Although this is rather indirect evidence of congressional attitudes toward international institutions, one should note that humanitarian assistance, especially the responsibility to protect, is actually an emerging justification for military deployment under international law. But in terms of the effect of international law on domestic law, what might be the reason for and meaning of lower level of control over humanitarian assistance in military deployment cases? I would suggest that although the effect of international law is not at the center of the military deployment debate, this lower priority issue does not necessarily indicate congressional indifference toward international institutions. Otherwise, the relationship between humanitarian assistance and congressional control level would not be positively correlated in a foreign affair case. Moreover, as Paul Kahn indicates, since war has been eliminated as a legal action under the UN Charter, a country’s war declaration substantially has no effect on international law. Any international legal effect of war should be triggered only by UN authorized collective military action or self-defense under the UN Charter. If we still take constitutional clause seriously, especially Declare War Clause and Treaties Supremacy Clause, it would be inappropriate to claim that a declaration of war strictly occurs for a non-existing juridical purpose under international law. *See e.g.* ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S.

In sum, based on the aforementioned illustration, the function of Declare War Clause has two components. The first part is a procedural function dictating that not only the president and Congress but also the broader public sphere should deliberate over the legality and legitimacy of military deployment. Following such a mandate, I suggest that the deliberation over war authorization should be considered under a due deliberative process. The second part is a substantive function regarding the scope of congressional authorization for a war and declaration of war. My conclusion is that, in principle, declaration of and authorization for a war does not necessarily constitute a different scope of delegation to the president: both of them should be narrowly interpreted only as an authorization function for conduct concerning military deployment but not other war-related conduct.

B. The Relation between Declare War Clause and Commander in Chief Power

In the previous part, I argue that the functions of Declare War Clause and authorization for a war are identical in principle. However, I have not addressed the relationship between Declare War Clause and the Commander in Chief power. To address their relationship is crucial to the extent that the presidents often cite his Commander in Chief power as a source of the independent military power. In practice, in the absence of declaration or authorization, the presidents almost always argue that the power inherent in Commander in Chief power is broad and sufficient enough to allow the president to deploy troops for the security and defense of the United States. It is this inherent “defensive” war power, sometimes claimed as a presidential

FOREIGN POLICY 80-81 (1991); Henry P. Monaghan, *Presidential War-making*, 50 B.U. L. REV. 19 (special issue 1970); Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 864-6 (1972); John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996). Also see e.g. THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001). Also see Paul W. Kahn, *War Powers and the Millennium*, 34 LOY. L.A. L. REV. 11, 16-7 (2000).

obligation under the Take Care Clause, which contributes to numerous conflicts between the president and Congress regarding the scope of executive defensive and emergency power. In the following passages, I will address this issue by looking into congressional deliberative ability in both military deployment and non-military deployment case and argue that Commander in Chief power is an independent defensive power to repel a sudden attack which would occur within one month.

I begin my discussion by exploring again two strict but opposite interpretations of the relationship between Declare War Clause and Commander in Chief Clause made by Walter Dellinger and John Ely. Walter Dellinger opines that Congress can only regulate an initiation of a large-scale war through either a declaration of war or the issuance of a letter of marquee and reprisal.¹² If Congress fails to regulate a war by either measure, the president has independent power to wage a war under his Commander in Chief and broad foreign affair power.¹³

To the contrary, John Ely argued that Declare War Clause is an exclusive legislative power conferred upon the Congress to regulate all kinds of military deployment, regardless of the scale of hostility.¹⁴ Considering the Founders' original understanding of Commander in Chief power,¹⁵ Ely argues that the president can only

¹² See Office of Legal Counsel Opinion, DEPLOYMENT OF UNITED STATES ARMED FORCES INTO HAITI (9/27/1994).

¹³ This argument concerning broad foreign affair power as the president's independent military power was first seen in an article authored by Leonard Meeker, a Legal Adviser to the Department of State during the Johnson presidency. See 54 Dept. State Bull. 474 (1966). For another similar argument, please see Robert Turner, *The War on Terrorism and the Modern Relevance of the Congressional Power to Declare War*, 25 Harv. J.L. & Pub. Pol'y 519 (2002).

¹⁴ See John Hart Ely, *War and Responsibility* 5-7 (1993).

¹⁵ John Ely understood Commander in Chief power to be general power first and foremost. In particular, Hamilton wrote in *The Federalist* that Commander in Chief power is nothing more than "the supreme command and direction of the military and naval force, as first General and admiral of the Confederacy; while that of the British king extends to the declaration of war and to the raising and regulating of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature. See Hamilton, *The Federalist Paper No. 69* . . .

independently deploy troops without congressional authorization in advance in order to repel a sudden attack on the actual territory of United States. He explains that the meaning of “sudden” indicates that there is no time to secure an advance authorization.

Two empirical questions are raised by the above two constitutional interpretations. First, does Congress’s military deployment power vary in accordance with the scale of war as Dellinger suggests? The empirical demonstrated in chapter 4 suggests that the predicted congressional control level over a major war indeed is systematically higher than that of a minor war. As I already indicated in chapter 4, the empirical models demonstrated that in a minor war, members of Congress also attempt to impose a lower level of control over a minor war through passage of foreign affair legislation. In other words, a lower congressional control over minor force does not amount to any control at all. Moreover, even if one concedes that a minor war is under the ambit not of Declare War Clause but of presidential foreign affair power, the empirical model in chapter 4 demonstrated that in regulating a foreign crisis, Congress does not manifest a systematically heterogeneous check on the president between an ongoing major and minor use of force. That suggests that foreign affair power does not necessarily constitute an independent base of the president’s independent military power.¹⁶

¹⁶ Recalling the separation of power and authority I illustrated in chapter 2, a political action taken by a person or body can be deemed authoritative only if others are also granted the power to reconstruct the authority of that action. If the president can be a “sole organ” to have power to conduct foreign relations, that power must be granted by another constitutionally provided organ. Therefore, this empirical finding also suggests that the so-called “extra-constitutional foreign affair power” theory argued by Justice Sutherland in *U.S. v. Curtiss-Wright* is unsustainable in the real world of power politics. If Sutherland’s extra-constitutional theory does hold, then we would observe no congressionally systematic control over presidential foreign relations power but rather endless conflict whenever Congress control over external relations matters. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304,320 (1936). Therefore, the meaning of “sole organ” of the nation in its external relations should only be narrowly interpreted to refer to the sole agent of the nation as a whole but not a broad basis for independent military power holder; *see e.g.* Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs power*, 42 WM.& MARY L. REV. 379 (2000); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corp: An Historical Reassessment*, 83 YALE L.J. 1 (1973); David M. Levitan, *The Foreign*

The second empirical question related to Dellinger and Ely's debate concerns the role of time. In particular, Dellinger and other proponents of unitary executive theory rest their arguments on the functional incompetence of Congress to handle volatile foreign relations because of the freewheeling nature of deliberation in Congress.¹⁷ They do share Ely's underlying rationale to the extent that time compression would give Congress only a limited opportunity to conduct complicated external relations. But Ely did not opine that such time-compressing nature of foreign relations inevitably accords the president a seemingly unchecked foreign affair power. He argued that only in a time of "sudden" attack would Congress have no time to deliberate and react. Thus, except in the case of imminent threat, Congress still holds the primary power over military deployment and foreign affairs.

Relations Power: An Analysis of Justice Sutherland's Theory, 55 YALE L. J. 467 (1946); See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). In addition, although Sutherland's theory is often cited as "extra-constitutional theory," I understand his argument in relation with external matters as not totally beyond constitutional principles. For example, the Senate still holds treaty consent power pursuant to the Constitution; further, congressional-executive agreement is generally also conditioned by the principle of rule of law. As such, Sutherland's theory is more similar to a residual foreign power theory.

¹⁷ In *Curtiss-Wright*, Justice Sutherland also underscored the importance of efficiency in handling a volatile state in foreign relations and argued for a broad foreign relations power to the president.

Table 5.1. Congressional Control Scale and Congressional Time Variables

| | Dependent Variable= ControlScale | | | | | |
|---------------|-----------------------------------|---|----------------------|---|----------------------|---|
| | Military Deployment Cases | | Non-military Cases | | Overall Cases | |
| | No Political and Economic Context | Political and Economic Context Included | No Political Context | Political and Economic Context Included | No Political Context | Political and Economic Context Included |
| Justification | 5.215*** (3.27) | 14.919** (2.27) | 3.611*** (4.18) | 3.738*** (4.21) | 3.415*** (4.81) | 3.562*** (4.61) |
| LawCharacter | 4.565*** (3.63) | 8.206*** (3.50) | 0.681 (1.39) | 0.692 (1.18) | 1.281*** (2.82) | 1.295** (2.34) |
| HComHearing | -2.167 (-0.87) | -5.177*** (-3.54) | -0.646 (-1.61) | -0.567 (-1.39) | -0.799** (-2.17) | -0.603 (-1.63) |
| SComHearing | -0.07 (-0.1) | -2.433 (-1.48) | -0.198 (-0.9) | -0.362 (-1.53) | -0.338** (-2.03) | -0.587*** (-2.63) |
| ClosedRule | 3.002** (2.02) | 6.875** (2.17) | 0.156 (0.61) | 0.135 (0.43) | 0.483 (1.58) | 0.559 (1.44) |
| Cloture | 1.106 (0.66) | 5.183 (1.08) | 0.088 (0.3) | -0.236 (-0.77) | 0.232 (0.86) | -0.131 (-0.43) |
| HReportTime | 3.086*** (1.57) | 1.1** (0.53) | 0.111 (0.083) | 0.117 (0.08) | 0.131** (0.07) | 0.147** (0.08) |
| SReportTime | -0.254 (0.26) | -2.993 (2.55) | 0.353 (0.354) | 0.532 (0.38) | 0.282 (0.49) | 0.463 (0.35) |
| DividedGov | | -12.731* (-1.65) | | -0.513 (-1.13) | | -0.907** (-2.07) |

Ordinal logit regressions estimated. ***=p<0.01; **=p<0.05; *=p<0.10

Table 5.1 (Continued)

| Dependent Variable= ControlScale | | | | | | |
|----------------------------------|--------------------------------------|---|----------------------|---|----------------------|---|
| | Military Deployment Cases | | Non-military Cases | | Overall Cases | |
| | No Political and Economic Context | Political and Economic Context Included | No Political Context | Political and Economic Context Included | No Political Context | Political and Economic Context Included |
| Election | | -0.174 (-0.04) | | 0.062 (0.18) | | -0.281 (-0.83) |
| Approval | | 8.487 (0.67) | | -3.017** (-2.55) | | -2.333** (-2.08) |
| PercentParty | | -83.459* (-1.72) | | -8.372 (-1.47) | | -10.409** (-2.07) |
| GDP | | -0.004 (-0.12) | | 0.002*** (0.27) | | 0.002*** (0.31) |
| CPI | | 0.022 (0.46) | | 0.002 (0.32) | | -0.001 (-0.22) |
| Unemployment | | -2.647** (-2.33) | | 0.065 (0.49) | | -0.021 (-0.14) |
| N | 38 | 38 | 191 | 191 | 229 | 229 |

From an empirical standpoint, I suggest that in order to assess the above disputes over whether Congress has ability to duly deliberate over war and foreign affair issues, we should look into the congressional deliberative ability, in terms of time, to form a controllable and substantive military deployment and foreign affair policy. To make such an empirical investigation of the effect of time has on congressional deliberative ability, I slightly change my original empirical model regarding the relationship between congressional deliberation and congressional check in chapter 4 (Table 4.3) by including both chambers' committees deliberation time into the model. The results of the effect of time has on the level of congressional control over the president is presented in Table 5.1.

In particular, in terms of the time a bill takes to pass both chambers, there is no empirical evidence showing that a longer deliberative time would generate a higher level of congressional control. Nevertheless, time indeed is a significant factor for the House committee and thus affects the level of congressional control over presidential power. The empirical model demonstrates that a longer time taken by the House committee in reporting a bill back to the floor systematically generates a higher level of congressional check on the president in both military deployment and foreign affair cases. According to the post-regression analysis, in a military deployment case, a higher level (level 4 or greater) of congressional control over the president usually takes less than one month of the House's committee bill reporting time. In non-military deployment case, a higher level of congressional control over the president usually takes less than six months of the House's committee bill reporting time. I think these predicted results suggest that Congress is able to take a yes or no position on a specific military deployment issue within one month, and form a more comprehensive foreign policy within six months. Therefore, from the standpoint of congressional

deliberative ability,¹⁸ I would suggest that an imminent threat may be defined as a military action that must be taken to repel an attack within one month, which could annex a certain justification for the president to avoid acquiring advance congressional authorization from Congress. In other words, if an attack would happen within one month, then the president has independent power to take a military action under his Commander in Chief power.¹⁹

I want to suggest a point of policy and argue that a concurrent war power between the political branches is a procedural power that can be triggered by the president to require a “fast track-like” congressional process to take an advance yes or no position on a military deployment issue.²⁰ Moreover, the initiation of this fast track-like procedure for military deployment decision should also have an active dimension in foreign policy making.²¹ That is, a military deployment authorization, once reached,

¹⁸ It is worthwhile to recall Secretary of State Daniel Webster’s statement of a valid self-defense under international law here: “a necessity of self-defense, instant, overwhelming, leaving no choice of means, no moment for deliberation.” See VI THE WORKS OF DANIEL WEBSTER 261 (1851). Although his statement was made under international law, it is inspiring for us to be more accurate in defining the meaning of imminent threat from the perspective of congressional deliberation.

¹⁹ The above framework is a general scope of Commander in Chief power underscoring a revived liberal and deliberative model of emergency power. A deliberative emergency power framework does not deem time and space compression of international relations to indicate the alienation of Commander in Chief power from congressional war power. To the contrary, such compression demands a tighter congressional-executive relationship, given that a small hostile action could swiftly and easily trigger a bigger crisis in contemporary international relation. Power is not an instrument used to direct others to act without persuasion but a capacity to deliberate with others in concert. To deliberate in concert suggests that we situate in the same space simultaneously. One of the most important functions of the Constitution is to mandate that people continuously deliberate on a common issue; otherwise, there will be a lacking of common ground in the public sphere. This is an indispensable pillar of the congressional-executive relationship, no matter whether it is a time of emergency or not.

²⁰ The downside of this suggestion will be similar to that of War Powers Resolution’s “sixty-day clock,” that is, the president could choose not to trigger the “fast track-like” authorization process. I will address this issue in a later section when discussing the role of judicial review. My main argument there is that the courts, as one of the concurrent branches of the government, should be more accessible for war power litigation by relaxing the interpretation of standing and political question doctrines.

²¹ With regard to the importance of congressional foreign policy making and its relation with emergency power in the post-Cold War era, Jules Lobel has a comprehensive illustration. See Jules Lobel, *Emergency Powers and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989).

it will trigger another legislative process requiring Congress to mold a more comprehensive foreign policy within a six-month period.²²

C. Humanitarian Operation and Congressional Control

One of the controversial legal issues relating to use of force abroad in the post-Cold War period is the rising amounts of humanitarian operations authorized under UN Security Council resolutions. In terms of the constitutional interpretation concerning allocation of war power between the president and Congress, those controversies generally can be considered to have two dimensions. The first and foremost is whether a military deployment for a humanitarian operation could be justified solely under an authorization of the United Nations or another regional international organization without a congressional authorization? The second concerns whether the low-intensity nature of a humanitarian operation can be justified for an independent military deployment under the Commander in Chief power? Based on the empirical evidence demonstrated in chapter 4, I argue that the unstable nature of a humanitarian operation cannot justify an independent military deployment under the Commander in Chief power.

In addressing the constitutional authority of the president's independent use of force for humanitarian purposes in Somalia, Assistant Attorney General Flanigan argues that to maintain and support the credibility of a UN Security Council

²² As such, I would argue that a deliberative model of emergency power is not outside the Constitution but still should be controlled in accordance with basic constitutional principles. Several scholars regarded this non-normalcy period as a political moment that could only be checked by election and impeachment. *See e.g. Id.*, at 1385; also Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WISCON, LAW REV. 273 (2003). However, in terms that impeachment hardly had its effect in history, I doubt if impeachment could be an efficient tool for Congress to check on the president. Moreover, when calculating war and foreign affair policy, as empirical evidence shows, neither Congress nor the president is really affected by the election cycle, even though the constituents may retrospectively reflect their opinions. In addition, as I argued above, an adoption of open-rule procedure for a floor debate can also functionally play a role in national debate over a military deployment case. Therefore, I suggest that even during a political moment, an emergency also can be relatively accommodated in a liberal and deliberative model of constitutionalism.

Resolution, the president can justify an independent military deployment to enforce the Resolution under his Commander in Chief Power and Supremacy Clause.²³

However, the original purpose of the Supremacy Clause was to preempt international law with federal common law; it was not considered to be a source of state law.²⁴ In other words, the Supremacy Clause does not intend to substitute congressional lawmaking authority with a direct application of international law to municipal law.²⁵

Therefore, from an empirical stand point, if the president attempts to cite Supremacy Clause as a legitimate source of independent military deployment for humanitarian operation, he should at least prove that Congress has shown a systematically lower level of control over such humanitarian operation authorized under an international organization. However, as the empirical model in chapter 4 demonstrated, the level of congressional check on the president is positively correlated with humanitarian assistance, which suggests that Congress does not deem international institutions to be a sufficient measure of check on the president. Nor does Congress regard international institutions as legal authorities that can authorize the president to independently deploy troops abroad. I think this empirical pattern is reasonable because the decision making process of UN Security Council is not similar to that of congressional deliberation process, which makes municipal constituents difficult to oversee. As such, in order to prevent the president from bypassing Congress and detouring to international organizations, Congress in fact has to manifest a stronger will to control over the president in humanitarian operation area.

²³ Authority of the President to Use United States Military Forces for the Protection of Relief Efforts in Somalia, 13 Op. off. Legal Counsel 8 (Dec. 4, 1992).

²⁴ See Louis Henkin, *Foreign Affairs and the United States Constitution* 156-65 (1996).

²⁵ Another source of authority often cited by the president is that the president should abide by international law under the Take Care Clause. But the Take Care Clause is deemed to be authoritative only if there is already a law enacted by Congress. In other words, Take Care Clause cannot be cited as a direct source of presidential power. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Another legal justification for the independent use of force abroad for humanitarian operations is humanitarian operation's low-intensity.²⁶ However, as the military operation in Somalia suggests, the line between low- and high-intensity operations was ambiguous when American troops crossed the Mogadishu line.²⁷ More importantly, most of the military deployments for humanitarian assistance, as the empirical evidence demonstrates, accompany not a lower level of hostility but a higher one. Table 5.2 shows that of forty-three humanitarian assistance bills, thirty-three arose during a period of major hostility. This relationship between humanitarian assistance and force hostility is statistically significant, $X^2(1, N=229) = 14.42, p < .001$. This result informs us that though the development of an event triggering humanitarian assistance usually may be relatively static and emerging, Congress is highly concerned with the very unstable and unpredictable nature of such an assistance operation itself. Therefore, to ensure the function of Declare War Clause could also be fully realized in humanitarian operations, I argue that military deployment for a humanitarian operation also requires congressional authorization.²⁸

²⁶ Authority of the President to Use United States Military Forces for the Protection of Relief Efforts in Somalia, 13 Op. off. Legal Counsel 8 (Dec. 4, 1992).

²⁷ In March 1993, the UN Security Council authorized a mission, UNOSOM II, endowed with enforcement powers under Chapter VII of the UN Charter to establish a secure environment throughout Somalia. However, operations turned sour following the Battle of Mogadishu on October 3, 1993, when US forces attempted to launch an attack on the Olympic Hotel in search of Mohamed Farrah Aidid which caused 18 soldiers' deaths.

²⁸ The above empirical pattern, a positively congressional regulation on humanitarian assistance, also reflects an immature status of humanitarian intervention in international law. For those proponents of humanitarian intervention, humanitarian already constitutes a source of customary international law.²⁸ However, such a strong universal and highly moral argument for humanitarian intervention unsurprisingly induces more moral disagreements, both nationally and internationally. An argument for a universal rule should always be plural. Therefore, as long as the president relies on such strong arguments as universal human rights for a humanitarian operation involving the military, he does not have independent military power to deploy troops even during peacetime as Commander in Chief.

Table 5.2. Relationship between Humanitarian Assistance and Hostility Level

| | Humanitarian Assistance? | | Total |
|--------------|--------------------------|-----|-------|
| | Yes | No | |
| Major Forces | 33 | 83 | 113 |
| Minor Forces | 10 | 103 | 116 |
| Total | 43 | 186 | 229 |

Based upon the empirical pattern delineated in chapter 4, this section attempts a substantial redefinition of imminent threat or sudden attack as an attack that will occur within less than one month. After an action is taken, a renewal process should be put on the congressional calendar within six months in order that a more comprehensive foreign policy for a military event may be shaped. Regarding humanitarian operations, I argue that advance authorization of Congress also should be acquired by the president even if a humanitarian incident is often a relatively static crisis. So far I have discussed only the procedural and substantive functions of Declare War Clause and its relevant possible reform of congressional rule. However, what type of Act of Congress can be counted as a valid authorization of and regulation on presidential power has not yet been discussed above. I will further explore this issue in the next section.

II. Forms of Congressional War Authorization and Customary Presidential War Power

There are various tools that Congress may use to present its judgment to the public and impose a check on the president. The traditional view of war power scholars of war and foreign affair powers is that Congress assumes control over the president

principally through its budget power.²⁹ A notable example is that Congress ended the Vietnam War by terminating the funding requested by the president. However, it is uncertain whether control over appropriations is an efficient instrument for Congress to exercise control over the president. In practice, presidents have often cited appropriations as an implied congressional authorization for a military deployment initiated by the executive branch without a congressional authorization.³⁰ Moreover, Congress often tries to impose a check on the president by passing non-binding resolution such as a concurrent resolution or a single-chamber resolution. However, under *INS v. Chadha*,³¹ such non-bicameral resolution cannot be regarded as constitutional measures through which to bind the president to adhere to what Congress says. As such, it is worthwhile to make an empirical investigation into which of the types of legislative action other than “regular law” can be constitutionally valid and politically efficient checks on presidential power.

In addition to viewing congressional appropriations as implied authorization for military deployment, modern presidents often cite congressional acquiescence as another such implicit acknowledgment of his Commander in Chief power by Congress. Throughout the history of U.S. foreign relations, presidents have unilaterally taken military action over 300 times³² without congressional authorization. A standing president thus often argues that he may make an independent use of force

²⁹ See LOUIS FISHER, PRESIDENTIAL WAR POWER 10-12 (2004).

³⁰ For example, in Somalia humanitarian intervention and Bosnia peacekeeping operation, Congress never authorize the president to use military intervening in Somali human rights crisis but still appropriate sufficient amounts of money for those operations, both of which became an important rationale of the president to justify his military actions as authorized by impliedly congressional consent in the appropriation bills.

³¹ See *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

³² See Richard F. Grimmett, Instances of Use of United States Armed Forces Abroad, 1798-2004, Cong. Res. Serv. RL 30172, Oct. 5 (2004).

when he deems such action necessary to maintain the security and defense of the United States.

In short, a general question regarding such disputes mentioned above concerns the forms of congressional action and inaction that may be seen as constitutionally valid forms and politically efficient tools of either congressional authorization for or congressional regulation over presidential war power. In the following two sections, I will (1) explore what the valid forms of congressional war authorization and regulation are, and (2) examine the appropriateness of the argument of congressional acquiescence as a source of customary presidential war power.

A. Forms of Congressional War Authorization and Regulation

In addition to declaration of and authorization for a war, Congress often regulates a military deployment event through a budget bill, single-chamber resolution, or concurrent resolution. I argue that a budget bill can be a time-limited authorization for a military deployment but that Congress should have an appropriate second time deliberation over the same military action issue. In addition, a concurrent resolution is a valid form of the regulation of president war power, whereas a single-chamber resolution can be a valid form if both chambers adopt an identical resolution. The overall reason for these arguments is that as long as a congressional procedure is functionally capable of generating a higher level of deliberation, the decision that emerges from such a procedure is constitutionally valid. In the following passages, I will discuss the validity of an annual budget bill and a non-binding resolution respectively.

1. Annual Budget Bill

From the perspective of democratic deliberation theory, the enactment process of an annual budget bill is an opportunity for both Congress and the president to reconsider an issue each year. However, the empirical model presented in chapter 4 demonstrated that while the annual budget process tends to generate a lower level of congressional deliberation, the decision made after an annual budget process systematically generates a higher level of congressional check on the presidential power. I think that there is such a lower level of congressional deliberation in the annual budget process is because only those emerging and new security issues are often the reasons for congressional members to bring a constitutional issue into a budget bill debate.³³ But once congressional members have deliberated over an issue, they tend to maintain a status quo policy for the upcoming year before they turn their eyes on other new foreign issues.

For example, in 1995 and 1996, when a military crisis broke out between South Korea and North Korea, President Clinton ordered a joint military exercise with South Korea in the Yellow Sea to escalate the level of hostility, in an attempt to deter North Korea from a possible invasion of the South. Congress responded to the joint military exercise simply by stating a sense of Congress within the defense authorization bills passed over the next two years but without discussing the appropriateness of the escalation of hostility that the president could allow the military exercises to be performed. However, during the enactment process of the same defense authorization bill, Congress spent a great amount of time deliberating on the constitutionality of the peacekeeping operation in Bosnia. Therefore, it is fair to conclude that debate in the annual budget process is apt to focus on a new and

³³ A similar conclusion is also made by Mitchell Pickerill. See MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 64-8(2004).

prevalent issue and maintain a status quo for an already existing policy or security threat.³⁴

In terms of such a limited capacity for re-deliberation over the same issue in a summary³⁵ annual budget process, I argue that annual budget law can only be a time-limited congressional authorization for or regulation of a war. In particular, if Congress does not authorize the president to initiate a military action in a separate authorization bill, then an appropriation bill cannot be validly seen as an authorization of military deployment unless it has been “duly deliberated” by members of Congress. Otherwise, I argue that only the first-year appropriation bill can be seen as a valid authorization for a military deployment.

But what is the meaning of “due deliberation” of a military deployment in an annual budget process? I propose two elements: separation of annual authorization and appropriation process, and adoption of open-rule for military deployment debate in the annual budget process. First, traditionally, even if an authorization clause is not enacted,³⁶ an appropriation bill itself still provides a sufficient legal basis for the executive branch to spend the money.³⁷ However, this may inevitably undermine the power of the oversight committee and the authority of the appropriation committee. The members of an oversight committee are those who particularly commit time and

³⁴ In addition to the distraction provided by other foreign affair events, William Howell and Jon Pevehouse also suggest that domestic political struggles would distract congressional members because of its highly exploitable nature. *See* WILLIAM HOWELL & JON PEVEHOUSE, WHILE THE DANGERS GATHER 114-51. For example, the impeachment of President Clinton is by definition more politically exploitable than a constitutional issue concerning a joint military exercise with South Korea in order possibly to deter North Korea.

³⁵ In *Greene v. McElroy*, the Supreme Court refused to recognize that Congress has ratified the Department of Defense to establish a security clearance program through appropriation on the grounds that annual budget process is just a summary process. *See Greene v. McElroy*, 360 U.S. 474 (1959).

³⁶ This situation occurred twice during the passage of foreign affair authorization bills between 1989 and 2008.

³⁷ *See* WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 48-9 (2004).

resources toward tracking every possible emerging issue. If the authorization process can be randomly substituted with a mere appropriation process, a congressional policy may lack sufficient publicity for the chair of the appropriations committee to have a substantially larger role. Second, as the empirical model demonstrated in chapter 4 shows, an adoption of open-rule would generate a higher level of congressional deliberation. Therefore, I suggest that a military deployment issue should be debated under an open-rule during the annual budget process.

2. Non-binding Resolution

Other than regulating presidential war power through appropriations, Congress has often tried to impose a check on a presidential use of force through a non-binding resolution, such as a concurrent resolution or a single-chamber resolution. After *INS v. Chadha*, the failure of Congress to present a bill to the president is regarded as having no legal significance and thus cannot be seen as a constitutionally permissible instrument through which to control presidential war power. From an empirical standpoint, I think that to apply *Chadha* to a war power case, one should at least prove that a formal bicameral and presentment procedure—either annual budget process or ordinary lawmaking process— is the only channel in which the publicity of a law can emerge. Otherwise, an alternative procedure such as legislative veto can be a valid tool through which Congress can control the president.

Table 5.3 shows that the level of constitutional deliberation in Congress is not systematically higher in a debating process over a binding regulation regarding a military deployment than in a debating process over a non-binding one. In other words, Congress does not think that a non-binding resolution fails to have an effect on the president. For example, in debating over whether to authorize President Clinton to enforce NATO's bombing directive in Serbia, the level of constitutional deliberation

was greater than the average level of constitutional deliberation over other military events, even though Congress was only trying to vote on a concurrent resolution.

Table 5.3. Relationship between Unilateral Presidential Action and Congressional Discourse

| | President Takes Unilateral Action? | | Total |
|-------------------|------------------------------------|-----|-------|
| | No | Yes | |
| High Deliberation | 15 | 7 | 22 |
| Low Deliberation | 8 | 8 | 16 |
| Total | 23 | 15 | 38 |

Pearson $\chi^2(1) = 1.2817$; Pr = 0.258

Moreover, the empirical model presented in chapter 4 also demonstrated that the president systematically responds to a congressional regulation, either a binding or non-binding resolution, of his military deployment power by strategically issuing an executive order, a national security order, or a proclamation. This systematically unilateral presidential response to a congressional “partial” legislation also suggests that the president understands the political and legal effects of a formally non-binding resolution. War power negotiation and constitutional deliberation between the president and Congress in fact proceeds not only in a formal legislative process, but also in other alternative forms. In consequence, a non-binding resolution is functionally equivalent to that of a formally binding law in the eyes of both the president and of congressional members, and can be an alternative constitutional tool for Congress to assert control over the president.³⁸ Lastly, I think a single-chamber

³⁸ I think this argument is also similar to that of Charles Tiefer. He argues that since both binding and non-binding resolutions could raise attention and debate in the broader public sphere, a non-binding resolution can be a sufficient legal basis for regulation of presidential war power. His argument is also consistent with my empirical finding that Congress systematically takes the attitude of the broader public sphere into account when legislators debate over both binding and non-binding military deployment regulations. See Charles Tiefer, *War Decisions in the Late 1990s by Partial Congressional Declaration*, 36 SAN DIEGO L. REV. 1, 105 (1999).

resolution cannot be seen as valid tool to control over the president because it does not stand for a full congressional deliberation over a substantial issue unless two chambers adopt an identical single chamber resolution. .

B. Does Congress Always Acquiesce to a Presidential Use of Force?

In the previous part I demonstrated that in negotiating the use of force, Congress do not necessarily adopt a formal and regular legislation. Congress can response to the president via alternative measures to express its intention. Analogous to this argument, many scholars also argue that historical practices of presidential independent use of force also provide legitimacy for the justification of inherent presidential war power, as long as Congress does not take action to express its objection to a use of force.

However, based on the empirical evidence in chapter 4, I found that (1) presidential independent use of force systematically resisted congressional explicit regulation on a war, and more importantly, (2) legislative inaction were in fact systematically out of congressional unawareness of presidential encroachment on congressional war power, which suggests that congressional acquiescence cannot be used as a source for justifying customary presidential war power. I will illustrate these two empirical findings and my reflection on acquiescence doctrine and customary war power in greater detail in the following passages.

1. No Systematic Practice of Congressional Acquiescence to Unilateral War

Proponents of the presidential war-making usually argue that the historical practices of the president's deployment of the military independent of Congress were often initiated without explicit congressional authorization since the Founders' time. Hence, these proponents argue that these frequent, systematic, and unbroken practices already assign the president the role of primary and central decision maker of war and foreign

affair policy, while Congress only controls presidential war power out of an *ad hoc* political concern.³⁹ Nevertheless, such an argument does not reflect a counterpart in the historical pattern, namely, congressional regulation over the presidential use of force. In other words, only until the historical practice of unilateral presidential military deployment compared with historical practice of congressionally authorized military deployment can one argue whether Congress intentionally acquiesced in a specific military deployment event. To explore this comparison, I examine two elements proposed by presidential war-making scholars: (1) whether statistics show an unbroken and systematic practice of non-congressional control over the president's deployment of the military, and (2) whether such deployment is not out of an *ad hoc* political concern as is Congress's attempt to check presidential war power.

To assess the first element, I suggest recalling the result of the presidential unilateral model (Table 4.11) that I demonstrated in chapter 4. In fact, the president either tends to initiate a use of force partially beyond a congressional authorization or totally violates a congressional prohibition on a military deployment. Thus, the scholarly proponents of presidential war-making authority do not provide a fair account of presidential violation of congressional war-regulation. As the empirical model shows, whatever procedural/substantive or *ex ante*/ *ex post* controls Congress attempts to impose on the president, as long as there is a minimum control pertaining to a military deployment, the president systematically resists it. There is no systematic and unbroken non-congressional control over military deployment. Hence, I would understand that the historical pattern of unilateral use of force is not a constitutional justification for inherent presidential war-making power but, as history reminds us, an ongoing power counteraction between the president and Congress.

³⁹ See Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19, 25-7 (SPECIAL ISSUE 1970).

As to the second element, more importantly, the empirical models in chapter 4 demonstrated that a lower presidential approval rating systematically generates unilateral military deployment, which may suggest that the president tends to justify his unilateral action solely based on power politics by going public, creating rally-around-the-flag effect, and skipping a mutual deliberation with Congress. This suggests that even a unilateral military deployment is not necessarily initiated out of non-political concern. Therefore, I would argue that even if one can hardly prove congressional war regulation does not emerge out of an *ad hoc* political concern, proponents of customary presidential war power also cannot show that unilateral war is not a random political concern.

I believe that the empirical evidence presented here could help us assess what I would call the “frequency” argument in *United States v. Midwest Oil Co.*,⁴⁰ which is often cited as a legitimate source of customary presidential war power by the proponents of presidential war-making authority. In the *Midwest Oil* case, the Supreme Court ruled that if a *repeated* executive usage is not objected to by Congress, then that unilateral usage is presumed to be authorized by Congress, especially when that usage has lasted systematically over years. To put this argument into quantitative terms for proponents of presidential war-making, it can be restated thus: an implied, constitutionally valid presidential war power is positively correlated with two or more identical kinds of unilateral executive action. However, this statement neglects the fact that under some circumstances, unilateral usage is often a political response to other political campaigns without intention to deliberate with Congress. I believe that such a deliberative intention in a unilateral action is important to the extent that a foundational premise of deliberative politics is that all of the political actors have desires mutual understanding and reciprocal justification. If a unilateral act does not

⁴⁰ See *United States v. Midwest Oil Co.* 236 U.S. 459 (1915).

participate with such nature, it simply undermines the function of Declare War Clause, as I mentioned in the last section. Therefore, though a judge can take such a “repeated usage” argument into account, the burden of proof in a war power case should be beyond the “frequency” standard held in the *Midwest Oil* case and cannot be applied as a controlling justification for the existence of a customary presidential war power.⁴¹

2. *No Fully Congressional Awareness of Unilateral Presidential Action*

Another important element for the justification of congressional acquiescence is whether Congress is fully aware of a unilateral presidential action. As Michael Glennon points out, a legislative inaction cannot be necessarily deemed as an acquiescence to the president if Congress does not have both the opportunity to notice the existence of a unilateral action and the institutional capability to make an objection. Moreover, in *Greene v. McElroy*,⁴² the Supreme Court also held that an assumption of congressional acquiescence should at least be grounded upon congressional awareness. Thus, from an empirical standpoint, legislative silence can be proven to be legislative acquiescence under a full awareness situation if (1) the level of congressional deliberation is systematically higher after the president takes a unilateral action, and (2) the probability of congressional regulation of the president can be easily made after a *fait accompli* unilateral presidential action. However, as the empirical evidence shown in the following passages, neither of these elements can be confirmed.

⁴¹ For a more demanding definition of customary law making between the political branches, Michael Glennon has enumerated a set of comprehensive elements, including legal consistency, normalcy, duration, density, and continuity. See Michael Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 127-134 (1984).

⁴² See *Greene v. McElroy*, 360 U.S. 474 (1959).

With regard to the first element above, Table 5.3 reveals that a presidential unilateral action does not significantly raise a higher level of constitutional deliberation. In fifteen initiations of unilateral war, eight of them generated higher-level deliberation, while seven generated a lower-level deliberation. Such a non-statistically significant distribution may suggest that a unilateral presidential action does not necessarily give rise to congressional awareness of a possible presidential encroachment on its power. Ironically, this finding is even consistent with the arguments of proponents of presidential war-making power, who argue that congressional regulation of a war is just only out of random concern. If they hold this argument to be true, then it is hardly understandable why legislative silence throughout history can be seen as intentional congressional inaction.

As for the second element, the empirical evidence shows that there is no statistical difference between the proportion of legislative action and inaction in unilateral and non-unilateral military deployment cases. Table 5.4 shows that the probability of generating a congressional regulation on the president *after* a unilateral presidential military action is not significantly greater than a congressional authorized one. One of the possible reasons that the probability of congressional regulation is not higher is that a military deployment may have simply ended, which gave Congress no opportunity to deliberate.

Based on the two empirical findings presented above, I would have a difficult time concluding that scholars of war power regard congressional inaction as an implied, systematic congressional consent to a unilateral military deployment by the president. Hence, as a matter of the interpretation of law, congressional inaction over a presidential unilateral military deployment event should be presumed to be the result of presidential encroachment on congressional war power but not a precedent for justifying inherent presidential war power.

Table 5.4. Relationship between Unilateral Presidential Action and Congressional Post-regulation

| Congress Regulate on the Presidential Power | President Takes Unilateral Action? | | Total |
|---|------------------------------------|-----|-------|
| | No | Yes | |
| No | 0 | 1 | 1 |
| Yes | 23 | 14 | 37 |
| Total | 23 | 15 | 38 |

Pearson $\chi^2(1) = 1.5748$ Pr = 0.210

III. Courts as a Forum for Facilitating War Power Deliberation

On top of control over presidential war power through law, congressional members, and also various citizens often try to challenge the constitutionality and legality of a war in court. Such long history challenging the presidential power in the courts suggests that citizenry as a whole expect to ask judicial branch to facilitate their voices in order to support them participate into the political and decision-making process⁴³ of war policy making. Moreover, in terms of the systematic pattern of unilateral presidential use of force regardless of what Congress explicitly says, as Justice Jackson's pointed out in his famous opinion in *Youngstown*,⁴⁴ it is court's responsibility to perform a heightened review on presidential action in order to keep equilibrium of our constitutional system. However, in this long history challenging the presidential war power in the courts by congressional members and citizens, judicially prudential rules often play a dominant role in war power adjudication in order not to involve into both branches' power controversy that often frustrates those people who try to rebalance the war power between the president and Congress. Therefore, it is

⁴³ See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 3-11 (1980).

⁴⁴ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

important to reinterpret those judicially prudential doctrines in war power litigation cases to facilitate the citizenry's deliberation in the war-making process. Nevertheless, what I want to repeatedly emphasize here is that because these reinterpretations below based on the limiting nature of empirical evidences, those reinterpretation are just supplements to the entire debates of judicially prudential doctrines in war power litigation.

Generally, judicially prudential rationales given by courts are divided into two types: (1) prudence based on procedural reason (i.e. standing, and ripeness/ mootness) and (2) prudence based on subject matter reason (i.e. political question doctrine). In this section, I will explore these issues based on the empirical evidence I found in chapter 4 to assess whether these judicially prudential doctrines are capable of facilitating not only congressional and public deliberation but, most importantly, a check on presidential war power. My principal argument is that in order to realize democratic constitutional deliberation in the public sphere, we should interpret the function and scope of these judicially prudential doctrines in accordance with a more dynamic procedural and substantive function of Declare War Clause.

A. Procedural Prudence Based on Standing

Procedurally prudential doctrines concern such matters as who has standing to challenge against the constitutionality and legality of a war in a court, whether a case is ripe for judicial adjudication, and whether a case is already moot not for judicial judgment. In this part, I will only explore the issue of the standings of citizens and congressional members as plaintiffs in the litigation of war power cases. My main argument here is that to create a more accessible judicial forum concerning national security cases for both citizens and congressional members, not only (1) should the courts reassess congressional attitudes toward various military deployment debates

situated in the broad public sphere, but (2) Congress also should have the will to incorporate a more deliberative-orientated rules for war power debates.

The function of standing is to ensure that the allegedly violated right of a plaintiff can be redressed by a judicial action. The primary elements of the standing doctrine are clearly stated in *Lujan v. Defenders of Wildlife*,⁴⁵ in which the Supreme Court remarked that (a) there is an actual or imminent injury on a legally protected interest, (b) such injury can be fairly attributed to the challenged action of the defendant, and (c) there exists a likelihood that a judicial favorable decision to the plaintiff can redress that injury. These elements of standing doctrine have been often applied to war and foreign affair cases by judges. I will discuss the application of this doctrine based on the empirical evidence in relevant litigations by congressional members and citizens respectively.

1. Congressional Member Plaintiff

In *Raines v. Bird*,⁴⁶ six congressional members sued against the constitutionality of the line-item veto act on the grounds that the effect of congressional members' votes would be diluted by the presidential cancellation of a particular item of spending in an appropriation bill. However, the Court ruled that such a "dilution effect" on the votes does not satisfy the meaning of "injury" defined by *Lujan*. An injury would be "completely nullified" by the president. Nevertheless, the *Raines* Court opined that congressional members could still adjust that dilution effect by simply amending or repealing the Line-Item Veto Act and need not challenge the statute's constitutionality in the court.

⁴⁵ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); also see *Northeastern Florida Chapter, General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993).

⁴⁶ See *Raines v. Bird*, 521 U.S. 811, 829 (1997).

An impact of *Raines* on war power cases was seen in *Campbell v. Clinton*,⁴⁷ in which thirty-one congressional members sued against President Clinton for his violation of failure to acquire congressional authorization for the air-strike against the former Yugoslavia, which completely nullified the results of congressional votes in that authorization decision process. Both trial and appellate courts⁴⁸ ruled against the plaintiffs on the lack of standing grounds by reasoning that Congress could have passed a bill prohibiting the president from taking the air-strike. Moreover, the appellate court also noted that Congress could have achieved the same purpose by not appropriating funds for the military campaign or making an impeachment on the president.

Based on these Supreme Court cases, one can understand that, in principle, the Court adopts a formal approach to interpreting the definition of the injury to congressional power. That is, as long as a congressional member can propose a bill and is not deprived of opportunity to vote a bill on the floor by the president, there is no standing for congressional members to sue against the presidential unilateral action of a military deployment. Such rationale can be called a “vote-oriented” doctrine of congressional standing. Nevertheless, this “vote-oriented” standard thoroughly neglects the fact that one of the main functions of legislative action, which is at the nature of such action, is not voting, but reciprocal understanding and consensus building. From an empirical standpoint, this “vote-oriented” view should at least prove that the degree of voting *per se* is the most important mechanism to check a presidential military deployment.⁴⁹ In other words, a “vote-oriented” view should meet

⁴⁷ See *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999), *aff'd* 203 F. 3d 19 (D.C. Cir 2000).

⁴⁸ *Id.*; also *Mitchell v. Laird*, 488 F. 2d 611 (D.C. Cir. 1973).

⁴⁹ See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 462 (2000) (*legislator standing is proper if she or he can reasonably demonstrate that a past or future vote is fairly traceable to the challenged action.*)

the hypothesis that if more congressional members' votes converge on the same opinion, then the level of congressional check on the president is also accordingly higher.

Table 5.5 displays this relationship between the degree of congressional votes and the level of congressional check on the presidential war and foreign affair powers. The result primarily confirms that the degree of consensus does not have any statistically significant relationship with the level of congressional control over presidential power. In particular, if one only looks into those military deployment cases, in thirty super-majority (two-thirds of the members of both chambers voting for a bill) cases, the level of congressional control over the president in fact randomly concentrates on level 2 and 4, which suggests that the number of votes is not a mechanism that generates an effective and balanced relationship between the political branches. Moreover, an identical situation can also be observed in those simple-majority (at least more than half of the members of both chambers vote for a bill) cases and non-military foreign affair cases.

In consequence, based on the empirical observation presented above of the relationship between congressional votes and control over the president, I argue that to find a standing for congressional members in a court to challenge a presidential action, the court should first discern whether the president has impaired the opportunity of congressional deliberation over a military deployment case. Consistent with my primary argument mentioned in the first section of this chapter, any unilateral presidential military action without advance congressional deliberation unless the president can rationally prove that a military deployment should be dispatched within one month to repel a sudden attack, is an actual injury to the institutional power of Congress.

Table 5.5. Congressional Votes and the Level of Congressional Control on the President

Panel A. Level of Congressional Control on the Presidential Military Deployment Power

| | Level of Congressional Control on the Presidential Military Deployment Power | | | | | | Total |
|------------------|--|---|----|---|----|---|-------|
| | 0 | 1 | 2 | 3 | 4 | 5 | |
| Simple-majority | 0 | 0 | 2 | 0 | 3 | 1 | 6 |
| Super-majority | 4 | 1 | 13 | 1 | 9 | 2 | 30 |
| Fails of passage | 2 | 0 | 0 | 0 | 0 | 0 | 2 |
| Total | 6 | 2 | 15 | 1 | 12 | 3 | 38 |

Pearson $\chi^2(10) = 13.6378$; Pr = 0.190

Panel B. Level of Congressional Control on the Presidential Non-military Deployment Power

| | Level of Congressional Control on the Presidential Non-military Deployment Power | | | | | | Total |
|------------------|--|----|----|----|----|----|-------|
| | 0 | 1 | 2 | 3 | 4 | 5 | |
| Simple-majority | 3 | 3 | 14 | 3 | 11 | 2 | 36 |
| Super-majority | 12 | 9 | 51 | 28 | 32 | 7 | 139 |
| Fails of passage | 2 | 2 | 6 | 3 | 1 | 2 | 16 |
| Total | 17 | 14 | 71 | 34 | 44 | 11 | 191 |

Pearson $\chi^2(10) = 7.5477$; Pr = 0.673

2. Citizen Plaintiff

Another kind of litigation challenging the constitutionality and legality of a war is often initiated by citizens. However, the Supreme Court has also often denied such

litigation on the ground of precluding “extra-judicially” questions from the Court and keeping and balancing “lines of separation [among the three branches] drawn by the Constitution.”⁵⁰ In other words, standing doctrine assures that a legal but not advisory question is presented at the bar and should be resolved “not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.”⁵¹

To apply the above “non-advisory opinion” standard to a war power case, I argue from an empirical standpoint that one should at least prove that in a military deployment decision making process, both the president and Congress are isolated from public attitudes toward a military action. It is empirically true that the president and Congress should and do indeed independently decide on a military deployment case as I demonstrated in chapter 4. However, my empirical findings do not suggest that legislators do not take public attitudes, or what I called “political factors” (presidential approval rating, election year, divided government, and percentage of president’s party in Congress), into the decision-making process account.

As Table 4.15 demonstrates, the quality of congressional deliberation in military deployment cases is also statistically correlated with presidential approval rating and the advent of an election year. This result suggests that in military deployment cases, the citizens in the broader public sphere in fact desire to mutually engage in a war power deliberation with Congress. Military deployment litigation is not an atomic action taken by random citizens in the public sphere. Rather, such litigation is situated and concurrent with other political actions in the public sphere to deliberate over and re-legislate the legitimacy and justification of a military campaign. This concurrent action taken in the political public sphere is one of the core tenets of

⁵⁰ See *Valley Forge Christian College v. American United for Separation*, 454 U.S. 464, 472 (1982).

⁵¹ *Id.*

democratic deliberation. As such, I argue that a finding in a case that a citizen has standing to sue against military deployment legality should be “loosely defined” by the court on the grounds that this action is not situated in a rarified debating atmosphere.

But what is the limit of the above “loose definition” of citizen standing? I think there are at least two directions that can satisfy the “injury formula” specified by *Lujan*. First of all, in the event of an injury to a citizen’s rights in a military deployment case, that citizen has the right to deliberate both with Congress and other citizens reciprocally. Each constituent across the nation, as the empirical evidence demonstrates, systematically affects the deliberation of congressional members in each debate over a military authorization bill. This suggests that every American citizen, under the unification of the Constitution, deliberates on a war power issue via the “nexus of public sphere,” namely, Congress.

Accordingly, I argue that either (1) a presidential action that impairs a congressional opportunity to deliberate on a military deployment authorization in advance, or (2) the adoption by Congress of closed-rule for the floor debate over military deployment,⁵² is arguably detrimental to the citizens’ right to mutually deliberate in the political public sphere. In consequence, under the former circumstance, the court should find a standing for citizen plaintiffs to sue the president, while in the later situation, a standing to sue Congress, both of which could ensure that both the legislative and the executive branches take charge over their political responsibilities.

⁵² As I have argued in the first section of this chapter, a closed-rule floor debate for military deployment authorization in fact dilutes the voice of constituents whose representatives are not defense and foreign affair committee members.

B. Judicial Prudence Based on Political Question Doctrine

In addition to their absence from adjudicating a legality or allocation of war power case by declining to find a standing for congressional and citizen plaintiffs, the courts also employ another approach to avoid vindicating the merits of war power case by claiming that such a case is “political” in nature and therefore features inappropriate subject-matter under the judicial cognizance. In this part, I will (1) illustrate the meaning of “political question doctrine” and its application to several important war power cases, and (2) assess the appropriateness of political question doctrine in those cases based on various empirical evidences in chapter 4. To propose a more dynamic and flexible scope of political question doctrine in war and foreign affair power cases, I argue that the function and scope of political question doctrine should be carefully applied in accordance with the procedural and substantive function of Declare War Clause in military deployment litigation, whereas in foreign affair case political question doctrine could be broadly applied for the political branches to mutually form a more unified foreign affair policy within the constitutional limits.

1. A Brief History of Political Question Doctrine

The first and foremost illustration of political question doctrine in the Supreme Court was laid down by Justice Marshall in one of the most notable cases, *Marbury v. Madison*.⁵³ Justice Marshall both argued that the Supreme Court has the power to say what the law is, and at the same time emphasized the importance of judicial restraint from a case in which the Constitution invests the president “with certain important political powers, in the exercise of his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . The subjects are

⁵³ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

political. They respect the nation, not individual rights. . . . the decision of the executive is conclusive.”⁵⁴

Although Justice Marshall pointed out that some presidential action such as ministerial appointment is a purely political matter, he did not elucidate the nature of judicial restraint considered by political question doctrine. A formalist explication emphasizes the textual allocation of some governmental power to the non-judicial branch governing the constitutional interpretation of a separation of powers case.⁵⁵ Whereas another functional explanation of a political question’s character accentuates a prudential approach, as the judicial branch lacks of institutional competence to adjudicate a case that warrants an extraordinary, democratically accountable judgment.⁵⁶

Such different textual and prudential approaches to the interpretation of political question doctrine in judicial restraint cases are best accommodated in *Baker v. Carr*,⁵⁷ in which the Supreme Court also mentioned the relationship between political question doctrine and both war and foreign affair powers. The *Baker* Court enumerated several situations under which political question doctrine should be applied when a case⁵⁸

is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or

⁵⁴ *Id.*, at 165-6.

⁵⁵ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-9 (1959).

⁵⁶ See Alexander Bickel, *The Supreme Court, 1960 Term—Forward: The Passive Virtues*, 75 HARV. L. REV. 40, 75 (1961).

⁵⁷ See *Baker v. Carr*, 369 U.S. 186 (1962).

⁵⁸ *Id.*, at 186.

the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncement by various department on one question.

Hence, the *Baker* Court opined that the application of political question doctrine is flexible and not necessarily based on either the text of the Constitution text or on the ground of judicial prudence.

Most importantly, the *Baker* Court argued that although in the areas of war and foreign affairs the political branches should have power to make political determinations, it does not follow that the judicial branch does not have the power to decide the legal effect of that political determination in accordance with various legal contexts.⁵⁹ Therefore, though a court has no power to determine when and how a war should be initiated, for example, it still has power to review a military action with regard to the interpretation of belligerency under the laws of war. However, it is still uncertain under what context is the limit of political question doctrine drawn in war and foreign affair cases. In the next part, I further introduce several important judicial cases that specifically regard the application of political question doctrine in war and foreign affair cases.

2. Application of Political Question Doctrine in War and Foreign Affair Cases

Whether political question doctrine is applicable to military deployment or foreign affair cases is a very controversial issue. Some theorists (1) argue for the application of political question doctrine in war power cases on the grounds that formal constitutional texts not only exclusively mandate the political branches to resolve war power disputes, but also because judicial branch functionally lacks the expertise to

⁵⁹ *Id.*

find the legal facts pertaining to a war; (2) argue against the application of political question doctrine by claiming that at least under the circumstances of offensive or major military campaign, a military action can be defined as a “war” and should be reviewed under the legal principle mandates by Declare War Clause; or (3) argue that the application of political question doctrine is a functional tool for the Court to maintain different political interactions of war power negotiations between the political branches within the limit of constitutionalism. In this part, I will introduce these complex disputes over the application of political question doctrine in war and foreign affair cases.

In the following parts, I will first (a) introduce the aforementioned three kinds of applications of political question doctrine in accordance with military deployment and foreign affair power cases respectively, and then (b) evaluate those three kinds of arguments based on the empirical evidences revealed in the previous chapter respectively.

a. Arguments for Application of Political Question Doctrine in War and Foreign Affair Cases

In *Ange v. Bush*,⁶⁰ the plaintiff, an Army Sergeant, sued against President Bush because he deployed troops in Operation Desert Shield before an imminent and offensive military action against Iraq without advance congressional authorization. Judge Royce Lamberth ruled that a dispute about military initiation is “political” because a decision of war and peace policy is not only “textually demonstrable” for the political branches to form via various constitutional tools but is also fashioned in the political process as well, and thus leaves no room for the judicial branch to

⁶⁰ See *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990).

adjudicate such a dispute.⁶¹ Moreover, an alternative to the above political question doctrine application and resting on the strict reading of the constitutional text was presented in *Campbell v. Clinton*,⁶² in which case Judge Silberman ruled that no one could challenge the legality of a war (in this case against Yugoslavia) due to the lack of a “judicially manageable standard.”⁶³

As for the foreign affairs area, *Goldwater v. Carter*⁶⁴ is one of the most representative cases regarding the debate over political question doctrine. In *Goldwater*, Senator Barry Goldwater (joint by other congressional members) sued against President Carter’s decision to terminate the mutual defense treaty with Taiwan in formally recognizing the People’s Republic of China. Justice Rehnquist reasoned that a termination of United State’s treaty with a foreign country is purely political in nature not only because it only has an external effect upon the United States, but also the Constitution, contrary to the adoption of a treaty, is silent about the termination procedure of a treaty.⁶⁵ Thus, Justice Rehnquist opined that the Court should view treaty termination as a “policy determination” and left such determination for the political branches.

⁶¹ *Id.*, at 512-4.

⁶² *See Campbell v. Clinton*, 203 F. 3d 19, 24-5 (D.C. Cir. 2000).

⁶³ *Id.*, at 24.

⁶⁴ *See Goldwater v. Carter*, 444 U.S. 996 (1979).

⁶⁵ *Id.*

b. Arguments against Political Question Doctrine in War and Foreign Affair Cases⁶⁶

Concerning military deployment cases and a court's refusal to apply political question doctrine in the most recent major cases is presented in *Dellums v. Bush*.⁶⁷ In *Dellums*, Judge Harold Greene held that as Commander in Chief, the president does not have a sweeping discretion to initiate any magnitude of offensive military attack; otherwise, the original intention of "an effectual check to the Dog of war" by Congress expected by the framers would become an illusion. In this vein, Judge Greene maintained the argument that a court undoubtedly has no difficulty in finding whether a military action qualifies as a war, especially when large amounts of Americans have been or would be killed. Accordingly, Judge Greene concluded that if the function of Declare War Clause has its normal meaning and is materialized, political question doctrine must not be applied for the protection of Americans.

As for the non-application of political question doctrine in foreign affair cases, it was best illustrated in the *Goldwater* case by Justice Powell.⁶⁸ Justice Powell, contrary to Justice Rehnquist in the same case, argued that, first, precisely because presidential termination of a treaty is not textually demonstrated in the Constitution, it is the Court's responsibility to determine whether the president has power to unilaterally terminate a treaty.⁶⁹ Second, in accordance with *Baker*, Justice Powell opined that even if the Constitution does not provide a judicially manageable standard for treaty termination, political question doctrine does not necessarily bar a court from

⁶⁶ One should note that non-application of political question doctrine in war and foreign affair cases may suggest that a court may either be restrained from deciding a merit on a standing ground, or to the contrary, may be vindicating a merit of a case. In this part, I only discuss those cases involving non-application of political question doctrine but do not touch on the relationship between the non-application of political question doctrine and other prudential doctrines.

⁶⁷ See *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990).

⁶⁸ See *Goldwater v. Carter*, 444 U.S. 996 (1979).

⁶⁹ *Id.*

reviewing the validity and legal effect of a presidential termination of a treaty.⁷⁰

Finally, Justice Powell argued that if an application of political question doctrine would create irreconcilable voices pronounced by different branches, it would be the Court's constitutionally mandated responsibility to avoid such embarrassment, as the *Baker* case pointed out.⁷¹

3. Political Question Doctrine as a Tool to Police the Border of Constitutional Politics

Louis Henkin argues that if a court applies political question doctrine in a case, it in fact adjudicates that a political action as a whole still operates within the limit of constitutionalism (such as rule of law).⁷² I think this view is largely concurrent with Justice Jackson's famous opinion in *Youngstown*,⁷³ in which he argues that constitutional silence on an issue is left for the political branch to fill in the constitutional content through concurrently political interaction in each event. As such, the function of political question doctrine is a judicial tool to police the norm of a political game and sometimes even to empower either branch in a particular political event.

In accordance with the above canon of political question doctrine in war and foreign affair cases, Louis Henkin thus argues that courts in fact suggest that a particular political branch (and usually the president) has a dispositive effect in a case of constitutional silence.⁷⁴ Henkin explains that political question doctrine, in reality, is not a judicial abstention from review; rather, it is a doctrine that recognizes the legal

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L. J. 597 (1976).

⁷³ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁷⁴ See Louis Henkin, *supra* note 72, 597.

effect given by the interaction between the political branches based on their constitutional power.⁷⁵

So in such a military deployment case as that of the Vietnam War, various lower courts refused to review those cases involving the constitutionality of military deployment because any judicial step-in would in fact impair the constitutional tools owned by Congress to resolve such deep political conflict with the president, which would substantially keep Congress out of an ongoing political game. As for those cases only involving foreign affair power, since the primary constitutional principles are less at stake than they are in cases involving military deployment power, political question doctrine would also often be applied to modestly keep the judicial branch from intervening in foreign affair matters.⁷⁶

C. A Reinterpretation of Political Question Doctrine

In this part, I will assess the three kinds of political question doctrine arguments presented above, according to the empirical evidence demonstrated in chapter 4. In short, I argue that whatever theory of political question doctrine one holds, in the determination of whether an issue is “political,” one should in the first place define what issue is a “legal” question in a military deployment under both the procedural and substantive functions of Declare War Clause. Moreover, I argue that application of political question doctrine should be relatively constrained in military deployment cases if the issue being litigated relates to whether the president acquires an ex ante congressional authorization, whereas the doctrine could be loosely applied in foreign affair cases.

⁷⁵ See LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 143-7 (1996).

⁷⁶ *Id.*, at 147-8.

As the empirical evidence has demonstrated in chapter 4, congressional deliberation on a constitutionality of a military deployment systematically concentrates on the timing of congressional control. That fairly suggests that congressional “law-deliberation” and “law-making” in a military deployment decision mainly focuses on whether Congress can and wants to make an *ex ante* authorization. Based on this empirical evidence, I think that a military deployment dispute in a court is a “legal” question regarding two parts. The first part is the procedural function of Declare War Clause. In particular, it is a legal question whether a congressional authorization of war--if it is made under an adoption of open rule and referral of a bill to committee, or is an appropriation act--is made under a separation of annual authorization and appropriation process. The second part is in accordance with the substantive function of Declare War Clause--that is, whether Congress authorizes a deployment before a military initiation, or whether an arguably sudden attack cannot secure an advance congressional authorization within one month. As such, to decide whether to authorize a military deployment is a matter that is textually provided for the political branches, but to adjudicate whether a military campaign is effectively “activated” by law in advance is an easily manageable standard that can be found by the judicial branches.⁷⁷

Second, in the *Dellums* case, Judge Greene claims that whether a military deployment question is “legal” depends on the possible scale of hostility and casualty. As empirical evidence demonstrates in chapter 4, while a “legal” check on a major hostility is systematically higher than a minor one, the result at the same time also reveals that legal control over a minor hostility does not emerge in vacuum. The empirical result also informs us that the legal factors affecting the difference types of

⁷⁷ I think this interpretation of this political question is consistent with the canon proposed by the *Baker* Court. That is, if a legal effect should be governed by a previous political decision, a court at least must shoulder its responsibility to decide whether such a legal effect exists.

“legal” control over the president suitable for a major war or for a minor war mainly lie in whether a *substantive* control over a foreign crisis policy is provided in a law. Thus, based on this empirical analysis, I think a magnitude of hostility *per se* does not constitute a constitutional line between a political and legal question in nature. A question can be regarded as “political” if one asks a court to declare unconstitutionality of a congressional silence on a substantive foreign policy (but not on a military deployment authorization) regarding a foreign affair crisis, which may create “multifarious pronouncements” by a judicial decision.⁷⁸ But the legality of a war, whether it is major or minor is a “legal” question, given that an issue is relevant to the timing of congressional war regulation.

A more complicated assessment of political question doctrine pertains to whether it can be an effective tool both to balance the negotiating power over declaring war and shaping foreign affairs, between the political branches and to create a more unified voice for the country. I analyze this question in terms of the empirical evidence based on the model of unilateral presidential action. In terms of that model demonstrated in chapter 4, I am pessimistic that an application of political question doctrine could leave much room for the political branches to act concurrently and create an institutional precedent for a more balanced war negotiating power, as several courts expect. As empirical evidence demonstrated in chapter 4, in military deployment cases, neither a congressional war regulation nor a greater number of congressional members objecting to the presidential position could prevent the president from taking a unilateral military action. The empirical pattern already informs us that the president alone dominates the military deployment negotiations. If judges think that an application of political question doctrine could empower Congress

⁷⁸ I think this conclusion is also consistent with my bottom-line argument and empirical finding: a “legal” question of military deployment is about the timing (i.e. *ex ante* authorization) of congressional control.

to “do something” to restore this unbalanced relationship of war power negotiation via various constitutional tools, they therefore ignore the reality of power politics and impair the tradition of the rule of law in America.

Nevertheless, the critique presented above of the empowerment of congressional power to negotiate military deployment power with the president through political question doctrine does not undermine the “empowerment function” of this doctrine. In particular, a unilateral military action by the president can be categorized into two types as mentioned in the last section: action without any congressional authorization and action beyond a congressional authorization. In the former type, as my argument suggests above, it is a “legal” question, for Congress does not explicitly permit a military deployment in advance--the legal effect of this can be easily found by a court. In the latter type, however, I would regard it as a political question on the grounds that even Congress could not necessarily foresee a clear scope of its authorization in a military deployment event.

As empirical model demonstrated in chapter 4, contrary to a congressional war regulation, the president does not tend to systematically resist a congressional regulation of a foreign affair matter. This fairly suggests that an application of political question doctrine arguably can be expected by a court to empower and even encourage the president to cooperate with Congress in order to begin a new round of the foreign affair policy formation process. Hence, if a court attempts to apply political question doctrine in order to strengthen congressional negotiation power with the president in a foreign affair area, I think a “political” question is actually tantamount to an “uncertain legal effect” question and thus should “remand” the case back to the political branches. That is, if a court finds that a presidential unilateral action cannot necessarily be placed into the ambit of a congressional foreign affair regulation, unless

that there are constitutional rights involved, a court should be prudent and provide the political branches with an additional opportunity for mutual deliberation.

D. A Defense of a Broader Scope for Constitutional Review of War Power

My reinterpretation of a narrower scope of standing and political question doctrines in war and foreign affair cases would be strongly challenged by a conventional prudential argument. In addition to defending my reinterpretation based on the empirical evidence mentioned above, I also want briefly to provide another reason in terms of the function of judicial review from the perspective of deliberative democracy theory. Although different deliberative democratic theorists have different attitudes toward the role of constitutional review, I argue that their various perspectives still can find common ground for war and foreign affair power litigation if the main objective of judicial review is to motivate a higher quality of constitutional deliberation in the legislative process, as this can promote a more unified political accountability of the government. I briefly present three reasons in the following passages.

As the empirical evidence from chapter 4 shows, congressional rule is a key institutional factor that affects the level of ideal speech situation and congressional control over the presidential power. These key procedural factors, as I have indicated above primarily include adoption of an open-rule, separation of the annual authorization and appropriation processes, and referral of a House bill to committee. I think that a constitutional review limiting these procedural factors by definition is not beyond judicial competence, for these may all be found in public record.

Furthermore, at least in the case of military deployment deliberation (but not necessarily that of foreign affair deliberation), since the empirical model strongly demonstrates that both Congress and the broader civil society as a whole are desired to

have a mutual deliberation, it is fair to conclude that congressional rule is not a mere congressional “internal” subject matter. It becomes a previous question of public reasons of war and peace policies in the public sphere.

Lastly, as empirical evidence shows in Table 5.3, a unilateral military action by the president and legislative action or inaction are often *ad hoc* political decisions, which suggests that in fact there is no systematic and institutionally “invisible” norm for interaction between the political branches in an incident of military deployment as political question doctrine expects. Therefore, if a judicial review mainly focuses on those “due law-deliberation/ making process,” it can “remand” a political conflict back to the political branches and encourage them to shoulder their political accountability to create a more coordinated norm of war power negotiation for in order to unify the American public. However, one should note that this “procedural” due law-making argument for judicial review does not exclude a minimum “substantive” due law-making argument. Namely, as I have repeatedly emphasized in this chapter, an advance congressional authorization for a military campaign is the bottom line of a substantive due standard for a military deployment action, except that an emergency military campaign should be taken in one month.

In sum, I believe that if the function of war power judicial review is a broad procedural due law-deliberation/ due law-making process combined with a minimum substantive due law-deliberation/ due law-making process, it will not be in violation with the prudential concern of judicial branch.

IV. Summarizing the Deliberative-oriented Argument for National Security Constitution

Here at the conclusion of this chapter, I want to make a brief summary of my main arguments or suggestions for a more deliberative-oriented reform for war power

constitution. I mainly argue that a due legal constitutional function and standard of Declare War Clause are predicated on whether Congress is capable to the greatest extent possible of making a reasoned authorization of military deployment within an ideal speech situation of the lawmaking process. Therefore, I suggest that there are procedural due law-deliberation/ due law-making processes and substantive due law-deliberation/ making processes that should be explored based on various points of empirical evidence. Moreover, the scope of judicial review should also be considered in terms of these standards.

Only one argument has been made with regard to substantive due law-deliberation/ making standard here. I suggest that Congress can appropriately take a yes or no position on a military deployment in one month. In this vein, therefore, I argue that an emergency situation constitutes the need to repel a sudden attack within one month. Otherwise, the president should acquire an advance congressional authorization.

As for the procedural due law-deliberation/ due law-making process, first of all, since the empirical models demonstrated that both Congress and the broader civil society desire to have a mutual deliberation upon a military deployment incident, an adoption of open-rule in the House floor debate is indispensable. It will ensure that the voices of citizens could be heard in a reciprocal deliberate between the citizenry and Congress and take possible political action via a more open forum in the House. Second, as the empirical evidence also demonstrates that the quality of constitutional deliberation is lower in the annual appropriation process, perhaps for the reason that the function of an appropriations committee is not as specialized as that of the defense and foreign relations committees, I argue that separation of the annual authorization and appropriation budget processes from deliberation over both the defense and the foreign affair budgets should be strictly enforced. Third, empirical evidence also

reveals that if a bill is referred to a House committee, the level of congressional check on the presidential power is higher. In consequence, I also suggest that deliberation over both military deployment and foreign affairs bills should not bypass the jurisdiction of defense and foreign relations committees.

The enforcement of due process cannot be realized through judicial action. Therefore, I suggest that before applying a prudential judicial doctrine including standing and political question doctrine, a court should first consider the historical pattern of whether an instance of congressional inaction is a primary phenomenon, compared with a situation when a congressional war regulation is systematically resisted by the president. Based on my empirical analysis, I find that no matter what the level of congressional war regulation is, the president systematically encroaches upon such congressional regulation. Therefore, I argue that so far there is no room for a justification of inherent presidential war power through congressional acquiescence discourse.

More importantly, in terms of such a historical pattern of presidential resistance, I argue that neither a prudential standing doctrine nor political question doctrine will restore and empower Congress to restore the balance of war power negotiation. As such, I argue that a court should adopt a loose standing doctrine for both citizen and congressional plaintiffs. The most important here is to interpret that an “injury” to the right to have a due law-deliberation/ due law-making exists if those procedural and substantive due standards are arguably violated. Lastly, I reason that if we treat the function of judicial review as a mechanism through which to motivate a higher quality of congressional deliberation, a court can adopt a broad procedural due law-deliberation/ making process review and a minimum substantive due law-deliberation/ making process review, which would not only fall within judicial

expertise but also promote greater political accountability and coordination among the political branches.

CHAPTER 6: CONCLUSION

What kind of democratic theory and U.S. law-making institution can promote a more politically accountable government in the area of war policy making? We should establish a more democratic, deliberation-oriented congressional rule to create both a more ideal speech situation for congressional deliberation and broader public sphere as a whole on the constitutionality of a war. The establishment of such a rule would thus generate a more reasoned, balanced, and concurrent war power. In providing justification for this answer, I demonstrated three main empirical models in this dissertation: (1) the relationship between the quality of congressional deliberation and the level of congressional attempt of control over presidential power, (2) the relationship between congressional attempt of control over presidential power and presidential unilateral action, and (3) the relationship between congressional rules and the quality of congressional deliberation

From the very beginning of the American republic, the Founders proposed control over presidential war and foreign affair power through congressional deliberation. For example, James Madison, in his address to Congress on Jay Treaty, emphasized that both the Declare War and the Commander in Chief Clauses need to be exercised with congressional deliberation and discretion. James Wilson, in the Philadelphia Convention, argued that the calculation of a constitutional system is to make in Congress a concurrent and certain decision based on national interest about an initiation of a war. Moreover, in the Federalist Papers, John Jay wrote that congressional procedure can consider and decide a more temperate and cooler decision for a just cause of war. Additionally, Pierce Butler also in the Convention argues that the purpose of the Declare War Clause is to ensure a unified national support for a

military action. I think all of these various historical interpretations of the Founders of war and foreign affair powers converge on one important point: control over presidential war power through congressional deliberation.

Although the importance of congressional deliberation concerning war and foreign affairs is part of the American constitutional tradition, the Founders did not provide a clear answer to the following questions regarding the conditions of democratic deliberation, the contents of a “deliberative” war power relationship between the political branches, and the canon of “deliberative” constitutional interpretation of war and foreign affair war. First, from a theoretical standpoint, what are the conditions for a “good” democratic deliberation and the contents of a “deliberative” and balanced war and foreign affair powers relationship? Second, from an empirical standpoint, does “good” congressional deliberation necessarily generate a more controllable and balanced war power between the political branches? Third, from constitutional interpretation and policy suggestion points, what implication does the thesis of “control through congressional deliberation” have on the interpretation of Declare War Clause, congressional rules, and their relevant constitutional and legal issues? These three questions left unanswered by the Founders are the principal research questions I have endeavored to explore in this dissertation. In the balance of this chapter, I will provide a brief answer for each question I demonstrated in the previous chapters respectively.

I. What Are the Conditions and Contents of Good Deliberation and “Deliberative” War Power?

In modern democratic deliberative theory, I identified three theoretical conditions and contents for a good congressional deliberation and a balanced war power relationship in order to generate my principal empirical hypotheses and analytical variables. These

theoretical conditions and contents are: (1) constitutional public reason, (2) reciprocally political action, and (3) universal discourse principle.

A. Constitutional Public Reason

The first principle I identified in my dissertation is the suggestion that a constitution is the starting point of democratic deliberation. Following the central tenets of political liberalism, I argue that constitution is a minimum reason of which American public and political lives constitute. But since a constitution is only a minimum public reason for our public life, I also elucidate that the nature of a constitution is a public resolution of an entrenchment of public reason that recognizes our history as value-plural, and thus the content of a constitution needs to be continuously interpreted and constructed by the public. Therefore, in the United States, constitutional deliberation is not a monopoly of the Supreme Court but should be a public virtue of Congress, and a component of the broad public sphere as a whole.

In war and foreign affair power areas, I think constitutional deliberation in Congress is especially important on the grounds that the judicial branch regularly denies reviewing of relevant issues. Although I argued that constitutional deliberation should be an indispensable part of congressional deliberation, this theoretical argument should be empirically provable to the extent that a higher level of constitutional deliberation in Congress can generate a more balanced congressional-executive relationship. Such an empirical demand becomes the most fundamental research hypothesis of this dissertation. In other words, if there is a higher level of constitutional justification in Congress, then a higher level of congressional attempt of control over the president in a law will be generated.

B. Reciprocally Political Action

Yet another empirical question must be asked: what is an operational measurement of the above “higher level of congressional control” in a law? I think it depends upon the degree of reciprocity of a political action. As I argued in chapter 2, if constitution deliberation is an indispensable part of political life, then a reciprocally political action is another necessary element of democratic deliberation because disagreement over the contents of constitution always persists. More specifically, constitutional interpretation always involves different moral arguments held by different moral agencies, and thus disagreement is expected to be a constant of constitutional deliberation. However, such disagreement should not obstruct political action. In consequence, to prevent democratic deliberation and cooperation from falling apart, I argued that reciprocal and concurrent political action is a crucial element that can encourages future constitutional deliberation.

In war and foreign affair power areas, I think this reciprocal political action principle is vital because the Constitution does not provide for many guidelines regarding the allocation of war or foreign affair power between Congress and the president. Much of the content of relevant war power allocation should be left for a mutual deliberation. Therefore, I argued that the bottom-line standard for a concurrent war power action is that even if there is no consensus on a substantive war or foreign policy between the political branches, Congress should at least procedurally be informed of a presidential action and give Congress a sufficient opportunity to deliberate and take a yes or no position. This standard thus generates my major measurement regarding congressional control over the president. That is, substantive control stands for a higher level of congressional attempt of control over the president, while procedural control stands for a lower level of congressional attempt of control over the president.

C. Universal Discourse Principle

The third principle I proposed is a combination of Habermas U-principle and D-principle. Disagreement over constitutional interpretation always exists. It is therefore essential, in order for democratic deliberation to thrive, that there be a universally agreed upon procedure of participation to ensure that every moral agency's has opportunity (U-principle) to discourse and criticize on an action norms (D-principle). In spite of various kinds of discursive procedures in the public sphere, the most fundamental procedure is still the deliberative process in Congress, which Habermas called "the nexus of public sphere." Therefore, the participating structure and speech condition in Congress are at the center of democratic deliberation and must be carefully explored. Moreover, even though Congress is the nexus of the public sphere, deliberative theorists agree that congressional members have the obligation to deliberate independently in the political public sphere and not merely reflect the chaotic opinions of civil society. In other words, congressional members are accountable to their constituents, but in the meantime they should be independent of their constituents during the deliberation.

Accordingly, the relationship between the congressional participation structure and congressional deliberation can be divided into two kinds: the effect of congressional rule-setting on congressional deliberation and the effect of non-congressional rule-setting (or "political factors") on congressional deliberation. Two hypotheses are related to these two kinds of participation structure. The first hypothesis is that if Congress adopts a more inclusive and information-facilitative congressional rule, then a higher level of congressional deliberation can be expected. The second hypothesis is that even if congressional deliberation is affected to certain extent by congressional members' respective constituents, congressional rule still

plays a primary and independent role in determining the quality of congressional deliberation.

An examination of how these two hypotheses relate to the war and foreign affair powers areas, is important for two reasons. First of all, the Founders expected that a relatively insulated Congress elected from a wide territory would be beneficial to congressional deliberation, which is especially important in discussing a just cause of a war. Second, precisely for this reason, the elements of procedural due process of lawmaking and deliberation that are crucial to condition prudently congressional war and foreign affair decisions, are thus worthy of being identified through an empirical analysis.

II. Is a Good Congressional Deliberation more likely to Impose a Check on the Presidential War Power?

This question in fact consists of two main empirical questions. First, is Congress more likely to impose a check on the presidential use of force after a good deliberation over the constitutionality of a current or proposed presidential decision on use of force? The main empirical model demonstrates that , if Congress has a higher level of deliberation, then Congress is more likely to impose a higher level of check on the president through the passage or rejection of legislation. Second, is a higher level of congressional check on the president more likely to prevent the president from taking a unilateral use of force? The empirical model demonstrates that once Congress regulates a military deployment, the president systematically resists such regulation and takes unilateral action alone. Although neither deliberation nor legal regulation on war can necessarily prevent the president from unilaterally deploying the troops, I argue that congressional deliberation and war regulation can invite the president to be

charged with greater political accountability. In the following passages, I briefly describe these results in more detail.

A. The Quality of Congressional Deliberation and Check on the Presidential War Power

To explore whether the war power relationship between the president and Congress is balanced and reasoned, I observed it from two aspects in chapter 4: (1) the level of legal control over the president, and (2) the probability of presidential unilateral action. One should be reminded that I do not suggest that deliberation itself is a check on presidential power; rather, deliberation is a process used to decide the degree of legal control over the president and persuade the president to accept what Congress says. Law is still the primary mechanism to impose a check on presidential power.

1. Legal Control over the President and Congressional Deliberation

As for the relationship between congressional deliberation and the level of attempt of control over the president, in a **military deployment** case, the empirical model manifestly demonstrates that a higher level of congressional deliberation consistently generates a higher level of congressional attempt of control. Upon a further investigation into the content of congressional control over presidential military deployment provided in a law, the data shows that a higher level of congressional deliberation generates statistically more *ex ante* control over military deployment than substantive policy control does. In other words, regarding a military deployment event, Congress is concerned with whether it has opportunity to take a yes or no position in advance.

In addition to the level of congressional deliberation, there are also three important factors that determine the level of congressional attempt of control over the

president's military deployment power. First, the empirical model demonstrates that a higher hostility level generates a statistically greater level of congressional attempt of control. But that does not suggest that congressional attempt of control over a minor use of force does not exist; it is just statistically lower. Second, the model also demonstrates that the type of military action affects congressional attempt of control. In particular, if a military deployment is for international assistance, such military action triggers a statistically lower level of congressional attempt of control. Third, two "political factor" variables, — lower presidential approval rating and lower percentage of congressional members of the president's party in Congress — will generate a statistically higher level of congressional attempt of control.

With regard to a **non-military deployment** case, the empirical model also strongly demonstrates that a higher level of congressional deliberation results in a higher level of congressional attempt of control over the president. A further look at the content of congressional control over the president provided in a law in a non-military deployment case, a higher level of congressional deliberation tends to generate more *ex post* and substantive policy control over the president. That suggests that in foreign affairs, Congress is willing to authorize the president loosely to take an action first by delineating some substantive foreign policy for the president.

Besides the level of congressional deliberation, there are also several factors significantly determining the level of congressional attempt of control over the president. First, the model demonstrates that a higher level of hostility also generates a statistically higher level of congressional attempt of control. Second, the type of military action that is being proposed also significantly affects the level of congressional attempt of control. Contrary to that of military deployment control, a military action for international assistance yields a higher level of congressional non-military deployment control. Third, only one "political factor" variable, lower

presidential approval rating, generates a higher level of congressional attempt of control over the president.

2. Congressional Control and Unilateral Presidential Action

To explore congressional control ability over the presidential war power through the passage or rejection of legislation, I constructed a unilateral presidential action model in chapter 4. The model demonstrates that in a military deployment case, whatever level of attempt of control Congress imposes, the president systematically resists it. In a non-military deployment case, the president's calculation of whether to take a unilateral action is a kind of 'public appealing' based more out of political concerns.

In a **military deployment** case, the empirical model demonstrates that the level of congressional deliberation is not a significant factor in making the president cooperate with Congress in making war policy. In particular, as long as Congress tries to regulate military deployment, re-deployment, or withdrawal, the president will systematically impair such regulation. The president resists a congressional military deployment regulation through various unilateral tools at his disposal, including a unilateral dispatch of the troops, an executive order, a signing statement, or a proclamation.

In a **non-military deployment** case, the empirical model demonstrates that a higher level of congressional deliberation generates a greater probability of unilateral presidential action. This kind of presidential unilateral action in foreign policy making is also a synthesis of political calculation to counter congressional constraint through a highly public act. In particular, the empirical model demonstrates that a lower presidential approval rating and a divided government both statistically signal a probability of unilateral presidential action. Hence, it is fair to conclude that unilateral presidential action in foreign policy area is a kind of deliberative action to the extent

that the president tries to pressure Congress by generating pressure from the constituency and Congress is fully aware of a constitutional issue.

B. Transition: Deliberation and Collaborative Political Accountability

Deliberative theorists may be disappointed by the above empirical findings: a higher level of congressional deliberation and a higher level of congressional check on the president cannot prevent the president from taking a unilateral military action. However, I think this finding does not undermine the value of democratic deliberation. To the contrary, and for the reasons I elaborate below, it suggests that a good congressional deliberation can place the president under a greater political accountability if he is in violation of a congressional regulation.

The central tenet of democratic deliberation is simple: deliberate before you act. Any action should be predicated on a norm generated out of a deliberative process. This central tenet not only suggests that deliberation is a premise of law, but also reminds us that while an action is controlled by law, deliberation itself is not. Thus, two kinds of accountability are derived from the aforementioned central tenet of democratic deliberation: reason-giving and acceptance of a better argument and decision thereof. The president can provide his opinion on a bill during the consideration of a bill through various channels. If his rationale is not accepted by Congress, he is both legally and politically accountable for compliance with a law that Congress has predicated on a weightier argument; otherwise he can veto the bill.

Therefore, even if the empirical model demonstrates that a higher level of congressional deliberation cannot prevent the president from taking unilateral action, I argue that it is still legitimate to promote “good” deliberative condition in Congress on the grounds that a better justification not only can be presented to the public sphere but also creates a unequivocal legal and political accountability for the president to abide

by. In consequence, I further present the third model to explore what kind of congressional law-making rule and “political factors” influence the quality of congressional deliberation.

III. What Kind of Congressional Participation Structure Influences the Quality of Deliberation?

The congressional participation structure can be observed by regarding two dimensions: (1) congressional rule-setting on deliberation and (2) non-congressional rule-setting (“political factors”) as mentioned above. With regard to the relationship between congressional rule-setting and quality of deliberation, in a **military deployment** case, the empirical model systematically demonstrates that an adoption of closed-rule will contribute to a lower level of congressional deliberation. In addition, referral of a bill to committee also generates a higher level of congressional deliberation. In a **non-military deployment** case, three factors will yield a lower level of deliberation: deliberation in an annual budget process, an adoption of closed-rule, and filibuster. It seems worthy of note that an invocation of cloture can generate a higher level of congressional deliberation.

As for non-congressional rule-setting (“political factors”), in a **military deployment** case, the empirical model demonstrates that although military deployment deliberation is systematically affected by the political factors, congressional rule still plays a statistically significant role in determining the level of congressional deliberation. More specifically, both presidential approval rating and the advent of an election year will generate a lower level of congressional deliberation; while in the meantime, an adoption of closed-rule still contributes to a lower level of deliberation. Therefore, one can conclude that deliberation over the constitutionality of military deployment in Congress is independent of but closely connected with civil

society. A slightly different situation is observed in a **non-military deployment** deliberation. The empirical model demonstrates that an adoption of closed-rule and filibuster will decrease the level of non-military deployment deliberation. Also, an invocation of cloture can contribute to the level of non-military deployment deliberation. But “political factors” does not have any significant effect on the level of congressional deliberation. Therefore, it is fair to conclude that non-military deployment deliberation in Congress is strongly independent of public opinion in civil society.

The aforementioned empirical findings have two important implications on the democratic deliberation in Congress. First, the institution of congressional participation indeed elaborates an independent deliberative function as the Founders expected. But at the same time, the empirical evidence also demonstrates that Congress does not neglect public opinion or civil society during military deployment deliberation. Second, among various congressional rules, it is fair to say that an adoption of open rule, invocation of cloture, and a referral of a bill to committee are three important factors that contribute to a better speech situation.

IV. What Implications does Empirical Analyses of Congressional War Power Deliberation Have on Constitutional Interpretation of War Power?

The empirical analyses above provide a plethora of information about whether and how Congress can exert attempt of control over the president through deliberation as the Founders expected, the limits of congressional ability to regulate a war, and historical patterns of presidential unilateral action. As a matter of constitutional interpretation, these analyses provide much insight for reflection on various disputes over war power interpretation. In chapter 5, I examined three legal issues often raised in the war power area: (1) the procedural and substantive function of Declare War

Clause, (2) the form of congressional war authorization and customary presidential war power, and (3) justiciability and political question doctrine in war power litigation. My overall argument is that interpretation of the allocation of war power should be in accordance with procedural and substantive due law-deliberation and law-making processes. But to realize a veritably deliberative war power Constitution and a more accountable government, certain congressional rule reforms are needed.

A. The Procedural and Substantive Function of Declare War Clause

Two legal issues are explored in chapter 5 under the Declare War Clause: (1) the function of Declare War Clause, and (2) the relationship between Declare War Clause and Commander in Chief power. As for the first issue, I argue based on the empirical evidence that the function of Declare War Clause is a mandate for greater publicity because both Congress and civil society have a strong desire in the military deployment decision-making process to mutually deliberate with each other. With regard to the second issue, I argue that Commander in Chief Clause is an independent presidential war power to repel a sudden attack that will occur within one month. My ground for this, based on the empirical evidence, is that Congress is able to have a higher level of deliberation within one month to take a yes or no position on a military action decision.

1. The Procedural Function of Declare War Clause

As the empirical model demonstrates in chapter 4, Congress systematically and seriously takes civil society's attitude into account during a military deployment decision making process, which suggests that Congress and civil society both desire a reciprocal deliberate with each other in the broader public sphere. I think this phenomenon is consistent with the Supreme Court's opinion in *Bas v. Tingy* that both

declared and undeclared wars are public wars, because Congress and civil society are both involved in a war-making decision. From the perspective of deliberative democracy, this mutual deliberation over a military deployment decision in the public sphere is a collaboration of a two-track public sphere that is searching for a greater publicity of a war. Thus, I argue in chapter 5 that the function of Declare War Clause is a mandate requiring both the president and Congress to deliberate devotedly with civil society in a military deployment decision making process, regardless of whether it is going to make a declaration of war or authorization for a war.

To realize the aforementioned “greater publicity” of a war, I proposed in chapter 5 that a military deployment debate on the floor should be taken under an adoption of open-rule. Moreover, I suggest that a military deployment bill should be referred to committee for informed judgments. Lastly, since filibuster is a significant factor contributes to a lower level of congressional deliberation, I suggest that in a military deployment decision-making process, the Senate should seriously consider to adopt a simple-majority vote for invocation of cloture.

2. The Substantive Function of Declare War Clause and Commander in Chief Power

The Founders at the Philadelphia Convention and modern presidential war power scholars agree that the president has the independent power to repel an attack on America without advance congressional authorization under his Commander in Chief power. But to what extent the president can repel an attack is still a matter of legal controversy.

On the grounds of Congress’ deliberative ability, I argue that if an attack would occur within one month, then the president has the independent power to repel that attack. The reason for suggesting that an attack occurs within a one-month period as a sudden attack on the grounds that the empirical model in chapter 4 demonstrates

that Congress needs one month to have a higher level of deliberation and take a yes or no position on a military deployment. Moreover, in a military deployment bill, the empirical model demonstrates that Congress systematically generates *ex ante* control over a military deployment rather than substantive foreign policy, which suggests that Congress is concerned about whether it can deliberate over a military deployment issue before an event. In consequence, I suggest that the substantive function of Declare War Clause is that any military deployment should be considered in advance by Congress unless a sudden attack on America would occur within one month; only then can the president independently dispatch the troops under his Commander in Chief power.

However, since a congressional authorization for a war is only a yes or no position on a military deployment event, the scope of such authorization should not be loosely interpreted. As the empirical statistical findings in chapter 4 demonstrate, after a military deployment, Congress is able to form a substantive foreign policy control over a foreign crisis within six months. This suggests that in a congressional war authorization, Congress does not necessarily expect to invest the president with great discretion in order to manage a foreign crisis. But because of the institutional limit, Congress needs to take a longer time to form a substantive control over the management of a crisis. Hence, when one interprets the scope of a military deployment authorization, one should note that its scope and substance is more dynamic.

B. Form of Congressional Authorization and Customary Presidential War Power

Two issues relating to types of congressional war regulation are explored in chapter 5 regarding (1) the types of valid forms of congressional authorization and regulation of

a military deployment, and (2) the appropriateness of the argument for customary presidential war power.

1. What are Valid Forms of Congressional War Authorization and Regulation?

In addition to declaration of and authorization for a war, Congress often regulates a military deployment event through a budget bill, single-chamber resolution, or concurrent resolution. I argue that a budget bill can be a time-limited authorization for a military deployment. In addition, I argue that concurrent resolution is a valid form of the regulation of president war power, whereas a single-chamber resolution can be a valid form if both chambers adopt an identical resolution. The reasons are provided as follows.

As to the budget bill, the empirical model in chapter 4 demonstrates that congressional deliberation of a budget bill is systematically lower than that of a non-budget bill, but the level of attempt of control over presidential power is consistently higher in a budget bill. As I explained in chapter 5, this is because Congress often employs the annual budget process in order to deliberate and regulate an emerging military crisis, but at the same time congressional members are unable to deliberate a second time over an already ongoing military action but choose status quo. Therefore, I argue that if Congress does not duly (at least schedules a consideration on legislative calendar) deliberate a second time an ongoing military event, a continuing appropriation for such a “non-first year” military event should not be deemed as a valid and tacit congressional authorization unless Congress had authorized a war by enacting an independent bill.

As for concurrent resolution, the empirical model in chapter 4 demonstrates that the level of congressional deliberation is identical to that of a binding bill. In addition, when a bill tries to impose a higher level of attempt of control over the

president in a non-binding concurrent resolution, the president systematically tries to avoid it by taking a unilateral action. As such, it is fair to say that both the president and congressional members expect that a non-binding concurrent resolution has the legal effect of imposing a check on the president. With regard to a single-chamber resolution, since it does not represent a full deliberation of Congress, I think it is not appropriate to regard such resolution as a legally valid tool for regulating a war. However, if both chambers adopt an identical single-chamber resolution, it can stand for a full congressional deliberation and thus be seen as a constitutionally valid measure to express its attempt of control over the president.

2. Congressional Acquiescence is Not a Source of Customary Presidential War Power

The argument for customary presidential war power often claims that the content of presidential war power is also supplemented by congressional acquiescence to events of presidential military deployment independent of Congress. The acquiescence doctrine consists of two elements in war power area: (a) no historical pattern of presidential encroachment on congressional war regulation, and (b) significant congressional awareness of a unilateral presidential military action. The empirical model in chapter 4 demonstrates that neither of these two elements is satisfied. Hence, the proponents of customary presidential war power should rely on other standards to justify claiming the implied congressional consent of presidential war power.

The proponents of presidential war power often argue that Congress often took no action in response to an independent presidential use of force. Thus, based on those independent military events, they argue that Congress tacitly agreed that the president has independent power to dispatch troops as he deems necessary. However, as I mentioned in chapter 5, this argument fails to indicate whether the president historically and systematically encroaches on congressional war regulation. If the

president does not systematically resist congressional regulation, then those incidents of congressional acquiescence can be regarded as the “systematic and unbroken practice” of Congress. In terms that the empirical model in chapter 4 demonstrates that as long as there is a war regulation, the president statistically defies it. Therefore, I think those events of independent presidential military deployment did not constitute systematic and unbroken precedents of congressional acquiescence.

With respect to whether Congress is aware of a unilateral presidential action, I state from an empirical standpoint that the proponents of customary presidential power should at least prove that *after* a presidential unilateral action: (1) the probability of a higher level of congressional deliberation is significantly greater than a lower level of deliberation before a presidential unilateral action, and (2) the probability of generating a congressional regulation on the president is significantly greater than generating a congressional regulation before a unilateral presidential action. The empirical data demonstrated in chapter 5 shows that neither the probability of higher level of congressional deliberation nor the probability of congressional regulation of the president is significantly greater after a unilateral presidential action than it is before a unilateral action. Thus, I conclude that congressional acquiescence cannot be a source for justifying customary presidential war power.

C. Justiciability, Political Question, and War Power Litigation

In chapter 5, I repeatedly emphasized that the function of Declare War Clause is to promote a reasoned military deployment decision-making process within an ideal speech situation to the greatest extent. To realize this function, judicial review is indispensable because one of the most important functions of judicial review is to that ensure citizenry’s deliberation in the decision making process can be fully facilitated. However, courts almost always refuse to review war power cases on prudential

reasons. In chapter 5, I assess two kinds of prudential reasons based on the empirical evidence demonstrated in chapter 4: (1) standing doctrine and (2) political question doctrine. I argue that the court should loosely interpret the legal meaning of “injury” in *Lujan* case to create more opportunity for both congressional members and citizens to litigate war power cases. Moreover, I argue that political question doctrine should be carefully applied in a manner consistent with a dynamic due law-deliberation and law-making process concept of the function of Declare War Clause. Last, I want to emphasize that though I try to reconceptualize standing and political question doctrine based on the above empirical evidences, such reconceptualization is just a supplement to the whole debates of constitutional war power debates.

1. A Reinterpretation of Standing Doctrine in War Power Litigation

Generally, two types of plaintiffs often litigate a war power issue in court: (1) congressional members and (2) citizen plaintiffs. With regard to congressional member plaintiffs, the court usually refuses to review a case by reasoning that a congressional member’s right to vote is not injured by a unilateral presidential military deployment because that congressional member still can introduce and enact a bill that would be able to express its attempt of control over the president. From an empirical standpoint, I argue that this “vote-oriented” view should prove that the degree of voting itself is the most important factor for Congress to provide a check on the president. The empirical dataset in chapter 5 demonstrates that the level of congressional attempt of control over the president is not significantly higher when more congressional members vote for a bill. In consequence, I argue that the significant factor is not whether a voting opportunity is injured by a presidential unilateral action, but whether deliberation opportunity is injured.

As for citizen plaintiffs, the court usually refuses to review a case by reasoning that a citizen's right is not injured by a unilateral presidential action. If the court accepts a citizen as a plaintiff in such case, it would allow an advisory question presented before a court "in a rarified debating atmosphere in a society." As the empirical model demonstrates in chapter 4, both the level of congressional deliberation and the level of congressional attempt of control over the president are significantly affected by the public attitude, which suggests that a debate over a military deployment action is not in a rarified debating atmosphere. Hence, war power litigation is one of those democratic deliberative actions that are vigorously debated in the public sphere. As such, if the president takes a unilateral military action, I argue that the citizens' right to mutually deliberate with each other in the nexus of public sphere, namely, Congress, is injured.

2. A Reinterpretation of Political Question Doctrine in War Power Litigation

The court often refused to review a war power issue by arguing that it is a matter that is (1) a textually demonstrable power of the political branches, or (2) left to the political branches to fill in the contents through individual event. My principal argument is that to decide whether a question is "political," one should first look into whether a question is "legal" in terms of the empirical evidence of congressional regulation pattern of military deployment. I briefly explain my argument based on the empirical evidence demonstrated in chapter 4.

Some judges argue that whether Congress purports to authorize a war is a power textually demonstrated for it and the court does not have power to review it. I think this argument ignores the fact that for Congress, a legal question in a military deployment case is whether Congress has the opportunity to deliberate and decide to authorize or decline a military deployment before a presidential action is taken. I

emphasized above that the empirical model in chapter 4 demonstrates that Congress systematically concentrates on the timing of control over a military deployment provided in a law. Therefore, based on this empirical pattern, I argue that a “legal” question in a military deployment case is whether Congress has decided to authorize or decline a military action before a military event.

Some argue that a war power issue is political on the grounds that any judicial involvement in a war power case will impair the incentives of political branches cooperatively to resolve a political conflict and further re-balance the power relationship between the president and Congress. I think that this argument ignores the reality of constitutional politics concerning war power. As I repeatedly emphasized above, the empirical model presented in chapter 4 demonstrates that the president systematically declines to accept any level of congressional attempt of control over his military deployment power unless he deems it is consistent with his military objective. Otherwise, the president will simply resist it. Therefore, if one thinks that an application of political question doctrine can facilitate a more cooperative relationship between the president and Congress, it would be an illusion.

V. The Limit of the Thesis and an Agenda for Future Research

The main limitation on my research concerns the subjective judgment on the quality of congressional member’s speech. Although I tried to limit the impact of subjective judgment by applying only two sub-categories of Discourse Quality Index and testing each, it may be better in the future to make an inter-coder reliability test. Second, since most of the primary deliberations in Congress are taken in committee, an ideal and more complete future study should include committee deliberation into the scope of research. Third, this thesis focuses on deliberations over military and foreign affair bills, which inevitably skip an investigation on how the quality of congressional

deliberation affects congressional decisions on individual rights bills. Lastly, this dissertation did not have opportunity to examine how the patterns of congressional deliberation and presidential war power under the context of Cold War and Vietnam War are different from that of post-Cold War era. I hope that the empirical research that I have presented here could be a helpful starting point for understanding the relationship between and implications of congressional deliberation and presidential war power.

APPENDIX A:

DRUG TRAFFICKING TIMELINE (EVENT NUMBER: 1)

| Drug Trafficking Timeline (Event Number: 1) | | |
|---|--|---|
| 11/29/1989 | <p>National Defense Authorization Act for Fiscal Years 1990 and 1991 (101-189) HR 2461</p> <p>Possible relating E.O. 12696 (11/13/1989): President's Drug Advisory Council: President established the Presidents Drug Advisor Council which can recommend relevant policy to Director of National drug control policy.</p> | <ol style="list-style-type: none"> 1. Inter-branch procedural control: Report by the Secretary of Defense on the drug interdiction activities (Sec. 1213) 2. Inter-agency procedural control: Secretary of defense shall carry out an integration of network and consults Director of National Drug Control Policy (Sec. 1204) 3. Substantive control: authorizes to intercept a vessel and hot pursue (1 section: Sec. 1202) 4. \$ Not more than \$450, 000, 000 for drug interdiction and counter-drug activities (Sec. 1201) |
| 11/21/1989 | <p>Department of Transportation and Related Agencies Appropriation Act, 1990 (101-164) HR 3015</p> | <ol style="list-style-type: none"> 1. Not less than \$567,000,000 shall be available for drug enforcement activities for Coastal Guard 2. Inter-branch procedural control: Possibly legal use of deadly force by Coastal Guard in the future according to any law, regulations, treaty, or executive agreements (Sec. 325) |
| 12/13/1989 | <p>International Narcotics Control act of 1989 (101-231) HR 3611</p> | <ol style="list-style-type: none"> 1. \$115,000,000 is appropriated for international narcotics control assistance 2. Substantive control: foreign stationed forces can participate into that country's police arrest action (Sec. 15) 3. Assistance: military and econ assistances (Sec. 3, 10, 12, 15, 17) |
| 11/5/1990 | <p>Department of Defense Appropriations Act of 1991 (101-511) HR 5803</p> | <ol style="list-style-type: none"> 1. \$1,084,100,000 for drug interdiction and counter-drug activities |

Drug Trafficking Timeline (Event Number: 1)

| | | |
|------------------|--|---|
| 11/5/1990 | National Defense Authorization Act for Fiscal year 1991 (101-510) HR 4739 | 1. \$ 1,084,100,000 (Sec. 301) 2. Inter-branch procedural control: Report on defense spending for counter-drug activities (Sec. 1007) 3. Logistic military assistance asked by other federal agencies for other foreign countries (Sec. 1004) |
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APPENDIX B:

FIRST IRAQI WAR (EVENT NUMBER: 2)

| First Iraqi War (Event Number: 2) | | |
|-----------------------------------|--|--|
| 8/2/1990 | A resolution to condemn Iraq's invasion of Kuwait (S Res 318) | <ol style="list-style-type: none"> 1. Retrospective recognition of the embargo against Iraq 2. Express the possible need for further air, sea, and land forces for resolving the crisis |
| 8/7/1990 | Operation Desert Shield begun | |
| 8/20/1990 | NSD 45: Directed Secretary of Defense to organize multi-national force requested by Kuwait | |
| 11/5/1990 | Iraq Sanctions Act of 1990 (101-514) HR 5114 E.O. 12722: Blocking Iraqi Government Property and prohibiting Transactions with Iraq E.O. 12724: Blocking Iraqi Government Property and prohibiting Transactions with Iraq | <ol style="list-style-type: none"> 1. Inter-branch procedural control: Consultation with Congress regarding Iraqi crisis (Sec. 586B); Report to Congress with respect to Iraq's nuclear, WMD, Ballistic Missile, and offensive military capability (586J) ; notice to Congress pertaining to Iraqi trade embargo (586C) ; certification to Congress regarding the sanctions against Iraq (586H) 2. Retrospective recognition of trade embargo (586C) 3. Assistance: humanitarian assistance (586C) |
| 11/5/1990 | Treasury, Postal Service and General Government Appropriations Act 1991 (101-509) HR 5241 | <ol style="list-style-type: none"> 1. Sense of the Senate (Sec 630) 2. Inter-agency procedural control: the President should take actions in concert with Secretary of State, Defense, Treasury, and OMB (Sec 630) 3. Inter-branch procedural control: the President should consult with the Congress; inform Congress legislative initiatives relating to the goals enumerated in the sense of the Senate (Sec 630) |
| 10/1/1990 | Supplemental appropriations for "Operation Desert Shield" for the fiscal year 1990 (HJ Res 655) | 1. Authorization of supplemental appropriations for military personnel, operation and maintenance |
| 11/5/1990 | National Defense Authorization Act for Fiscal year 1991 (101-510) HR 4739 | 1. Authorizes the President to decide if econ sanction against Iraq is in the national interest of US (Sec. 1458) |

First Iraqi War (Event Number: 2)

| | | |
|-------------------|---|--|
| 11/17/1990 | Iraq International Law Compliance Act of 1990 (Vetoed by the president) HR 4653 | <ol style="list-style-type: none">1. Inter-branch procedural control: consultation with Congress with respect to Iraq-Kuwait crisis; notice to Congress regarding regulations issued under E.O. 12722 and 12724; notice of termination of sanctions; certify to Congress with regard to the change of Iraqi policy if Iraq has great improvement on human rights policy (Sec. 522; 523; 543)2. Retrospective recognition of trade embargo against Iraq (Sec. 523)3. Assistance: Humanitarian assistance |
| 1/14/1991 | Authorization for Use of Military Force Against Iraq Resolution (102-1) HJ Res 77 NSD 54: Authorizes military action against Iraq to bring about Iraq's withdrawal from Kuwait | <ol style="list-style-type: none">1. The President is authorized to implement UN Resolutions relevant to Iraq (Sec. 2)2. Inter-branch procedural control: the president shall make available to the Speaker and President pro tempore of the House and Senate about his determination on the use of force; report to Congress every 60 days with respect to Iraq's compliance with UN Resolutions (Sec. 2; 3) |
| 4/10/1991 | Operation Desert Shield/ Desert Storm Supplemental Appropriations Act, 1991 (102-28) HR 1282 | <ol style="list-style-type: none">1. Authorization of the incremental cost of Operation Desert Shield and Storm \$15,000,000,0002. Inter-branch procedural control: the president shall report to Congress about troop redeployment relevant to Operation Desert Shield and Storm |
| 4/6/1991 | Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991 (102-25) S 725 | <ol style="list-style-type: none">1. Authorization of supplemental appropriations for Operation Desert Storm (Sec. 101; 102;103)2. Inter-branch procedural control: a transfer of Operation Desert Storm fund should be noticed-and-waited; Secretary of Defense shall monthly report to Congress on cumulative amount (Sec. 105; 106) |

APPENDIX C:

SOMALIA TIMELINE (EVENT NUMBER: 3)

| Somalia Timeline (Event Number: 3) | | |
|------------------------------------|---|---|
| 11/21/1989 | Foreign Operations, Export Financing, and related Program Appropriations Act, 1990 (101-167) HR 3743 HR 2939 was previously vetoed by the president and then became HR 3743 (but the bill vetoed is not related to Somalia issue) | <ol style="list-style-type: none"> 1. None of the funds should be appropriated for Somalia, except through the regular notification procedures of the Committees on Appropriations (Sec. 542) 2. Econ support fund for Somalia is rescinded (Sec. 589) |
| 10/30/1991 | International Cooperation Act of 1991 (Failed to pass on Conference Report in the House) HR 2508 The relevant provisions in this Act is independently enacted in Horn of Africa Recovery and Food Security Act (102-274) S 985 | <ol style="list-style-type: none"> 1. Sense of Congress: the president should develop a plan to meet the emergency need of Somalia and deliver those humanitarian resources to those needed but not military (Sec. 1062) 2. Sense of Congress: direct the president to pledge diplomatic and military resources for UN peacekeeping and peacemaking 3. Humanitarian assistance; but prohibitions on econ and military assistance to Somali government (Sec. 1063; 1064; 1065; 1066) 4. Inter-branch procedural control: the president shall submit certification to appropriate committee regarding the distribution of humanitarian assistance; the president shall also report on the progress with regard to Somali situation (Sec. 1067; 1068) |
| 6/28/1991 | Expressing the sense of the Senate regarding the emergency humanitarian and political situation in Somalia (S Res 115) | <ol style="list-style-type: none"> 1. Sense of the Senate expresses that the president should lead the world to resolve Somali factions conflict |

| Somalia Timeline (Event Number: 3) | | |
|------------------------------------|---|---|
| 4/21/1992 | Horn of Africa Recovery and Food Security Act (102-274) S 985 | <ol style="list-style-type: none"> 1. Sense of the Congress: direct the president should use whatever diplomatic resources to resolve Somali conflict; offer equitable distribution of human relief resources and emergency food assistance; direct the president to pledge diplomatic and military resources for UN peacekeeping and peacemaking Humanitarian assistance; but prohibitions on econ and military assistance to Somali government (Sec. 3; 4) 2. Prohibitions on military and econ assistance (Sec. 7) 3. Inter-branch procedural control: the president shall submit certification to appropriate committee regarding the distribution of humanitarian assistance; the president shall also report on the progress with regard to Somali situation (Sec. 8;9) |
| 5/19/1992 | Expressing the sense of the Senate regarding needed action to address the continuing state of war and chaos and the emergency humanitarian situation in Somalia (S Res 258) | <ol style="list-style-type: none"> 1. Urges UN to remain committed to peacekeeping in Somalia |
| 8/10/1992 | Expressing the sense of the Congress regarding the desperate humanitarian crisis in Somalia and urging the deployment of United Nations security guards (S Con Res 132) | <ol style="list-style-type: none"> 1. Retrospective recognizes the appropriation of the presidential security guards deployment to Somalia on 7/27/1992 2. Urges the president through UN to deploy security guards for humanitarian relief |
| 10/6/1992 | (102-391) HR 5368 | <ol style="list-style-type: none"> 1. Not less than \$25,000,000 shall be made available for Somalia for disaster relief 2. Funds obligated in this Act shall not be obligated or expended for Somalia unless through the regular notification procedures of Committee on Appropriations (Sec. 540) |

| Somalia Timeline (Event Number: 3) | | |
|------------------------------------|---|---|
| 10/8/1992 | Concerning the humanitarian crisis in Somalia (H Con Res 370) | 1. Express the willingness of the US to participate into UN Somali security guards deployment in consistent with US legal requirements |
| 11/30/1993 | National Defense Authorization Act for Fiscal Year 1994 (103-160) HR 2401 | 1. Sense of Congress: the president should consult and report with the Congress regarding the US forces deployment in Somalia (Sec. 1512) 2. Sense of Congress: the president should seek congressional approval regarding the continuance of Somali commission by 11/15/1993 (Sec. 1512) |
| 11/11/1993 | Appropriations for the Department of Defense for the fiscal year ending Sep. 30, 1994 (103-139) HR 3116 Signing statement: the president construed section 8151(b)(2)(ii) as not restricting his constitutional responsibility and authority as Commander In Chief, including his ability to place U.S. combat forces under the temporary tactical control of a foreign commander where to do otherwise would jeopardize the safety of U.S. combat forces in support of UNOSOM II. | 1. The Congress approves the combating action in Somalia only for expenses incurred through 3/31/1994; the said date could be extended by congressional authorization (Sec. 8151) 2. Future peacekeeping action should consult with the Congress fifteen days prior to the deployment or no later than forty-eight hours after the deployment; the said consultation can be waived if the president report to the Congress that the estimated cost will not exceed \$50,000,000. (Sec. 8153) 3. The president should seek supplemental appropriations for the defray of Somali cost (Sec. 8153) |
| 9/30/1994 | Appropriations for the Department of Defense for the fiscal year ending Sep. 30, 1995 (103-335) HR 4650 Signing Statement: | 1. None of the funds should be used for the continuous presence of US military personnel in Somalia (Sec. 8135) |
| 2/12/1994 | Emergency supplemental appropriations and rescissions, 1994 (103-211) HR 3759 | 1. Authorization of funds for the incremental and associated costs incurred in relation with the ongoing operations in Somalia (Sec. 302) |

Somalia Timeline (Event Number: 3)

| | | |
|------------------|--|--|
| 10/5/1994 | National Defense Authorization Act for Fiscal year 1995 (103-337) S 2182 | 1. Authorizes appropriations for incremental and associated costs regarding ongoing operations in Somalia (Sec. 1002) 2. Report on intelligence lessons learned from Somali action (Sec. 1403) |
|------------------|--|--|

APPENDIX D:

PANAMA TIMELINE (EVENT NUMBER: 4)

| Panama Timeline (Event Number: 4) | | |
|-------------------------------------|---|--|
| 2/14/1989 | 1. Urgent Assistance for Democracy in Panama Act of 1990 (101-243) HR 3952 2. President Bush issued an E.O. 12710 and Proclamation 6103 pursuant to the above law to terminate the emergency situation regarding Panama declared by E.O. 12635 and Proclamation 5779 by President Reagan | 1. Authorization of econ and military assistance (Sec. 101) 2. Inter-branch procedural control: the president shall notify the Congress 15 days before each obligations of funds applicable to Foreign Assistance Act of 1961 (Sec. 102) |
| 2/22/1989 | NSD 4: US Policy Toward May 7, 1989 Elections in Panama (classified) | |
| 5/4/1989 5/16/1989 | A resolution relating to free and fair elections in Panama (S Res 120) Concerning the May 7, 1989, Presidential election in Panama (H Con Res 122) | 1. Condemns Noriega 2. Ask the president to report and consult with Congress relating to further Panama's foreign policy |
| 7/22/1989 | US Actions in Panama (classified) | |
| 11/21/1989 | Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990 (101-162) HR 2991 | 1. Sense of Congress: Noriega has contributed to international illegal drug trafficking and should be removed from the position of power in Panama |
| 5/25/1990 | Dire Emergency Supplemental Appropriations for Disaster Assistance, Food Stamps, Unemployment Compensation Administration, and other Urgent Needs, and Transfers, and Reducing Funds Budgeted for Military Spending Act of 1990 (101-302) HR 4404 Signing statement: | 1. Econ assistance (Chapter III) 2. Inter-branch procedural control: the Secretary of Defense shall notify the Congress of all the additional and associated costs of Operation Just Cause (Sec. 211) |

| Panama Timeline (Event Number: 4) | | |
|-----------------------------------|---|---|
| 6/30/1989 | Dire emergency Supplemental Appropriations and Transfers, Urgent Supplemental, and Correcting Enrollment Errors Act of 1989 (101-45) HR 2402 | 1. Sense of the Senate: the President should not appoint a new administrator of the Panama Canal commission unless he certifies that Panama have become a democratically elected government (Sec. 405) |
| 9/1/1989 | NSD 21: US would not recognize Noriega government and support the clearly-won Endara government; current econ sanctions against Panama would be strictly enforced | |
| 11/30/1989 | National Security Directive (NSD) 32: Prohibit vessels of Panamanian registry from entering US ports | |
| 1/24/1990 | NSD 33: US should re-activate econ and other logistical assistance to Panama | |
| 1/24/1990 | NSD 34: US should initiate a \$40,000,000 for humanitarian assistance to Panama and other econ recovery plan | |
| 5/22/1990 | Supplemental Assistance for Emerging Democracies Act of 1990 (HR 4636) | <ol style="list-style-type: none"> 1. Reject to provide supplemental econ assistance to Panama (Failed to pass in the House) 2. Authorizes \$470,000,000 as supplemental appropriation for Panama econ assistance (Sec. 101) 3. Inter-branch procedural control: the president shall notify the Congress 15 days before each obligations of funds applicable to Foreign Assistance Act of 1961 (Sec. 101) |

APPENDIX E:

LEBANON HOSTAGE (WILLIAM HIGGINS) CRISIS (EVENT NUMBER: 5)

| Lebanon Hostage (William Higgins) Crisis (Event Number: 5) | | |
|--|--|---|
| 8/3/1989 | A resolution regarding American hostages in Lebanon (S Res 164) | 1. The Senate will support any retaliation against terrorists |
| 11/29/1989 | National Defense Authorization Act for Fiscal Year 1990 and 1991 (101-189) HR 2461 | 1. Sense of Congress: the president should use all available resources to identify those persons responsible for the kidnapping and retail against those terrorist in accordance with national and international legal requirements, including the use of military force (Sec. 1638) |

APPENDIX F:

BOSNIA TIMELINE (EVENT NUMBER: 6)

| Bosnia Timeline (Event Number: 6) | | |
|-----------------------------------|--|---|
| 10/30/1991 | International Cooperation Act of 1991 (HR 2508) (Failed to pass on conference report in the House) | 1. Sense of Congress: all peoples of Yugoslavia should resolve their future through democratic, peace, and negotiated ways |
| 4/18/1991 | To express Senate support for democracy and human rights in Yugoslavia and Senate opposition to the use of force against democratic republic governments in Yugoslavia (S Res 106) | 1. Senate noticed that democratic election requirement in 101-513 has not been met 2. Once there is military crackdown on Bosnia, the president should suspend econ assistance to Yugoslavia |
| 7/11/1991 | A resolution to express the Senate's support for democratization in Yugoslavia (S Res 153) | The Senate urges the president to contact with the leader of Yugoslavia's democratic republics and provide foreign assistances to those republics |
| 4/29/1992 | Regarding the aggression against Bosnia-Herzegovina and conditioning United States recognition of Serbia (S Res 290) | 1. US should hold accountable Serbia government for the occupation of Bosnia 2. US should hold its recognition of Republic of Yugoslavia |
| 5/30/1992 | E.O. 12808: Blocking "Yugoslav Government" Property and Property of the Government of Serbia and Montenegro | 1. Congress retrospectively codified in Pub. L. 103-160 (11/30/1993) |
| 6/4/1992 | Relating to the enforcement of United Nations Security Council resolutions calling for the cessation of hostilities in the former territory of Yugoslavia (S Res 306) | Calls on the president to urge UN Secretary General to enforce the Security Council resolutions seeking cessation of hostilities in the former republics of Yugoslavia |
| 6/5/1992 | E.O. 12810: Blocking Property of and Prohibiting Transactions with the Federal Republic of Yugoslavia | 1. Congress retrospectively codified in Pub. L. 103-160 (11/30/1993) |
| 10/6/1992 | Foreign Operations, Export Financing, and related Programs appropriations Act, 1993 (102-391) HR 5368 | 1. Development assistance fund of humanitarian relief for Bosnia 2. Inter-branch procedural control: The president should timely certify to the Congress regarding transfer of defense articles to Bosnia and report to the Congress every 60 days once the said transfer begins (Sec. 599D) |

| Bosnia Timeline (Event Number: 6) | | |
|-----------------------------------|--|--|
| 6/22/1992 | Dire Emergency Supplemental Appropriations Act, 1992 (102-302) HR 5132 | 1. Inter-branch procedural control: humanitarian assistance funds spent for Bosnia shall be made available only through the regular notification procedures of the Committee on Appropriations (Sec. 106) |
| 8/11/1992 | Relating to authorization of multinational action in Bosnia-Herzegovina under Article 42 of the United Nations Charter (S Res 330/H Res 554) | <ol style="list-style-type: none"> 1. The president should call for UN Security Council meeting for the authorization of all the necessary means, including use of force and demonstration of force to ensure humanitarian relief in Bosnia 2. The said meeting should also review the arms embargo on Bosnia, discussion of convene of war crime tribunal 3. No US military force should be introduced for combat except a clearly defined objective |
| 1/15/1993 | E.O. 12831: Additional Measures with Respect to the Federal Republic of Yugoslavia | 1. Congress retrospectively codified in Pub. L. 103-160 (11/30/1993) |
| 4/25/1993 | E.O. 12846: Additional Measures with Respect to the Federal Republic of Yugoslavia | 1. Congress retrospectively codified in Pub. L. 103-160 (11/30/1993) |
| 11/30/1993 | National Defense Authorization Act for Fiscal Year 1994 (103-160) HR 2401 | <ol style="list-style-type: none"> 1. Retrospective codified of the presidential sanctions against Serbia in E.O. 12808, 12810, 12831, 12846, Proclamation 6389 (Sec. 1511) 2. Prohibits assistance to Serbia; but the said prohibition can be waived after the president certifies to the Congress that emergency basic humanitarian needs are met. (Sec. 1511) |

| Bosnia Timeline (Event Number: 6) | | |
|-----------------------------------|---|---|
| 4/30/1994 | Foreign Relations Authorization Act. Fiscal Years 1994 and 1995 (103-236) HR 2333 | <ol style="list-style-type: none"> 1. Sense of Congress: the president should terminate the US embargo on Bosnia to assist Bosnia's right to self-defense under Art. 51 of the UN Charter and provide military assistance to Bosnia (Sec. 520) 2. Sense of Congress: explicitly asked the president to retract executive policy adopted on July 19, 1991 in the Federal Register (Suspension of Munitions Export Licenses to Yugoslavia) (Sec. 520) 3. The president is authorized to exempt sanctions against Yugoslavia if such assistances are to support its democratic program supported by the US (Sec. 532) |
| 9/30/1993 | Foreign Operations, Export Financing, and Related Programs appropriations Act, 1994 (103-87) HR 2295 | <ol style="list-style-type: none"> 1. Inter-branch procedural control: The president should timely certify to the Congress regarding transfer of defense articles to Bosnia and report to the Congress every 60 days once the said transfer begins (Sec. 548) 2. The president is authorized to provide up to \$25,000,000 for UN War Crimes Tribunal without regard to the ceiling limitation in Foreign assistance Act of 1961 if he determines that doing so will contribute to a just resolution of charges regarding genocide (Sec. 548) |
| 11/11/1993 | Department of Defense Appropriations Act, 1994 (103-139) HR 3116 | <ol style="list-style-type: none"> 1. Sense of Congress: None of the funds should be made available for the purposes of deploying Armed forces to implement peace-settlement in Bosnia, unless previously authorized by Congress |
| 8/12/1993 | Emergency Supplemental appropriations for Relief from the Major, Widespread Flooding in the Midwest Act of 1993(103-75) HR 2667 | <ol style="list-style-type: none"> 1. Sense of the Senate: UN should expedite the process of the prosecution of war crimes in the former Yugoslavia |

Bosnia Timeline (Event Number: 6)

| | | |
|------------------|---|--|
| 8/23/1994 | Foreign Operations, Export, Financing, and Related Programs Supplemental appropriations Act, 1994 (103-306) HR 4426 | <ol style="list-style-type: none">1. Inter-branch procedural control: The president should timely certify to the Congress regarding transfer of defense articles to Bosnia and report to the Congress every 60 days once the said transfer begins (Sec. 546)2. The president is authorized to provide up to \$25,000,000 for UN War Crimes Tribunal without regard to the ceiling limitation in Foreign assistance Act of 1961 if he determines that doing so will contribute to a just resolution of charges regarding genocide (Sec. 575)3. Inter-branch procedural control: the Secretary of State shall report to the Congress with respect to the collection of the evidence regarding genocide information and further furnish such evidence to War Crimes Tribunal (Sec. 575) |
| 9/30/1994 | Department of Defense Appropriations Act for the fiscal year ending September 30, 1995 (103-335) HR 4650 | <ol style="list-style-type: none">1. Sense of Congress: None of the funds should be made available for the purposes of deploying Armed forces to implement peace-settlement in Bosnia, unless previously authorized by Congress |

Bosnia Timeline (Event Number: 6)

| | | |
|-------------------|---|---|
| 10/5/1994 | National Defense Authorization Act for fiscal Year 1995 (103-337) S 2182/ HR 4301 Signing Statement: Construes Sec. 1404 in the right column as not applicable | 1. Inter-branch procedural control: report on reforming UN peace operations (Sec. 1401); the Secretary of Defense shall submit a military readiness assessment of US armed forces in peacekeeping operations within Bosnia 30 days following the deployment of US ground forces, including total number of forces, estimated cost, expected duration (Sec. 1402) 2. Sense of Congress: UN should lift arms embargo on Bosnia and provide logistical assistance ; 3. Substantive control: if the Bosnian Serbs do not accept contact Group proposal by 10/15/1994, then the president should formally introduce a resolution in UN Security Council to terminate the Bosnia arms embargo; if the said resolution is not accepted by Security Council, then the president shall submit a plan and consult with the congress regarding military training assistance to Bosnia government and further provide no funding for the enforcement of the Bosnia arms embargo (Sec. 1404) |
| 2/12/1994 | Emergency Supplemental Appropriations Act of 1994 (103-211) HR 3759 | 1. Funds shall only be obligated and expended to fund the incremental and associated costs of the humanitarian operations and no-fly zone enforcement relating to Bosnia |
| 10/25/1994 | E.O. 12934: Blocking Property and Additional Measures with Respect to the Bosnian Serb-Controlled Areas of the Republic of Bosnia and Herzegovina | |

Bosnia Timeline (Event Number: 6)

| | | |
|------------------|--|--|
| 8/11/1995 | Bosnia and Herzegovina Self-Defense Act of 1995 (S 21) Vetoed | <ol style="list-style-type: none">1. The president should terminate arms embargo on Bosnian government once US government receives request made by Bosnia; the said termination should only be implemented after the withdrawal of UNPROFOR (Sec. 4)2. Inter-branch procedural control: the president shall report to the Congress on the status and completion of the withdrawal of UNPROFOR (Sec. 4)3. Direct the president to introduce a resolution into Security Council to terminate the arms embargo once Bosnia request UNPROFOR to withdraw from Bosnia (Sec. 4)4. None of the provision in this act should be construed as an authorization of troop deployment in the territory in Bosnia (Sec. 4) |
| 12/1/1995 | Department of Defense Appropriations Act, 1996 (104-61) HR 2126 | <ol style="list-style-type: none">1. Sense of Congress: none of the funds available under this Act shall be obligated for any peacekeeping operation in Bosnia unless authorized by the Congress after the enactment of this Act (Sec. 8124)2. Sense of Congress: the president shall consult with the Congress before any deployment of the US forces in any international peacekeeping, peace enforcement, and humanitarian assistance operation; the said consultation shall be performed at least 15 days before the deployment, but if the president determines that the national security so requires, he may delay the consultations after the initiation of such deployment (Sec. 8115) |

Bosnia Timeline (Event Number: 6)

| | | |
|-------------------|--|--|
| <u>12/13/1995</u> | <u>To prohibit Federal funds from being used for the deployment on the ground of United States Armed Forces in the Republic of Bosnia and Herzegovina as part of any peacekeeping operation, or as part of any implementation force (HR 2770 Failed to pass)</u> | <u>1. No Federal funds shall be appropriated or otherwise available for the deployment on the ground of United States Armed Forces in the Republic of Bosnia and Herzegovina as part of any peacekeeping operation, or as part of any implementation force</u> |
| <u>12/13/1995</u> | <u>To prohibit the use of funds appropriated to the Department of Defense from being used for the deployment on the ground of United States Armed Forces in the Republic of Bosnia and Herzegovina as part of any peacekeeping operation, or as part of any implementation force, unless funds for such deployment are specifically appropriated by law (HR 2606 Failed to pass)</u> | <u>1. None of the funds appropriated or otherwise available to the Department of Defense may be obligated or expended for the deployment on the ground of United States Armed Forces in the Republic of Bosnia and Herzegovina as part of any peacekeeping operation, or as part of any implementation force, unless funds for such deployment have been specifically appropriated by a law enacted after the date of the enactment of this Act</u> |
| <u>12/13/1995</u> | <u>Expressing the opposition of the Congress to President Clinton's planned deployment of United States ground forces to Bosnia (S Con Res 35 Failed to pass)</u> | <u>1. Expressing the opposition to the presidential decision to deploy troop to Bosnia</u> |
| <u>12/13/1995</u> | <u>Expressing the sense of the House of Representatives regarding the deployment of United States Armed Forces to Bosnia (H Res 306)</u> | <u>1. Expressing the questions of and concerns over the presidential troop deployment to Bosnia</u> |
| <u>5/23/1995</u> | <u>Foreign Relations Authorization Act, Fiscal Years 1996 and 1997 (HR 1561) (Failed to override the presidential veto)</u> | <u>1. The president is authorized to enter into an international agreement to assist the self-defense of Bosnia and relating substantive requirement of such agreement (Sec. 1610) 2. Inter-branch procedural control: the president shall submit a report on the progress of the said authorization (Sec. 1610); the president shall also submit a report on the military and non-military aspects of the implementation of general framework agreement (Sec. 1611)</u> |

Bosnia Timeline (Event Number: 6)

| | | |
|------------------|---|---|
| 2/12/1996 | Foreign operations, Export Financing, and Related Programs Appropriations Act, 1996 (104-107) HR 1868 | <ol style="list-style-type: none">1. The president is authorized to transfer defense articles to Bosnia pursuant to a lifting of the UN arms embargo (Sec. 540)2. Inter-branch procedural control: The president should timely certify to the Congress regarding transfer of defense articles to Bosnia and report to the Congress every 60 days once the said transfer begins (Sec. 540)3. The president should certify to the Congress the urgent humanitarian needs in Yugoslavia or need for the negotiated settlement of the conflict in Bosnia, then the president could terminate sanctions against Serbia (Sec. 540A)4. The president is authorized to provide non-military assistance to Serbia in post-conflict period. (Sec. 540A)5. Funds appropriated under this Act in the territory of Bosnia may only be funded in the territory of the Bosnian Federation (Sec. 584) |
| 9/23/1996 | National Defense Authorization Act for fiscal Year 1997 (104-201) HR 3230 | <ol style="list-style-type: none">1. The price of the equipment transferred to Bosnian government should not exceed the lowest level transferred to any other country (Sec. 1083) |
| 10/8/1997 | Department of Defense Appropriations Act, 1998 (105-56) HR 2266 | <ol style="list-style-type: none">1. None of the funds in this Act may be made available for the deployment of forces in Bosnia after June 30, 1998, unless the president consult and transmit a certification to the congress not later than May 15, 1998 that the extension of the deployment meets with the national security interest; the president shall also submit a supplemental appropriations request accompany with that certification (Sec. 8132) |

Bosnia Timeline (Event Number: 6)

| | | |
|-------------------|---|---|
| 11/26/1997 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998 (105-118) HR 2159 | 1. Econ assistance to Bosnia; the president is authorized to withhold funds appropriated under SEED as long as he determines and certifies that Bosnia has not complied with General Framework Agreement for Peace in Bosnia |
| 11/18/1997 | Nation Defense Authorization Act for Fiscal Year 1998 (105-85) HR 1119 | 1. Sense of Congress: US ground combat forces should not participate in a follow-on force in Bosnia after June 1998, but the president also should consult with Congress regarding a NATO-led force in Bosnia after June 30, 1998. (Sec. 1201, 1202) 2. Substantive and inter-branch procedural control: No funds of DoD for fiscal year 1998 and beyond may be used for the deployment of ground combat forces after June 30, 1998, unless the president consults and certifies with and to the Congress that that extension is met with national security interest and submit a supplemental appropriation request in the same time (Sec. 1203) 3. Inter-branch procedural control: Secretary of defense should report on each activity carried out in Bosnia (Sec. 1204) 4. Inter-branch procedural control: the president should report on the political and military conditions in Bosnia (Sec. 1205) |

Bosnia Timeline (Event Number: 6)

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| 10/17/1998 | Strom Thurmond national Defense Authorization Act for Fiscal Year 1999(105-261) HR 3616 (HR 4103's debate regarding Bosnia should be included in this act) | <ol style="list-style-type: none">1. \$1,858,600,000 is authorized for Bosnia peacekeeping operations2. Inter-branch procedural control: the president may certify to the Congress that peacekeeping operation is in accordance with US national security interest and requests a supplemental appropriations for the amount exceeding the said authorized amount (Sec. 1004)3. Sense of Congress: US ground combat forces should not remain in Bosnia indefinitely, and the Congress urges the president also should consult with Congress regarding a NATO-led force in Bosnia after June 30, 1998. (Sec. 1201, 1202)4. Inter-branch procedural control: the president shall report to the Congress on the continuing operation information in Bosnia semiannually; Secretary of Defense should also reports on the effect of operations in Bosnia on US military capability to conduct two simultaneous major theater wars (Sec. 1203, 1204)5. Inter-branch procedural control: the Secretary of Defense shall report to Congress on the major contingency operations and ongoing operations; the request of a contingency appropriations should also be accompanied with a report on the objectives of the operation made by the Secretary of Defense (Sec. 1211, 1212)6. Inter-branch procedural control: the Secretary of Defense shall submit a report on the lesson learned from NATO-led stabilization force in Bosnia |
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Bosnia Timeline (Event Number: 6)

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| 10/5/1999 | National Defense Authorization Act for Fiscal Year 2000 (106-65) S 1059/ HR 1401 | <ol style="list-style-type: none">1. The president may not obligate more than 1,824,400,000 incremental costs for Bosnia peacekeeping operations (Sec. 1006)2. The said limitation can be waived by the president if he certifies to the Congress that it is in accordance with national security interest and will not adversely affect the readiness of military forces and also submit a supplemental appropriation request accompanied the said certification (Sec. 1006)3. Sense of Congress: the president shall review the national security strategy regarding those noncritical overseas missions involving US forces (Sec. 1235)4. Inter-branch procedural control: the president shall submit a report of the above review by March 1, 2000. (Sec. 1235) |
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Bosnia Timeline (Event Number: 6)

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| 10/30/2000 | Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (106-398) HR 4205 | <ol style="list-style-type: none">1. The president may not obligate more than 1,387,800,000 incremental costs for Bosnia peacekeeping operations; the said limitation can be waived by the president if he certifies to the Congress that it is in accordance with national security interest and will not adversely affect the readiness of military forces and also submit a supplemental appropriation request accompanied the said certification (Sec. 1005)2. Inter-branch procedural control: the president should report to the Congress on the effect of continued operations in the Balkans region on readiness but such obligation is not required after US terminates its military operations in the region (Sec. 1005)3. The president shall develop a comprehensive political-military strategy relating to the benchmarks of Bosnia peacekeeping operation (Sec. 1212) |
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Bosnia Timeline (Event Number: 6)

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| 12/28/2001 | National Defense Authorization Act for Fiscal Year 2002 (107-107) S 1438 | <ol style="list-style-type: none">1. The president may not obligate more than 1,315,600,000 incremental costs for Bosnia peacekeeping operations; the said limitation can be waived by the president if he certifies to the Congress that it is in accordance with national security interest and will not adversely affect the readiness of military forces and also submit a supplemental appropriation request accompanied the said certification (Sec. 1005)2. Inter-branch procedural control: the president should report to the Congress on the effect of continued operations in the Balkans region on readiness but such obligation is not required after US terminates its military operations in the region (Sec. 1005) |
| 1/10/2002 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2002 (107-115) HR 2506 | <ol style="list-style-type: none">1. Econ assistance to Bosnia2. The president is authorized to withhold the funding for the said econ assistance if he determines that Bosnia does not comply with General Framework Agreement for Peace in Bosnia |
| 5/28/2003 | E.O. 13304: Termination of Emergencies with Respect to Yugoslavia and Modification of E.O. 13219 of June 26, 2001 | |
| 12/8/2004 | Consolidated Appropriations Act, 2005 (108-447) HR 4818 | <ol style="list-style-type: none">1. Econ assistance to Bosnia2. The president is authorized to withhold the funding for the said econ assistance if he determines that Bosnia does not comply with General Framework Agreement for Peace in Bosnia |

APPENDIX G:

HAITI TIMELINE (EVENT NUMBER: 7)

| Haiti Timeline (Event Number: 7) | | |
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| 11/19/1989 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990 (101-167) HR 3743 (It previously was HR 2939 but was vetoed not relevant to the Haitian provisions in the right column.) | <ol style="list-style-type: none"> 1. Military assistance material for Haiti shall be limited to non-lethal items; None of the funds shall be obligated for Haiti unless as provided through the regular notification procedures of the Committee on Appropriation 2. Assistance to Haiti should be suspended unless Haiti embarks on the transition to democratic power (Sec. 560) 3. The said limitation does not include humanitarian and democratic assistance (sec. 560) |
| 5/25/1990 | Dire Emergency Supplemental Appropriations for Disaster Assistance, Food Stamps, Unemployment Compensation Administration, and other Urgent Needs, and Transfers, and Reducing Funds Budgeted for Military Spending Act of 1990 (1041-302) HR 4404 | <ol style="list-style-type: none"> 1. Not less than \$10,000,000 made available for econ and electoral assistance for Haiti (two sections) |
| 11/5/1990 | Foreign Operations, Export Financing, and Related programs Appropriations Act, 1991 (101-513) HR 5114 | <ol style="list-style-type: none"> 1. Military assistance material for Haiti shall be limited to non-lethal items; None of the funds shall be obligated for Haiti unless as provided through the regular notification procedures of the Committee on Appropriation (Sec. 541) (two sections) |
| 10/2/1991 | A resolution relative to Haiti (S Res 186/ H Res 235) | <ol style="list-style-type: none"> 1. All US assistance to Haiti shall remain suspended until restore of a democratic government |
| 10/4/1991 | E.O. 12775: Prohibiting Certain Transactions with Respect to Haiti | No congressional retrospective recognition (authorized by IEEPA and NEA) |
| 10/28/1991 | E.O. 12779: Prohibiting Certain Transactions with Respect to Haiti | No congressional retrospective recognition (authorized by IEEPA and NEA) |

| Haiti Timeline (Event Number: 7) | | |
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| 10/6/1992 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1993 (102-391) HR 5368 | 1. None of the funds shall be obligated for Haiti unless as provided through the regular notification procedures of the Committee on Appropriation (Sec. 540) (two sections) |
| 6/3/1993 | Proclamation 6569: Suspension of Entry as Immigrants and non-immigrants of persons who formulate or implement policies that are impeding the negotiations seeking the return to constitutional rule in Haiti | |
| 6/30/1993 | E.O. 12853: Blocking Government of Haiti Property and Prohibiting Transactions with Haiti | IEEPA, NEA, UN Participations Act of 1945 |
| 9/30/1993 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1994 (103-87) HR 2295 | 1. None of the funds shall be obligated for Haiti unless as provided through the regular notification procedures of the Committee on Appropriation (Sec. 520) 2. None of the funds may be obligated or expended for military-related assistance to Haiti unless such assistance program is an integral part of UN program or for strengthening the civilian control over military (Sec. 563) |
| 10/18/1993 | E.O. 12872: Blocking Property of Persons Obstructing Democratization in Haiti | |

Haiti Timeline (Event Number: 7)

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| 11/11/1993 | Department of Defense Appropriations Act, 1994 (103-139) HR 3116 | <ol style="list-style-type: none">1. Sense of Congress: US has interest in preventing uncontrolled emigration from Haiti and thus should remain engaged in Haiti (Sec. 8147)2. Sense of Congress: but funds appropriated by this Act should not be obligated for US military operations in Haiti unless authorized in advance by the Congress; for protection of US citizen, property, or any other national security interest, but in no later than 48 hours shall the president report to the Congress (Sec. 8147)3. Sense of Congress: if the said military deployment is reported to the Congress in advance, then the above limitation need not be applied (Sec. 8147) |
| 5/7/1994 | E.O. 12914: Prohibiting certain transactions with respect to Haiti | |
| 5/7/1994 | Proclamation 6685: Suspension of entry of aliens whose entry is barred under UN Security Council Resolution 917 or who formulate, implement, or benefit from policies that are impeding the negotiations seeking the return to constitutional rule in Haiti | |
| 5/21/1994 | E.O. 12917: Prohibiting certain transactions with respect to Haiti | |
| 6/10/1994 | E.O. 12920: Prohibiting certain transactions with respect to Haiti | |
| 6/21/1994 | E.O. 12922: Blocking property of certain Haitian nationals | |

Haiti Timeline (Event Number: 7)

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| 8/23/1994 | Foreign Operations, Export Financing, and Related Programs Supplemental Appropriations Act , 1994 (103-306) HR 4426 | <ol style="list-style-type: none">1. None of the funds shall be obligated for Haiti unless as provided through the regular notification procedures of the Committee on Appropriation (Sec. 520)2. Sense of Congress: US has interest in preventing uncontrolled emigration from Haiti and thus should remain engaged in Haiti3. Sense of Congress: but funds appropriated by this Act should not be obligated for US military operations in Haiti unless authorized in advance by the Congress; for protection of US citizen, property, or any other national security interest, but in no later than 48 hours shall the president report to the Congress4. Sense of Congress: if the said military deployment is reported to the Congress in advance, then the above limitation need not be applied <p>(The above 2-4 was dropped at the conference stage)</p> |
| 10/5/1994 | National Defense Authorization Act for Fiscal year 1995 (103-337) S 2182/ HR 4301 | <ol style="list-style-type: none">1. Authorization of incremental and associated costs related to US operations in Haiti (Sec. 1002)2. In light of several humanitarian relief assistances of US forces, the Secretary of Defense should submit a review and Congress a report of the effect of those humanitarian operations on the force structure required to fight and win two major regional contingencies; after the submission of such report, the president should also submit a report detailing the steps the presidents intends to meet the Secretary's report (Sec. 1069) |
| 2/12/1994 | Emergency Supplemental Appropriations Act of 1994 (103-211) HR 3759 | <ol style="list-style-type: none">1. Funds appropriated in this Act shall only be obligated and expended for incremental and associated costs relating to the maritime interception operations relating to Haiti (Sec. 301) |

| Haiti Timeline (Event Number: 7) | | |
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| 10/14/1994 | E.O. 12932: Termination of Emergency with respect to Haiti | |
| 10/25/1994 | United States Policy toward Haiti (103-423) SJ Res 229/ HJ Res 416 Signing Statement: interprets Sec. 2's language as seeking only information about the rules of engagement that I may supply consistent with my constitutional responsibilities, and not information of a sensitive operational nature. | <ol style="list-style-type: none"> 1. Sense of Congress: the president should have sought congressional approval before deploying US forces to Haiti (Sec. 1) 2. The president shall submit a statement of US's policy objectives in Haiti (Sec. 2) 3. The president shall monthly report to the Congress on the situations in Haiti (Sec. 3) 4. the Secretary of State shall report to the Congress on human rights situation in Haiti (Sec. 4) 5. The Secretary of State shall report on all agreements US enters into with Haiti (Sec. 5) 6. Nothing in this resolution should be construed as approval and disapproval of the US participation in UN mission in Haiti (Sec. 6) |
| 9/28/1994 | Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1995 (103-327) HR 4624 | 1. Legal effects o UN Security Council Resolution does not constitute authorization of US troop deployment to Haiti (Dropped this section in the Conference stage) |
| 4/10/1995 | Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995 (104-6) HR 889 | 1. Within 60 days after the enactment of this Act, the president shall report to the Congress the estimated incremental costs of US deployment in Haiti and its associated military activities (Sec. 106) |
| 5/23/1995 | Foreign Relations Authorization Act, Fiscal Years 1996 and 1997 (HR 1561) Veto override failed | 1. Sense of Congress: the president should cease obligating funds in peacekeeping operations including Haiti (Sec. 218: this section was dropped in the Conference stage) |

Haiti Timeline (Event Number: 7)

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| 1/3/1996 | National Defense Authorization Act for Fiscal Year 1996 (HR 1530) Vetoed | 1. The president should closely consult with the Congress regarding UN peacekeeping operations and before any vote regarding Security Council Resolution with respect to that peacekeeping operation (Sec. 1301) |
| 2/12/1996 | Foreign Operation, Export Financing, and Related Programs Appropriations Act, 1996 (104-107) HR 1868 | 1. None of the funds shall be obligated for Haiti unless as provided through the regular notification procedures of the Committee on Appropriation (Sec. 520) 2. None of the funds shall be made available for Haitian if it is not controlled by a democratic regime (Sec. 564); 3. None of the funds shall be appropriated for Haiti unless the president report to Congress and certifies that Haitian government is investigating extrajudicial killing (sec. 583); the said report can be waived if it is for the timely withdrawal of US forces from Haiti (Sec. 583) 4. The above two limitations shall not be construed as a limitation on humanitarian relief (Sec. 583) |

Haiti Timeline (Event Number: 7)

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| 11/26/1997 | Foreign Operations, Export Financing, and Related Programs Appropriations ct, 1998 (105-118) HR 2159 | <ol style="list-style-type: none">1. None of the funds shall be obligated for Haiti unless as provided through the regular notification procedures of the Committee on Appropriation (Sec. 520)2. Several limitations on assistance for Haiti can be waived if the president report to the Congress that Haitian government cooperates with US in the investigation of political and extrajudicial killings (Sec. 562)3. The said limitation can also be waive if it for humanitarian, electoral, counter-narcotics, or law-enforcement assistance (Sec. 562)4. The said limitation can also be waived if the president certifies to the Congress that the waiver is in the national interest of US (sec. 562) |
| 10/5/1999 | (106-65) S 1059/ HR 1401 Signing Statement: section 1232, which contains a funding limitation with respect to continuous deployment of United States Armed Forces in Haiti pursuant to Operation Uphold Democracy. I have decided to terminate the continuous deployment of forces in Haiti, and I intend to keep the Congress informed with respect to any future deployments to Haiti; however, I will interpret this provision consistent with my constitutional responsibilities as President and Commander in Chief | <ol style="list-style-type: none">1. No funds available to the DoD may be expended after May 31, 2000 for the continuous deployment in Haiti for Operation Uphold Democracy (Sec. 1232)2. If there is still any troop deployment in Haiti after the said date, the president shall submit a report to the Congress (Sec. 1232) |

APPENDIX H:

KOREA TIMELINE (EVENT NUMBER: 8)

| Korea Timeline (Event Number: 8) | | |
|----------------------------------|---|---|
| 11/29/1989 | National Defense Authorization Act for Fiscal Years 1990 and 1991 (101-189) HR 2461 | <ol style="list-style-type: none">1. Sense of Congress: US and Korea should consult on the reductions of US military forces in Korea and report to the appropriate congressional committee on the said issue (Sec. 915)2. The president shall also report to the Congress on US security plan in East Asia (Sec. 915) |
| 11/21/1989 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990 (101-167) HR 3743 (This Act previously was HR 2939 but vetoed by the president) | <ol style="list-style-type: none">1. No stockpile shall be located outside US military base except Korea, NATO, or other non-NATO major ally. (Sec. 587) |
| 11/21/1989 | Department of Defense Appropriations Act, 1990 (101-165) HR 3072 | <ol style="list-style-type: none">1. Sense of Congress: as long as North Korea does not abandon its intention to reunite, the threat to Korea will remain clear and present (Sec. 9110)2. Sense of Congress: however, the president shall reassess the US military structure in Korea and submit a report on such assessment (Sec. 9110) |
| 11/5/1990 | Military Construction Authorization Act for Fiscal Year 1991 (101-510) HR 4739 | <ol style="list-style-type: none">1. Authorization of appropriation for US military base in Korea (one section) |
| 10/31/1991 | International Cooperation Act of 1991 (HR 2508) Vetoed | <ol style="list-style-type: none">1. No stockpile shall be located outside US military base except Korea, NATO, or other non-NATO major ally. (Sec. 207)2. Designates Korea as non-NATO major ally (Sec. 223) |

Korea Timeline (Event Number: 8)

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|-------------------|---|--|
| 12/5/1991 | National Defense Authorization Act for Fiscal Years 1992 and 1993 (102-190) HR 2100 | <ol style="list-style-type: none">1. Sense of Congress: the president shall report to the Congress on the basing and military structure of US forces in Asia (Sec. 1043)2. The president shall also submit a report to the Congress on the econ and political situations in Korea after the gradual reduction of US military troops in Korea (Sec. 1044)3. The commander of the special operations commander of any other unified or specified combatant command may authorize payment for training in conjunction with a friendly developing country; the Secretary of Defense shall submit to congress a report regarding the said military training (Sec. 1052) |
| 10/23/1992 | National Defense Authorization Act for Fiscal Year 1993 (102-484) HR 5006 | <ol style="list-style-type: none">1. No appropriation may be used for permanent duty ashore in nations outside the US except Korea, NATO, and non-NATO major ally if there is armed attack on those alliance countries. (Sec. 1302) |
| 11/30/1993 | National Defense Authorization Act for Fiscal Year 1994 (103-160) HR 2401 | <ol style="list-style-type: none">1. Sense of Congress: In light of the ballistic missiles threat of North Korea's, the Secretary of Defense shall submit a report to Congress on the possible modification of ABM Treaty to install anti-ballistic missile devices (Sec. 234)2. Urges the president not to provide econ assistance to North Korea unless it fully comply with the inspection of IAEA and does not have or seek a nuclear weapons capability (Sec. 1613) |

Korea Timeline (Event Number: 8)

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|-------------------|---|---|
| 4/30/1994 | Foreign relations Authorizations Act, Fiscal Year 1994 and 1995 (103-236) HR 2333 | <ol style="list-style-type: none">1. The president is authorized to transfer certain obsolete or surplus defense articles to Korea (Sec. 509)2. Sense of Congress: US has national security interest in curtail the WMD and nuclear weapons in North Korea; as such, the president should consult with allies regarding the military posture of the US to deter a North Korean attack or to defeat such an attack should it occur. To toward these ends, the US and South Korea should take all steps necessary to defend themselves, including joint military exercises. (Sec. 529) |
| 10/5/1994 | National Defense Authorization Act for fiscal Year 1995 (103-337) S 2182 | <ol style="list-style-type: none">1. The president shall submit a report to Congress on the readiness of the military forces of Korea to defeat an attack by North Korea (Sec. 1322)2. Sense of Congress: the Secretary of Defense shall submit a report on the force structure based on the hypothesis of winning a war with North Korea (sec. 1323)3. Sense of Congress: in light of the nuclear and WMD threat of North Korea, the US Forces should continue the Team Spirit (jointly military exercise) with Korea and seeking of international sanctions against North Korea (Sec. 1324) |
| 11/26/1997 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998 (105-118) HR 2159 | <ol style="list-style-type: none">1. None of the funds appropriated pursuant to this Act shall be obligated or expended to directly and indirectly finance any assistance to North Korea (sec. 507; 523)2. Not more than \$40,000,000 defense articles may be made available in the Korea (Sec. 575) |

| Korea Timeline (Event Number: 8) | | |
|----------------------------------|---|---|
| 10/5/1999 | National Defense Authorization Act for Fiscal Year 2000 (106-65) S 1059 | <ol style="list-style-type: none"> 1. Secretary of Defense shall submit a report on the security situation on the Korean peninsula. (Sec. 1233) 2. Sense of Congress: Recognizing Korea as a region of potential cross-border, large-scale theater in the future, the president shall submit a report on possible disengagement of US forces from several missions to execute US national security strategy in terms of the said scenario. (Sec, 1235) |
| 9/29/1994 | Riegle-Neal Interstates Banking and Branching Efficiency Act of 1994(103-328) HR 3841 | <ol style="list-style-type: none"> 1. Sense of Congress: the president should work to achieve an enforceable agreement with allies regarding multilateral controls to thwart efforts of North Korea to acquire arms and WMD (Sec. 202) |
| 1/3/1996 | Ballistic Missile Defense Act of 1995 (104-106) S 1124 It previously was HR 1530, but HR 1530 was vetoed.... | <ol style="list-style-type: none"> 1. In light of North Korea's continuous missile test, it is the policy of US to deploy TMD and NMD systems and the Secretary of Defense shall report on the progress the said architectures. (Sec. 234; 235) 2. To install the above systems, the Congress urges the president to negotiate with Russia to amend ABM Treaty. (Sec. 236) 3. Funds under this Act shall not be obligated to implement an international agreement to ban test on the said missile defense system. (Sec. 237) |
| 4/10/1995 | Emergency Supplemental Appropriations and Rescissions for the DoD to Preserve and enhance Military Readiness Act of 1995 (104-6) HR 889 | <ol style="list-style-type: none"> 1. None of the funds may be obligated or expended for assistance to North Korea (Sec. 109) |
| 12/1/1995 | Department of Defense Appropriations Act, 1996 (104-61) HR 2126 | <ol style="list-style-type: none"> 1. None of the funds may be obligated or expended for assistance to North Korea (Sec. 8088) |

| Korea Timeline (Event Number: 8) | | |
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| 7/21/1996 | Defense and Security Assistance improvement Act (An act to amend the Foreign Assistance Act of 1961) (104-164) HR 3121 | 1. Korea shall be deemed as US major non-NATO ally (Sec. 147) |
| 9/30/1996 | Omnibus Consolidated Appropriations Act, 1997 (104-208) HR 3610 | 1. None of the funds may be obligated or expended for assistance to North Korea (Sec. 8065) |
| 11/29/1999 | Consolidated Appropriations Act (106-113) HR 3194 (It previously was HR 2415) | 1. No cooperation with North Korea with respect to nuclear infrastructure. (Sec. 706) 2. Not more than \$320,000,000 may be made available for stockpiles in Korea (Sec. 1301) 3. The president is authorized to transfer obsolete and surplus defense articles to Korea (Sec. 1302) |
| 10/6/2000 | Security Assistance Act (an Act to amend Foreign Assistance Act of 1961) (106-280) HR 4919 | 1. No more than \$50,000,000- may be made available for stockpiles in Korea. (Sec. 111) |
| 10/18/1999 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2000 (HR 2606) Vetoed | 1. None of the funds appropriated pursuant to this Act shall be obligated or expended to directly and indirectly finance any assistance to North Korea (Sec. 507; 523) 2. The president should certify and report to the Congress before obligating and expending funds for KEDO (Sec. 576) 3. Not more than \$40,000,000 may be made available for the stockpiles in Korea (Sec. 584) |
| 10/6/1992 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1993 (102-391) HR 5368 | 1. None of the funds appropriated pursuant to this Act shall be obligated or expended to indirectly finance any assistance to North Korea (Sec. 543) 2. Up to \$189,000,000 may be available for stockpiles in the Republic of Korea. (Sec. 569) |

| Korea Timeline (Event Number: 8) | | |
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| 8/23/1994 | Foreign Operations, Export Financing, and Related Programs Supplemental Appropriations Act, 1994 (103-306) HR 4426 | <ol style="list-style-type: none"> 1. None of the funds appropriated pursuant to this Act shall be obligated or expended to directly and indirectly finance any assistance to North Korea (Sec. 507; 523) 2. Up to \$40,000,000 may be made available for stockpiles in the Republic of Korea (Sec. 535) |
| 9/30/1993 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1994 (103-87) HR 2295 | <ol style="list-style-type: none"> 1. None of the funds appropriated pursuant to this Act shall be obligated or expended to indirectly finance any assistance to North Korea (Sec. 523) 2. Up to \$72,000,000 may be made available for stockpiles in the Republic of Korea. (Sec. 535) |
| 4/30/1996 | Foreign Relations Authorization Act, Fiscal Years 1996 and 1997 (HR 1561) Failed to override the veto | 1. Sense of Congress: no assistance North Korea unless such assistance is in accordance with the purpose of KEDO and the president also notify and report to the Congress that such assistance is in the vital to the national security interest of the US (Sec. 1607) |
| 2/12/1996 | (104-107) HR 1868 | <ol style="list-style-type: none"> 1. No funds may be made available under this Act to KEDO unless the president determines and certifies to the Congress (one section) 2. None of the funds appropriated pursuant to this Act shall be obligated or expended to directly and indirectly finance any assistance to North Korea (Sec. 507; 523) 3. Not more than \$40,000,000 may be made available for stockpiles in the Republic of Korea (Sec. 531B) |
| 9/23/1996 | National Defense Authorization Act for Fiscal Year 1997 (104-201) HR 3230 | 1. Any NMD deployed by the US should be able to defeat Taepo Dong II missile (Sec. 246) |
| 10/8/1997 | Department of Defense Appropriations Act, 1998 (105-56) HR 2266 | 1. None of the funds made available under this Act may be obligated or expended for assistance to North Korea (Sec. 8066) |

Korea Timeline (Event Number: 8)

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|-------------------|--|---|
| 10/17/1998 | Department of Defense Appropriations Act, 1999 (105-262) HR 4103 | 1. None of the funds made available under this Act may be obligated or expended for assistance to North Korea (Sec. 8060) |
| 10/25/1999 | Department of Defense Appropriations Act, 2000 (106-79) HR 2561 | 1. None of the funds made available under this Act may be obligated or expended for assistance to North Korea (Sec. 8060) |
| 8/9/2000 | Department of Defense Appropriations Act, 2001 (106-259) HR 4576 | 1. None of the funds made available under this Act may be obligated or expended for assistance to North Korea (Sec. 8057) |

APPENDIX I:

KOSOVO TIMELINE (EVENT NUMBER: 9)

| Kosovo Timeline (Event Number: 9) | | |
|-----------------------------------|--|--|
| 10/6/1992 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1993 (102-391) HR 5368 | 1. Not less than \$5,000,000 shall be available only for Kosovo's development assistance fund (Title II's one section) |
| 11/5/1990 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1991 (101-513) HR 5114 | 1. None of the funds appropriated under this Act shall be obligated or expended for the assistance to Yugoslavia unless the Secretary of State certifies that Yugoslavia complies with Helsinki Accords. (Sec. 599A) |
| 9/30/1993 | Supplemental Appropriations for the New Independent States of the Former Soviet Union Act, 1993 (103-87) HR 2295 | 1. Humanitarian assistance (Sec. 549) |
| 8/23/1994 | Foreign Operations, Export Financing, and Related Programs Supplemental Appropriations Act, 1994 (103-306) HR 4426 | 1. Humanitarian assistance (Sec. 547) |
| 2/12/1996 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996 (104-107) HR 1868 | 1. The president should not cease sanction against Serbia unless he certifies to the Congress that there is substantial improvement of human rights situation in Kosovo (Sec. 540A) 2. Humanitarian assistance (Sec. 541) |

Kosovo Timeline (Event Number: 9)

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|-------------------|--|--|
| 12/1/1995 | Department of Defense Appropriations Act, 1996 (104-61) HR 2126 | <ol style="list-style-type: none">1. Sense of Congress: a deployment or participation of US forces in any peacekeeping, enforcement, or humanitarian assistance, the president must engage in consultations with the Congress at least 15 days before such deployment. However, in the case of emergency, the president may delay such consultations no later than 48 hours after such deployment. (Sec. 8115)2. The president should seek supplemental appropriations to meet the incremental costs no later than 90 after the initiation of the deployment. (sec. 8115) |
| 4/30/1996 | HR 1561 Failed to override the veto | <ol style="list-style-type: none">1. The president shall report to the Congress on the diplomatic efforts to terminate human rights violation in Kosovo (Sec. 1611) |
| 11/26/1997 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998 (105-118) HR 2159 | <ol style="list-style-type: none">1. Humanitarian assistance to Kosovo (Sec. 539) |
| 6/9/1998 | E.O. 13088: Blocking property of the Government of the Federal Republic of Yugoslavia, Serbia, and Montenegro, and prohibiting new investment in the Republic of Serbia in response to the situation in Kosovo | |

Kosovo Timeline (Event Number: 9)

| | | |
|-------------------|--|---|
| 10/17/1998 | Department of Defense Appropriation Act, 1999 (105-262) HR 4103 Signing Statement: Consistent with the plain language of section 8115 and the intent of the Congress, I shall interpret it to apply only to the deployment of additional ground forces to one or more of the three countries. Further, I shall interpret and implement section 8115 consistent with my constitutional authority to conduct the foreign relations of the United States and as Commander in Chief and Chief Executive, and not in a manner that would encumber my constitutional authority. | 1. None of the funds appropriated under this Act may be obligated or expended for any additional deployment of forces to Yugoslavia unless the president consult and report to the Congress; but nothing in this section shall be deemed as restriction on the presidential authority to protect US citizens. (Sec. 8115) |
| 4/27/1999 | E.O. 13120: Ordering the selected reserve and certain individual ready reserve members of the armed forces to active duty | |
| 4/30/1999 | Blocking property of the Government of the Federal Republic of Yugoslavia, Serbia, and Montenegro, and prohibiting trade transactions involving the Federal Republic of Yugoslavia in response to the situation in Kosovo | |

Kosovo Timeline (Event Number: 9)

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|-------------------|---|--|
| 10/5/1999 | National Defense Authorization Act for Fiscal Year 2000 (106-65) S 1059 (It previously was HR 1401) | <ol style="list-style-type: none">1. The president shall submit a supplemental appropriations request for peacekeeping or combats operation in Yugoslavia if he determines such action is in the interest of US national security (Sec. 1004)2. The Secretary of Defense shall submit a report to the Congress on the conduct of military operation regarding "Operation Allied Force" (bombing operation to resolve Kosovo conflict) ; the said report shall also consult with the Chairman of the Joint Chiefs of Staff and the Commander in Chief, US European Command (Sec. 1211)3. Sense of Congress: US should provide sufficient resources for an expeditious and thorough investigation of the alleged war crimes committed in Kosovo (Sec. 1212) |
| 12/28/2001 | National Defense Authorization Act for Fiscal Year 2002 (107-107) S 1438 | <ol style="list-style-type: none">1. No more than \$1,525,600,000 may be obligated for incremental costs for Kosovo peacekeeping operations (Sec. 1005)2. The president may waive the said limitation if he certifies that the waiver is necessary in the national security interest and report to the Congress on the reason of additional funding; a supplemental appropriations request shall also accompany with the said report (Sec. 1005) |
| 1/17/2001 | E.O. 13192: Lifting and modifying measure with respect to the Federal Republic of Yugoslavia | |

Kosovo Timeline (Event Number: 9)

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| 7/10/2001 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2002 (107-115) HR 2506 | <ol style="list-style-type: none">1. Funds may be made available for assistance for Serbia if the president determines and certifies that Yugoslavia is cooperating with the ICTY and taking steps consistent with the Dayton Accords (Sec. 584)2. Funds made available under SEEDs should not exceed 15 percent of the total resources for calendar year 2002 for assistance for Kosovo; none of the said funds shall be made available for large scale physical infrastructure reconstruction (one section) |
| 7/13/2000 | Military Construction Appropriations Act, 2001 (106-246) HR 4425 | <ol style="list-style-type: none">1. Assistance to Kosovo for law enforcement (Sec. 502)2. This section was stricken after an amendment debate: None of the funds shall be available for ground combats troops after July 1, 2001 if the Congress does not enact a joint resolution to authorize to do so. (Sec. 2410) |
| 10/18/1999 | (HR 2606) Vetoed | <ol style="list-style-type: none">1. The sanctions against Yugoslavia shall remain unless the president certifies to the Congress Serbia is fully cooperating with ICTY regarding the investigation of human right violation in Kosovo (Sec. 599)2. Funds available under SEEDs shall be made for the assistance to Kosovo (one section) |

APPENDIX J:

AFGHANISTAN TIMELINE (EVENT NUMBER: 10)

| Afghanistan Timeline (Event Number: 10) | | |
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| 9/14/2001 | E.O. 13223 | 1. Ordering the ready reserve of the armed forces to active duty and delegating certain authority to the Secretary of Defense |
| 9/14/2001 | Proclamation 7463 | 1. Declaration of national emergency by reason of certain terrorist attacks |
| 9/18/2001 | Authorization for Use of Military Force Against Terrorists (107-40) | |
| 9/23/2001 | E.O. 13224 | 1. Blocking property and prohibiting transactions with persons who commit threaten to commit, or support terrorism |
| 10/25/2001 | NSPD 9 | Defeating the Terrorist Threat to the United States |
| 12/12/2001 | E.O. 13239 | 1. Designation of Afghanistan and the airspace above as a combat zone |
| 1/10/2002 | Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the US Act, 2002 (107-117) HR 3338 | 1. Humanitarian and reconstruction assistance for Afghanistan (one section under Chapter 6) |
| 7/2/2002 | E.O. 13268 | 1. Termination of Emergency with respect to the Taliban |

Afghanistan Timeline (Event Number: 10)

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| 12/4/2002 | Afghanistan Freedom Support Act of 2002 (107-327) S 2712 | <ol style="list-style-type: none">1. Econ, humanitarian, and military assistance for Afghanistan (Sec. 103;108; 202; 204;206)2. The president may provide assistance under this Act to any eligible foreign country or IGO if he determines that such assistance is in the national security interest and notifies to the Congress at least 15 days prior to the assistance (Sec. 205); the president shall also submit a report to the Congress every 6 months on immediate and long-term security needs of Afghanistan (Sec. 206)3. Sunset: military assistance to Afghanistan shall expire after 9/30/2006 (Sec. 208) |
| 12/2/2002 | Bob Stump National Defense Authorization Act for Fiscal Year 2003 (107-314) S 2514 Signing Statement: Section 1043 establishes new requirements for the executive branch to furnish sensitive information to the Congress on various subjects. The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. | <ol style="list-style-type: none">1. Secretary of Defense shall submit to the Congress an annual report on the conduct of Operation Enduring Freedom; each report shall be prepared in consultation with the Chairman of the Joint Chiefs of Staffs, commander in Chief of Us Central command (Sec. 1043) |
| 8/2/2002 | 2002 Supplemental Appropriations Act for further Recovery from and Response to terrorist Attacks on the US (107-206) HR 4775 | <ol style="list-style-type: none">1. Military logistical assistance for Afghanistan (two sections)2. Authorization of additional amount for peacekeeping relating to combating international terrorism in Afghanistan (one section)3. Report on Afghanistan security and humanitarian assistance (Sec. 603) |

Afghanistan Timeline (Event Number: 10)

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| 2/20/2003 | Consolidated Appropriations Resolutions, 2003 (108-007) HJ Res 2 | <ol style="list-style-type: none">1. Humanitarian assistance for Afghanistan (three sections)2. None of the funds appropriated under this Act shall be used for Afghanistan Freedom Support Act of 2002 unless the DoD notifies to the Congress (Sec. 112) |
| 11/6/2003 | Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan (108-106) HR 3289 | <ol style="list-style-type: none">1. Authorization for additional amount for operation and military assistance for Afghanistan (one section & Sec. 1107)2. Secretary of Defense shall notify the Congress not less than 15 days before providing military assistance to Afghanistan (Sec. 1107)3. Humanitarian assistance to Afghanistan; Secretary of Defense shall provide quarterly reports to the Congress regarding the source of funds of the said assistance (Sec. 1110)4. Secretary of Defense shall submit to Congress a report on the military operations of the forces and reconstruction activities of the DoD in Afghanistan (Sec. 1120)5. Military construction project's funds may be obligated for the needs of Global War on Terrorism; the Secretary of Defense shall submit a notice the Congress regarding the obligation of funds within fifteen days after the first said obligation; the Secretary of Defense shall also submit a quarterly report and certification of the said obligation and its relating construction (Sec. 1301)6. Econ assistance for Iraq |

Afghanistan Timeline (Event Number: 10)

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| 4/16/2003 | Emergency Wartime Supplemental Appropriations Act, 2003 (108-11) HR 1559 | <ol style="list-style-type: none">1. Authorization of additional expense for ongoing military operations in support of the global war on terrorism; the Secretary of Defense is authorized to transfer the appropriation in the proviso of his Section for the military personnel funds if the Secretary of Defense notify to the Congress not fewer than 5 days prior to such transfer and submit a quarterly report on the summary of the said transfer (one section)2. Authorization of the reimbursement for drawdown support under the Afghanistan Freedom Support Act of 2002 after the Secretary of Defense notify the Congress (Sec. 1307) |
| 1/23/2004 | Consolidated Appropriations Act, 2004 (108-199) HR 2673 | <ol style="list-style-type: none">1. Econ and humanitarian assistance to Afghanistan (Sec. 523) |
| 11/24/2003 | National Defense Authorization Act for Fiscal Year 2004 (108-136) HR 1588 | <ol style="list-style-type: none">1. Authorization of supplemental appropriations for fiscal year 2004 for the Reconstruction of Afghanistan (Sec. 1004) |
| 9/30/2003 | Department of Defense Appropriations Act, 2004 (108-87) HR 2658 | <ol style="list-style-type: none">1. Sense of the Senate: any request for funds for an ongoing overseas military operation, including Afghanistan, should be included in the annual budget of the president (Sec. 8139) |

Afghanistan Timeline (Event Number: 10)

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| 12/17/2004 | 9/11 Commission Implementation Act of 2004 (108-458) S 2845 | 1. The president shall identify foreign countries that are being used terrorist sanctuaries and implement necessary tools under IEEPA to eliminate such sanctuaries and report to the Congress on the said progress (Sec. 7102) 2. Assistance for Afghanistan and its relating report requirements: assistance plan regarding the promotion of econ, political, and social development; 5-year strategy (shall in consultation with US Agency for International Development); expansion of international peacekeeping in Afghanistan (Sec. 7104) |
| | <p>Signing Statement:</p> <p>1) The executive branch shall construe provisions in the Act, [including Sec. 7104,] that mandate submission of information to the Congress, entities within or outside the executive branch, or the public, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information that could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. 2) The executive branch shall construe as advisory provisions of the Act that purport to require the conduct of negotiations with a foreign government or otherwise direct or burden the President's conduct of foreign relations, [including] the Afghanistan Freedom Support Act as amended by section 7104. Further, the executive branch shall construe section 6(j)(5) of the Export Administration Act of 1979 as amended by section 7102(c) of the Act, to identify a non-exclusive factor for the Secretary of State to consider in his discretion in making determinations under subsection 6(j), as is consistent with the use of the non-exclusive term "include" in the provision and the congressional decision reflected in the text of the statute to afford the President substantial latitude in implementation of the provision.</p> | |

Afghanistan Timeline (Event Number: 10)

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| 8/5/2004 | Department of Defense Appropriation Act, 2005 (108-287) HR 4613 | <ol style="list-style-type: none">1. Sense of the Senate: any request for funds for an ongoing overseas military operation, including Afghanistan, should be included in the annual budget of the president (Sec. 8138)2. The Secretary of defense shall submit to the Congress 15 days prior to provide military training assistances for Afghanistan (Sec. 9006)3. Authorization of funds for urgent humanitarian relief for Afghan people and require report on such assistance (Sec. 9007)4. Authorization of funds for Afghanistan Freedom support Act (Sec. 9008)5. Providing funds available to DoD for operation and maintenance for logistical support for Afghanistan supporting military stability and report on military operations in Afghanistan (Sec. 9009; 9010)6. Report to the Congress on the estimated costs cover the 2006-2011 of Operation Enduring Freedom (Sec. 9012) |
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Afghanistan Timeline (Event Number: 10)

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| 10/28/2004 | Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (108-375) HR 4200 | <ol style="list-style-type: none">1. The Secretary of Defense is authorized to increase army active duty personnel for fiscal years 2005-2009 to support operations in Afghanistan (Sec. 403)2. Provide funds for response to Afghan urgent humanitarian relief; the Secretary of Defense shall also submit quarterly reports on the said program (Sec. 1201)3. Military assistance to Afghanistan military and security forces; the Secretary of Defense shall submit a notification not less than 15 days before the provision of such assistance (Sec. 1202)4. Other report requirements: quarterly accounting for Operation Enduring Freedom (Sec. 1041)5. Authorization for increased costs due to Operation Enduring Freedom and transfer amounts for such action is necessary in the national interest; the said transfer may be made only after the Secretary of Defense consults with the chairmen and ranking members of the congressional defense committees (Sec. 1505; 1511) |
| 12/8/2004 | Consolidated Appropriations Act, 2005 (108-447) HR 4818 | <ol style="list-style-type: none">1. Humanitarian and reconstruction assistance for Afghanistan (Sec. 523; 534) |

Afghanistan Timeline (Event Number: 10)

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| 1/26/2006 | National Defense Authorization Act for Fiscal Year 2006 (109-163) HR 1815 | <ol style="list-style-type: none">1. Provide funds for response to Afghan urgent humanitarian relief; the Secretary of Defense shall also submit quarterly reports on the said program (Sec. 1202)2. The president is authorized to transfer defense articles to the military and security forces of Afghanistan; the president may not transfer the said articles or defense services until 15 days after the date on which the president has provided the said notice (Sec. 1209)3. The Secretary of Defense shall submit a report on records of civilian casualties in Afghanistan (Sec. 1223)4. Other war-related reporting requirements: the Secretary of Defense shall submit to the Congress a report on the logistical costs relating to Operation Enduring Freedom (Sec. 1221)5. Retrospective recognizes that riot control agents are not chemical weapons as provided in E.O. 11850 for defensive military modes to save lives; but the president shall submit a report on the use of riot control agents (Sec. 1232)6. Authorization for increased costs due to Operation Enduring Freedom, including procurement, military personnel funds, and authority to transfer authorization; the said transfer may be made only after the Secretary of Defense make consultation with and notice to the Congress (Sec. 1513) |
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Afghanistan Timeline (Event Number: 10)

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| 12/30/2005 | Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic influenza Act, 2006 (109-148) HR 2863 | <ol style="list-style-type: none">1. Sense of the Senate: any request for funds for an ongoing overseas military operation, including Afghanistan, should be included in the annual budget of the president (Sec. 8117)2. Iraq Freedom Fund may be transferred to support Afghanistan activities; the Secretary of Defense shall submit a report 5 days prior to making such transfers (one section)3. Authorization of the funds for military logistical support to Afghanistan (Sec. 9006)4. Authorization of the funds for logistical support in Afghanistan; Secretary of Defense shall also provide quarterly reports (Sec. 9009) |
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Afghanistan Timeline (Event Number: 10)

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| 5/11/2005 | Emergency Supplemental Appropriations Act for Defense , the Global War on Terror, and Tsunami Relief, 2005 (109-13) HR 1268 | <ol style="list-style-type: none"> 1. Authorization of transfer authority to Secretary of Defense for security forces fund, including military logistical funds and humanitarian relief; the Secretary of Defense shall notify the Congress not fewer than 5 days prior to making such transfers and provide quarterly report no later than 30 days after the end of each fiscal quarter to the Congress (one section) 2. Sense of the Senate: any request for funds for an ongoing overseas military operation, including Afghanistan, should be included in the annual budget of the president (Sec. 1024) 3. Authorization of econ assistance to Afghanistan (one section) 4. Authorization of additional amount for Afghanistan peacekeeping operation (one section) 5. Authorization of additional amount for operation and maintenance for Afghanistan; the said funds may be available after consultation with the congressional committees (one section) |
| 11/14/2005 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006 (109-102) HR 3057 | <ol style="list-style-type: none"> 1. Econ assistance for Afghanistan; the Secretary of State shall also certifies to the Congress that Afghanistan is fully cooperating with US regarding poppy eradication (one section) 2. Humanitarian assistance (Sec. 523) 3. Transfer of excess defense articles for Afghanistan (Sec. 571) |
| 3/6/2006 | NSPD 46 | U.S. Strategy and Policy in the War on Terror |

Afghanistan Timeline (Event Number: 10)

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| 6/15/2006 | Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery (109-234) HR 4939 | <ol style="list-style-type: none">1. Authorization of transfer authority to Secretary of Defense for security forces fund, including military logistical funds and humanitarian relief; the Secretary of Defense shall notify the Congress not fewer than 5 days prior to making such transfers and provide quarterly report no later than 30 days after the end of each fiscal quarter to the Congress (one section)2. The program similar to Commander's Emergency Response Program in Afghanistan shall remain available until Dec. 31, 2007 (Sec. 1207)3. Sense of the Senate: any request for funds for an ongoing overseas military operation, including Afghanistan, should be included in the annual budget of the president (Sec. 1213)4. Econ support fund for Afghanistan shall remain available until Sep. 30, 2007 (one section)5. Authorization of additional amount for operation and maintenance for Afghanistan; the said funds may be available after consultation with the congressional committees (one section) |
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Afghanistan Timeline (Event Number: 10)

10/17/2006

John Warner national Defense Authorization Act for Fiscal Year 2007(109-364) HR 5122

Signing Statement: Several provisions of the Act call for executive branch officials to submit to the Congress recommendations for legislation, or purport to regulate the manner in which the President formulates recommendations to the Congress for legislation. This provision includes section 1008. The executive branch shall construe these provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as the President deems necessary and expedient.

2) A number of provisions in the Act call for the executive branch to furnish information to the Congress or other entities on various subjects. These provisions include sections 1402. The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.

1. Authorization for additional emergency supplemental appropriations for fiscal year 2006 for Afghanistan and Global War on Terror (Sec. 1002; 1008)
2. Authorization for increased costs due to Operation Enduring Freedom and transfer amounts for such action is necessary in the national interest; the said transfer may be made only after the Secretary of Defense consults with the chairmen and ranking members of the congressional defense committees; quarterly reports on the details of any obligation or transfer of funds from the Afghanistan Security Forces; report on the supplemental and cost of war execution reports (Sec. 1512; 1517; 1518)
3. Quarterly reports on DoD response's to threat posed by IED (Sec. 1402)
4. The establishment of a special working group on Afghanistan transition group; the said group shall report not later than one year after the date of the enactment of this Act on the said subject (Sec. 676)

Afghanistan Timeline (Event Number: 10)

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| 9/29/2006 | Continuing Appropriations Resolution, 2007 (109-289) HR 5631 | <ol style="list-style-type: none">1. Authorization of transferring Iraqi Freedom Fund for the support of operations in Afghanistan; the Secretary of Defense shall notify the congressional committee 5 days prior to the said transfer (one section)2. Authorization of transfer authority to Secretary of Defense for security forces fund, including military logistical funds and humanitarian relief; the Secretary of Defense shall notify the Congress not fewer than 5 days prior to making such transfers and provide quarterly report no later than 30 days after the end of each fiscal quarter to the Congress (one section)3. Authorization of the funds for the program similar to Commander's Emergency Response Program in Afghanistan; the Secretary of Defense shall submit to the congressional defense committee quarterly report regarding the source and allocation of the said program (Sec. 9006)4. Authorization of the funds for other military logistical funds (Sec. 9007; 9008)5. Each amount appropriated in this title is designated as making appropriations for contingency operations directly related to the global war on terrorism (Sec. 9013) |
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Afghanistan Timeline (Event Number: 10)

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| 1/28/2008 | National Defense Authorization Act for Fiscal Year 2008 (110-181) HR 4986; This bill previously was HR 1585 but was vetoed on 12/28/2007. | <ol style="list-style-type: none">1. Report on incremental cost of the early enhanced deployment (Sec. 353)2. Report on progress toward security in Afghanistan (Sec. 1230)3. The Secretary of Defense shall submit a report on a plan regarding sustaining the security in Afghanistan and border security with Pakistan through 2010 (Sec. 1231; 1232)4. Authorization for increased costs due to Operation Enduring Freedom and transfer amounts for such action is necessary in the national interest; the said transfer may be made only after the Secretary of Defense consults with the chairmen and ranking members of the congressional defense committees; quarterly reports on the details of any obligation or transfer of funds from the Afghanistan Security Forces; report on the supplemental and cost of war execution reports (Sec. 1512; 1517; 1518) |
| 11/13/2007 | Department of Defense Appropriations Act, 2008 (110-116) HR 3222 Signing Statement: The Act contains certain provisions identical to those found in prior bills passed by the Congress that might be construed to be inconsistent with my Constitutional responsibilities (8116, and the provision concerning consolidation under the heading "Operation and Maintenance, Defense Wide"). To avoid such potential infirmities, I will interpret and construe such provisions in the same manner as I have previously stated in regard to those provisions. | <ol style="list-style-type: none">1. Any request for funds for an ongoing military operations overseas, including operations in Afghanistan shall be included in the annual budget as submitted to Congress(Sec. 8116) |

Afghanistan Timeline (Event Number: 10)

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| 5/25/2007 | U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (110-28) HR2206 (It previously was HR 1591, but failed to override the presidential veto) | <ol style="list-style-type: none">1. Authorization of additional amount for Afghanistan security forces fund (one section)2. Authorization of funds for Afghanistan's urgent humanitarian relief; and requires the Secretary of Defense to report to the Congress regarding the allocation and sources of the funding (Sec. 1307)3. Econ support fund (one section)4. The Secretary of Defense and OMB shall submit a report on transition readiness assessment by unit of Afghan security forces and its anticipated funds (Sec. 3303)5. Authorization of additional amount for Operation Enduring Freedom (one section) |
| 6/30/2008 | Supplemental Appropriations Act, 2008 (110-252) HR 2642 | <ol style="list-style-type: none">1. Econ support fund (one section)2. Authorization of additional amount for Operation Enduring Freedom (one section)3. Authorization of funds for Afghanistan's urgent humanitarian relief; and requires the Secretary of Defense to report to the Congress regarding the allocation and sources of the funding (Sec. 9104)4. Authorization of additional amount for the logistical military of Operation Enduring Freedom (one section)5. Authorization of additional amount for Afghanistan security forces fund (one section)6. The Secretary of Defense and OMB shall submit a report on transition readiness assessment by unit of Afghan security forces and its anticipated funds (Sec. 9205)7. The president shall submit quarterly reports on the funds provided for logistical support to coalition forces supporting military and stability operations in Afghanistan (Sec. 9206) |

Afghanistan Timeline (Event Number: 10)

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| 12/26/2007 | Consolidated Appropriations Act (110-161) HR 2764 | <ol style="list-style-type: none">1. Econ support (one section)2. Transfer of excess defense articles for Afghanistan (Sec. 669)3. The Secretary of Defense may transfer the funds of Iraqi Freedom fund for humanitarian assistance for Afghanistan (one section)4. Authorization of the funds for Afghan security forces; the Secretary of Defense shall notify to the Congress t days prior to the said transfer (one section)5. Authorization of funds for Afghanistan’s urgent humanitarian relief; and requires the Secretary of Defense to report to the Congress regarding the allocation and sources of the funding (Sec. 606)6. Authorization of the funds for logistical military support (Sec. 607) |
| 10/14/2008 | Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (110-417) S 3001 | <ol style="list-style-type: none">1. Authorization for increased costs due to Operation Enduring Freedom and transfer amounts for such action is necessary in the national interest; the said transfer may be made only after the Secretary of Defense consults with the chairmen and ranking members of the congressional defense committees; quarterly reports on the details of any obligation or transfer of funds from the Afghanistan Security Forces; report on the supplemental and cost of war execution reports (Sec. 1512; 1517; 1518)2. The Secretary of Defense shall submit to the Congress a report on the command and control structure for military forces in Afghanistan; border security with Pakistan; (Sec. 1216; 1217) |

APPENDIX K:

SECOND IRAQI WAR TIMELINE (EVENT NUMBER: 11)

| Second Iraqi War Timeline (Event Number: 11) | | |
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| 12/28/2001 | National Defense Authorization Act for Fiscal Year 2002 (107-107) S 1438 | 1. Authorization on amount of assistance to UN inspections of Iraq's WMD activities (Sec. 1203) |
| 10/3/2002 | NSPD?? | Authorizing Training for Iraqi Opposition Forces |
| 10/16/2002 | Authorization for Use of Military Force Against Iraq Resolution of 2002 (107-243) HJ Res 114 | |
| 11/2002 | NSPD 21 | Support for Inspections in Iraq |
| 12/11/2002 | NSPD 17 | National Strategy to Combat Weapons of Mass Destruction |
| 1/20/2003 | NSPD 24 | Post-War Iraq Reconstruction |
| 2/20/2003 | Consolidated Appropriations Resolution, 2003(108-7) HJ Res 2 | 1. None of the funds appropriated under this Act shall be obligated or expended for assistance for Iraq (Sec. 502) 2. Econ support fund may be funded for benefitting Iraqi people if the president certifies and notify to the Congress that such assistance is in the interest of US national security interest (Sec. 567) |
| 3/20/2003 | E.O. 13290 | 1. Confiscating and vesting certain Iraqi Property |
| 5/22/2003 | E.O. 13303 | 1. Protecting the development fund for Iraq and certain other property in which Iraq has an interest |
| 8/28/2003 | E.O. 13315 | 1. Blocking property of the former Iraqi regime |

Second Iraqi War Timeline (Event Number: 11)

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| 11/6/2003 | Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan (108-106) HR 3289 | <ol style="list-style-type: none">1. Authorization of Iraqi freedom fund; the said fund can be transferred for military personnel funds if the Secretary of Defense notify to the Congress 5 days prior to such transfer and submit an annual report also on such transfer2. Authorization of funds for providing military logistical support to coalition forces in Iraq (Sec. 1106)3. Secretary of Defense shall notify the Congress not less than 15 days before providing military assistance to Iraq (Sec. 1107)4. Humanitarian assistance to Iraq; Secretary of Defense shall provide quarterly reports to the Congress regarding the source of funds of the said assistance (Sec. 1110)5. Secretary of Defense shall submit to Congress a report on the military operations of the forces and reconstruction activities of the DoD in Afghanistan (Sec. 1120)6. Military construction project's funds may be obligated for the needs of Operation Iraqi Freedom; the Secretary of Defense shall submit a notice the Congress regarding the obligation of funds within fifteen days after the first said obligation; the Secretary of Defense shall also submit a quarterly report and certification of the said obligation and its relating construction (Sec. 1301)7. Econ assistance for Iraq |
| 4/16/2003 | Emergency Wartime Supplemental Appropriations Act, 2003 (108-11) HR 1559 | <ol style="list-style-type: none">1. Authorization of additional expense for ongoing military operations in Iraq; the Secretary of Defense is authorized to transfer the appropriation in the proviso of his Section for the military personnel funds if the Secretary of Defense notify to the Congress not fewer than |

Second Iraqi War Timeline (Event Number: 11)

5 days prior to such transfer and submit a quarterly report on the summary of the said transfer (one section)

2. Authorization of reimbursement for the value of support under the Iraq liberation Act of 1998 after the Secretary of Defense notifies the Congress (Sec. 1309)

2. Authorization of funds for military operations in connection with logistical support of other nations regarding Iraqi War; such payments should be made in concurrence with the Secretary of State and in consultation with the Director of OMB and 15 days following notification to the Congress; Secretary of Defense shall also submit a report to the Congress including a financial plan for the said funding (Sec. 1310)

3. Funds available to econ assistance to Iraq shall be subjected to notification of the Committee on Appropriations, except that notification shall be transmitted at least 5 days in advance of the obligation of funds (one section)

4. The president may suspend the application of the Iraq Sanctions Act of 1990 if he notifies the Congress 5 days prior to exercising the said authority (Sec. 1503)

5. The president shall submit a report on the US post-conflict strategy for relief and reconstruction in Iraq not later than 45 days after the enactment of this Act and every 90 days thereafter the initial report until 9/30/2004 (Sec. 1506)

1/23/2004 Consolidated Appropriations Act, 2004 (108-199) HR 2673

1. Econ assistance for Iraq (one section)

| Second Iraqi War Timeline (Event Number: 11) | | |
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| 11/24/2003 | <p>National Defense Authorization Act for Fiscal Year 2004 (108-136) HR 1588</p> <p>Signing Statement: Sections 1202, 1204, require the executive branch to furnish information to the Congress or other entities on various subjects. The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.</p> | <ol style="list-style-type: none"> 1. Authorization of supplemental appropriations for fiscal year 2004 for the Reconstruction of Iraq (Sec. 1004) 2. DoD shall submit a report on the transfer account including the Iraqi Freedom Fund to the Congress not later than 30 days after the end of each fiscal quarter (Sec. 1003) 3. The Secretary of Defense shall submit to the Congress a report on the conduct of Operation Iraqi Freedom not later than March 31, 2004; the said report shall be prepared in consultation with the Chairman of the Joint Chiefs of Staff, the commander of the Us central Command (Sec. 1202) 4. Other report requirements: the Secretary of Defense shall report on the security activities, acquisition by Iraq of advance weapons (Sec, 1203; 1204) |
| 9/30/2003 | Department of Defense Appropriations Act, 2004 (108-87) HR 2658 | <ol style="list-style-type: none"> 1. Funds made available under the heading of Iraq Freedom Fund of Pub. L. 108-11 are hereby rescinded (Sec. 8128) 2. Sense of the Senate: any request for funds for an ongoing overseas military operation, including Iraq, should be included in the annual budget of the president (Sec. 8139) |
| 5/21/2003 | Expressing the sense of Congress that the United Nations should remove the economic sanctions against Iraq completely and without condition (H Con Res 160) | <ol style="list-style-type: none"> 1. UN should immediately lift the econ sanctions against Iraq pursuant to Security Council Resolution 661 and 687 |
| 5/11/2004 | NSPD 36 | United States Government Operations in Iraq |
| ??/??/2004 | NSPD 37 | Relating to Support of Iraqi Government in prosecution of war crimes |
| 7/29/2004 | E.O. 13350 | <ol style="list-style-type: none"> 1. Termination of emergency declared in E.O. 12722 with respect to Iraq and the above E.O. 13290, 13303, and 13315 |

Second Iraqi War Timeline (Event Number: 11)

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| 8/5/2004 | Department of Defense Appropriation Act, 2005 (108-287) HR 4613 | <ol style="list-style-type: none">1. Sense of the Senate: any request for funds for an ongoing overseas military operation, including Iraq, should be included in the annual budget of the president (Sec. 8138)2. The Secretary of defense shall submit to the Congress 15 days prior to provide military training assistances for Iraqi New Army (Sec. 9006)3. Authorization of funds for urgent humanitarian relief for Iraqi people and require report on such assistance (Sec. 9007)4. Authorization of funds for Afghanistan Freedom support Act (Sec. 9008)5. Providing funds available to DoD for operation and maintenance for logistical support for Iraq supporting military stability and report on military operations in Iraq (Sec. 9009; 9010)6. Report to the Congress on the estimated costs cover the 2006-2011 of Operation Iraqi Freedom (Sec. 9012) |
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Second Iraqi War Timeline (Event Number: 11)

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| 10/28/2004 | <p>Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (108-375) HR 4200</p> <p>Signing Statement: A number of provisions of the Act, including sections 1042,1202, 1204, call for the executive branch to furnish information to the Congress, a legislative agent, or other entities on various subjects. The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.</p> | <ol style="list-style-type: none">1. The Secretary of Defense is authorized to increase army active duty personnel for fiscal years 2005-2009 to support operations in Iraq (Sec. 403)2. Provide funds for response to Iraqi urgent humanitarian relief; the Secretary of Defense shall also submit quarterly reports on the said program (Sec. 1201)3. Military assistance to Iraqi military and security forces; the Secretary of Defense shall submit a notification not less than 15 days before the provision of such assistance (Sec. 1202)4. The president shall submit a report on strategy for stabilization of Iraq (Sec. 1204)5. Other report requirements: quarterly accounting for Operation Iraqi Freedom (Sec. 1041); report on post-major combat operation phase of Operation Iraqi Freedom (Sec. 1042)6. Authorization for increased costs due to Operation Iraqi Freedom and transfer amounts for such action is necessary in the national interest; the said transfer may be made only after the Secretary of Defense consults with the chairmen and ranking members of the congressional defense committees (Sec. 1505; 1507; 1511) |
| 9/30/2004 | <p>Joint Resolution making continuing appropriations for the fiscal year 2005, and for other purposes (108-309) HJ Res 107</p> | <ol style="list-style-type: none">1. Authorization for additional fund for Iraq Relief and Reconstruction Fund (Sec. 133 and 134) |

Second Iraqi War Timeline (Event Number: 11)

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| 1/6/2006 | National Defense Authorization Act for Fiscal Year 2006 (109-163) HR 1815 | <ol style="list-style-type: none">1. The Secretary of Defense shall submit a report on the actions taken to ensure that the Transition Assistance Programs for members of the forces separating from the Armed Forces; the said report shall be prepared in consultation with the Secretary of Labor and VA (Sec. 595)2. Provide funds for response to Afghan urgent humanitarian relief; the Secretary of Defense shall also submit quarterly reports on the said program (Sec. 1202)3. Other war-related reporting requirements: the Secretary of Defense shall submit to the Congress a report on the logistical costs relating to Operation Iraqi Freedom; at the same time the Secretary of Defense shall submit quarterly regarding war strategy in Iraq and civilian casualties in Iraq ; and the president shall submit a report on US policy and military operations in Iraq (Sec. 1221, 1222, 1223, 1227)4. Retrospective recognizes that riot control agents are not chemical weapons as provided in E.O. 11850 for defensive military modes to save lives; but the president shall submit a report on the use of riot control agents (Sec. 1232)5. Authorization for increased costs due to Operation Enduring Freedom, including procurement, military personnel funds, and authority to transfer authorization; the said transfer may be made only after the Secretary of Defense make consultation with and notice to the Congress (Sec. 1511;1513) |
| | An amendment was proposed to withdraw the troops from Iraq but failed to be adopted by the House on 5/25/2005 | |
| | Signing Statement: 1) A number of provisions of the Act, including section 1227, call for the executive branch to furnish information to the Congress on various subjects. The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. 2) Section 1222 of the Act refers to a joint explanatory statement of a committee of conference on a bill as if the statement had the force of law. The executive branch shall construe the provision in a manner consistent with the bicameral passage and presentment requirements of the Constitution for the making of a law. | |

Second Iraqi War Timeline (Event Number: 11)

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| 12/30/2005 | Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (109-148) HR 2863 | <ol style="list-style-type: none">1. Sense of the Senate: any request for funds for an ongoing overseas military operation, including Afghanistan, should be included in the annual budget of the president (Sec. 8117)2. Authorization of the funds for military logistical support to Iraq (Sec. 9006)3. Authorization of funds for humanitarian relief in Iraq (Sec. 9007)4. The Secretary of Defense shall submit a report to Congress a set of performance indicators and measure for progress toward military and political stability in Iraq (Sec. 9010) |
| 5/11/2005 | Emergency Supplemental Appropriations Act for Defense , the Global War on Terror, and Tsunami Relief, 2005 (109-13) HR 1268 | <ol style="list-style-type: none">1. Authorization of additional amount for operation and maintenance for Iraq; the said funds may be available after consultation with the congressional committees (one section)2. Authorization of Iraqi security forces fund; including military logistical funds and humanitarian relief; the Secretary of Defense shall notify the Congress not fewer than 5 days prior to making such transfers and provide quarterly report no later than 30 days after the end of each fiscal quarter to the Congress (one section)3. Authorization of additional amount for Iraqi peacekeeping operation (one section) |
| 11/14/2005 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006 (109-102) HR 3057 | <ol style="list-style-type: none">1. Econ assistance to Iraq (one section)2. Transfer of excess defense articles for Afghanistan (Sec. 571) |
| 2/2/2005 | Relating to the free election in Iraq held on January 30, 2005 (H Res 60) | <ol style="list-style-type: none">1. Reaffirms that US will possess all necessary authority to fulfill their mission in Iraq |

| Second Iraqi War Timeline (Event Number: 11) | | |
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| 11/18/2005 | Expressing the sense of the House of Representatives that the deployment of United States forces in Iraq be terminated immediately (H Res. 571) | 1. It is the sense of the House of Representatives that the deployment of United States forces in Iraq be terminated immediately |
| 12/16/2005 | Expressing the commitment of the House of Representatives to achieving victory in Iraq (H Res. 612) | 1. Setting an artificial timetable for the withdrawal of United States Armed Forces from Iraq, or immediately terminating their deployment in Iraq and redeploying them elsewhere in the region, is fundamentally inconsistent with achieving victory in Iraq |
| 6/15/2006 | Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery (109-234) HR 4939 | <p>1. Authorization of additional amount for operation and maintenance for Iraq; the said funds may be available after consultation with the congressional committees (one section)</p> <p>2. Authorization of Iraqi security forces fund; including military logistical funds and humanitarian relief; the Secretary of Defense shall notify the Congress not fewer than 5 days prior to making such transfers and provide quarterly report no later than 30 days after the end of each fiscal quarter to the Congress (one section)</p> <p>3. Econ support for Iraq (one section)</p> <p>4. Iraq Reconstruction fund shall remain available for one additional year (Sec. 1302)</p> |
| 10/17/2006 | <p>John Warner national Defense Authorization Act for Fiscal Year 2007(109-364) HR 5122</p> <p>Signing Statement: Signing Statement: Several provisions of the Act call for executive branch officials to submit to the Congress recommendations for legislation, or purport to regulate the manner in which the President formulates recommendations to the Congress</p> | <p>1. The establishment of a special working group on Afghanistan transition group; the said group shall report not later than one year after the date of the enactment of this Act on the said subject (Sec. 676)</p> <p>2. Authorization for additional emergency supplemental appropriations for fiscal year 2006 for Iraq and Global War on Terror (Sec. 1002; 1008)</p> <p>3. Sense of Congress: calling for</p> |

Second Iraqi War Timeline (Event Number: 11)

for legislation. This provision includes section 1008. The executive branch shall construe these provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as the President deems necessary and expedient.

2) The executive branch shall construe section 1512 of the Act, which purport to make consultation with specified Members of Congress a precondition to the execution of the law, as calling for but not mandating such consultation, as is consistent with the Constitution's provisions concerning the separate powers of the Congress to legislate and the President to execute the laws.

3) A number of provisions in the Act call for the executive branch to furnish information to the Congress or other entities on various subjects. These provisions include sections 1402. The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.

convening of a summit for a comprehensive political agreement for Iraq (Sec. 1229)

4. Authorization for increased costs due to Operation Iraqi Freedom and transfer amounts for such action is necessary in the national interest; the said transfer may be made only after the Secretary of Defense consults with the chairmen and ranking members of the congressional defense committees; quarterly reports on the details of any obligation or transfer of funds from the Iraqi Security Forces; report on the supplemental and cost of war execution reports (Sec. 1512; 1515; 1516; 1518)

5. Quarterly reports on DoD response's to threat posed by IED (Sec. 1402)

Second Iraqi War Timeline (Event Number: 11)

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| 9/29/2006 | Continuing Appropriations Resolution, 2007 (109-289) HR 5631 | <ol style="list-style-type: none">1. Authorization of transferring Iraqi Freedom Fund for the support of operations in Afghanistan; the Secretary of Defense shall notify the congressional committee 5 days prior to the said transfer (one section)2. Authorization of Iraqi security forces fund; including military logistical funds and humanitarian relief; the Secretary of Defense shall notify the Congress not fewer than 5 days prior to making such transfers and provide quarterly report no later than 30 days after the end of each fiscal quarter to the Congress (one section)3. Authorization of the funds for other military logistical funds (Sec. 9008)4. Not later than 60 days after the date of the enactment of this Act and every 90 days thereafter, the Secretary of Defense shall submit a report to Congress a comprehensive report on performance indicators for progress toward military and political stability in Iraq (Sec. 9010)5. None of the funds shall be obligated or expended for the establishment of the permanent stationing of US forces in Iraq (Sec. 9012)6. Each amount appropriated in this title is designated as making appropriations for contingency operations directly related to the global war on terrorism (Sec. 9013) |
| 6/16/2006 | Declaring that the United States will prevail in the Global War on Terror, the struggle to protect freedom from the terrorist adversary (H Res 861) | <ol style="list-style-type: none">1. It is not in the US national security interest to set up an arbitrary date to withdraw from Iraq |

Second Iraqi War Timeline (Event Number: 11)

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| 1/28/2008 | <p>National Defense Authorization Act for Fiscal Year 2008 (110-181) HR 4986; This bill previously was HR 1585 but was vetoed on 12/28/2007.</p> <p>Signing Statement: Provision of the Act, including section 1222, purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief. The executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President.</p> | <ol style="list-style-type: none">1. Report on incremental cost of the early enhanced deployment (Sec. 353)2. Authorization of additional emergency supplemental appropriations pursuant to Pub. L. 110-28 (Sec. 1003)3. No funds appropriated under this Act may be obligated or expended for the 5. None of the funds shall be obligated or expended for the establishment of the permanent stationing of US forces in Iraq (Sec. 1222)4. Report on US's policy and military operations in Iraq; comprehensive set of performance indicators and measure for progress toward military and political stability in Iraq (Sec. 1223)5. Sense of Congress: US should pursue a strategy to prevent a failed state in Iraq and urge the Gov of Iraq to agree on a comprehensive political settlement in Iraq based on federalism (Sec. 1226; 12270)6. The president shall implement a policy to control the export and transfer articles into Iraq (Sec. 1228)7. Authorization for increased costs due to Operation Iraqi Freedom and transfer amounts for such action is necessary in the national interest; the said transfer may be made only after the Secretary of Defense consults with the chairmen and ranking members of the congressional defense committees; quarterly reports on the details of any obligation or transfer of funds from the Iraqi Security Forces; report on the supplemental and cost of war execution reports (Sec. 1512; 1515; 1516; 1518) |
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Second Iraqi War Timeline (Event Number: 11)

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| 11/13/2007 | <p>Department of Defense Appropriations Act, 2008 (110-116) HR 3222</p> <p>Signing Statement: The Act contains certain provisions identical to those found in prior bills passed by the Congress that might be construed to be inconsistent with my Constitutional responsibilities (8116, and the provision concerning consolidation under the heading "Operation and Maintenance, Defense Wide"). To avoid such potential infirmities, I will interpret and construe such provisions in the same manner as I have previously stated in regard to those provisions.</p> | <p>1. None of the funds shall be obligated or expended for the establishment of the permanent stationing of US forces in Iraq (Sec. 8113)</p> <p>2. Any request for funds for an ongoing military operations overseas, including operations in Afghanistan shall be included in the annual budget as submitted to Congress(Sec. 8116)</p> |
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Second Iraqi War Timeline (Event Number: 11)

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| 5/25/2007 | U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (110-28) HR2206 (It previously was HR 1591, but failed to override the presidential veto) | <ol style="list-style-type: none">1. Authorization of additional amount for Operation Iraqi Freedom (one section)2. Authorization of funds for Iraq's urgent humanitarian relief; and requires the Secretary of Defense to report to the Congress regarding the allocation and sources of the funding (Sec. 1307)3. Conditioning of future US strategy in Iraq on the Iraqi government's record of performance on its benchmarks ; the president shall submit a report on the progress of Iraqi government's progress toward meeting the requirement of benchmarks; not until the president certifies to the Congress that Iraq's progress on each of the benchmarks does the funds can be appropriated for the econ support fund for Iraq; the president shall direct the orderly redeployment of US forces from Iraq if the Iraqi government acting in strict accordance with their respective powers given by the Constitution (Sec. 1314) |
| 7/17/2007 | E.O. 13438 | <ol style="list-style-type: none">1. Blocking property of certain persons who threaten stabilization efforts in Iraq |

Second Iraqi War Timeline (Event Number: 11)

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| 6/30/2008 | Supplemental Appropriations Act, 2008 (110-252) HR 2642 | <ol style="list-style-type: none">1. Authorization of additional amount for humanitarian assistance for Iraq and Operation Iraqi Freedom (two sections)2. Authorization of funds for Iraq's urgent humanitarian relief; and requires the Secretary of Defense to report to the Congress regarding the allocation and sources of the funding (Sec. 9104)3. None of the funds shall be used for establishing a permanent base in Iraq (one section)4. Econ and democracy support (two sections)5. The Secretary of Defense shall submit a report to Congress a set of performance indicators and measure for progress toward military and political stability in Iraq (Sec. 9204)6. The Secretary of Defense and OMB shall submit a report on transition readiness assessment by unit of Iraqi security forces and its anticipated funds (Sec. 9207) |
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Second Iraqi War Timeline (Event Number: 11)

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| 12/26/2007 | Consolidated Appropriations Act, 2008 (110-161) HR 2764 | <ol style="list-style-type: none">1. None of the funds may be made for the establishment for basing agreement in Iraq (Sec, 680)2. Authorization of funds for Iraq's urgent humanitarian relief; and requires the Secretary of Defense to report to the Congress regarding the allocation and sources of the funding (Sec. 606)3. The Secretary of Defense shall submit a report to Congress a set of performance indicators and measure for progress toward military and political stability in Iraq (Sec. 9204)4. Transfer of excess defense articles for Iraq (Sec. 669)5. Iraq Freedom Fund may be transferred only for the support of operation in Iraq (one section)6. Authorization of funds for Iraqi security forces; the Secretary of Defense shall notify to the Congress on the said transfer 5 days in advance (one section) |
| 3/9/2007 | <ol style="list-style-type: none">1. United States Policy in Iraq Resolution of 2007 (SJ Res 9) Failed to agree on by achieving 60 affirmative votes pursuant to the order made on March 7, 20072. S Res. 1073. S Con Res 20 | <ol style="list-style-type: none">1. The president shall promptly redeploy the troops in Iraq not later than 120 days after the enactment of this Act2. Sense of the Senate: the President and Congress should continue to exercise their constitutional responsibilities to ensure that the Armed Forces have everything they need to perform their assigned or future missions3. That it is the sense of Congress that Congress should not take any action that will endanger United States military forces in the field, including the elimination or reduction of funds for troops in the field |

Second Iraqi War Timeline (Event Number: 11)

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| 10/14/2008 | Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (110-417) S 3001 | <ol style="list-style-type: none">1. None of the funds shall be used for the establishment of any military base in Iraq (Sec. 1211)2. The president shall submit a report on status of forces agreements b/w the US and Iraq (Sec. 1212)3. Authorization of the additional amount for urgent humanitarian relief in Iraq (Sec. 1214)4. Authorization for increased costs due to Operation Iraqi Freedom and transfer amounts for such action is necessary in the national interest; the said transfer may be made only after the Secretary of Defense consults with the chairmen and ranking members of the congressional defense committees; quarterly reports on the details of any obligation or transfer of funds from the Iraqi Security Forces; report on the supplemental and cost of war execution reports (Sec. 1512; 1515; 1516; 1518) |
| | Signing Statement: Provision of the Act, including section 1211(2), purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to conduct diplomatic negotiations, to supervise the executive branch, to appoint officers of the United States, and to execute his authority as Commander in Chief. The executive branch shall continue to construe such provisions in a manner consistent with the constitutional authority and obligations of the President. | |

APPENDIX L:

TAIWAN-CHINA TIMELINE (EVENT NUMBER: 12)

| Taiwan-China Timeline (Event Number: 12) | | |
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| 3/21/1996 | A concurrent resolution expressing the sense of Congress regarding missile tests and military exercises by the People's Republic of China (H Con Res 148) | <ol style="list-style-type: none"> 1. The president should consult with the Congress regarding China's missiles threat on Taiwan and appropriate response of US 2. The president should reexamine the nature and quantity of defense articles enabling Taiwan to maintain sufficient self-defense capability |
| 7/19/1992 | To authorize the transfer of certain naval vessels to Taiwan (102-322) HR 5412 | <ol style="list-style-type: none"> 1. The Secretary of the Navy is authorized to lease the 'KNOX' class frigates BREWTON (FF-1086), ROBERT E. PEARY (FF-1073), and KIRK (FF-1087) to the Coordination Council for North American Affairs 2. The said authority will be expired two years after the enactment of this authorization |
| 10/30/1991 | International Cooperation Act of 1991 (HR 2508) Failed to agree on the conference report in House | <ol style="list-style-type: none"> 1. Sense of Congress: the future of Taiwan should be determined by peaceful means |
| 10/6/1992 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1993 (102-391) HR 5368 | <ol style="list-style-type: none"> 1. Anti-tank shell may be sold to Taiwan if the president determines that to do is in the security interest of US (Sec. 551) |
| 7/28/1993 | To authorize the transfer of naval vessels to certain foreign countries (103-54) HR 2561 | <ol style="list-style-type: none"> 1. The Secretary of the Navy is authorized to transfer to the Coordination Council for North American Affairs (which is the Taiwan instrumentality designated pursuant to section 10(a) of the Taiwan Relations Act) the auxiliary repair dry dock WINDSOR (ARD 22). 2. The said authority will be expired two years after the enactment of this authorization |
| 9/30/1993 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1994 (103-87) HR 2295 | <ol style="list-style-type: none"> 1. Anti-tank shell may be sold to Taiwan if the president determines that to do is in the security interest of US (Sec. 527) |

Taiwan-China Timeline (Event Number: 12)

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| 12/2/1993 | To authorize the leasing of naval vessels to certain foreign countries (103-174) HR 3471 | <ol style="list-style-type: none">1. To the Coordination Council for North American Affairs (which is the Taiwan instrumentality designated pursuant to section 10(a) of the Taiwan Relations Act), the `KNOX' class frigates JOSEPH HEWES (FFT 1078), COOK (FF 1083), and BARBEY (FF 1088)2. The said authority will be expired two years after the enactment of this authorization |
| 4/30/1994 | Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (103-236) HR 2333 | <ol style="list-style-type: none">1. Declaration of the Congress: The United States should take into account both the capabilities and intentions of the People's Republic of China with respect to the issue of Taiwan; The President should on a regular basis assess changes in the capabilities and intentions of the People's Republic of China and consider whether it is appropriate to adjust arms sales to Taiwan accordingly (Sec. 531) |
| 8/23/1994 | Foreign Operations, Export Financing, and Related Programs Supplemental Appropriations Act, 1994 (103-306) HR 4426 | <ol style="list-style-type: none">1. Anti-tank shell may be sold to Taiwan if the president determines that to do is in the security interest of US (Sec. 527) |
| 10/5/1994 | To express the sense of the Senate concerning United States relations with Taiwan (S Res 270) | <ol style="list-style-type: none">1. Sense of the Senate: urges the president to approve defensive arms sales to Taiwan based solely on Taiwan's self-defense needs, without qualitative or quantitative restrictions2. Sense of the Senate: raise U.S. concerns about the People's Republic of China threat to forcefully reunify Taiwan and the People's Republic of China |

Taiwan-China Timeline (Event Number: 12)

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| 10/19/1994 | To authorize the leasing of naval vessels to certain foreign countries (103-378) HR 5155 | <ol style="list-style-type: none"> 1. The Secretary of the Navy is authorized to transfer to the Taipei Economic and Cultural Representative Office in the United States (which is the Taiwan instrumentality designated pursuant to section 10(a) of the Taiwan Relations Act) the `NEWPORT' class tank landing ships MANITOWOC (LST 1180) and SUMTER (LST 1181) 2. The said authority will be expired two years after the enactment of this authorization; the Secretary of Defense shall certify to the Congress before such transfer |
| 4/30/1996 | Foreign Relations Authorization Act, Fiscal Years 1996 and 1997 (HR 1561) Failed to override the presidential veto | <ol style="list-style-type: none"> 1. Section 3(a) and (b) of the Taiwan Relations Act (22 U.S.C. 3302) supersede to any provision of the Joint Communiqué of the United States and China of August 17, 1982 |
| 8/15/1996 | E.O. 13014 | Maintaining unofficial relations with the people on Taiwan |
| 11/18/1997 | National Defense Authorization Act for Fiscal Year 1998 (105-85) HR 1119 | <ol style="list-style-type: none"> 1. To the Taipei Economic and Cultural Representative Office in the United States (the Taiwan instrumentality that is designated pursuant to section 10(a) of the Taiwan Relations Act), the following frigates of the KNOX class: <ol style="list-style-type: none"> (A) The WHIPPLE (FF 1062). (B) The DOWNES (FF 1070). (Sec. 1025) |
| 7/10/1998 7/20/1998 | Affirming the United States commitment to Taiwan (S Con Res 107 & H Con Res 301) | <ol style="list-style-type: none"> 1. Urges the President of the United States to seek a public renunciation by the People's Republic of China of any use of force, or threat to use force, against democratic Taiwan 2. The president should reexamine the nature and quantity of defense articles enabling Taiwan to maintain sufficient self-defense capability |

Taiwan-China Timeline (Event Number: 12)

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| 10/17/1998 | Department of Defense Appropriations Act, 1999 (105-262) HR 4103 | 1. Transfer to the Taipei Economic and Cultural Representative Office in the United States (the Taiwan instrumentality that is designated pursuant to section 10(a) of the Taiwan Relations Act)--(A) the KNOX class frigates PEARY (FF 1073), JOSEPH HEWES (FF 1078), COOK (FF 1083), BREWTON (FF 1086), KIRK (FF 1987), and BARBEY (FF 1088); (B) the NEWPORT class tank landing ships MANITOWOC (LST 1180) and SUMTER (LST 1181); (C) the floating dry dock COMPETENT (AFDM 6); and (D) the ANCHORAGE class dock landing ship PENSACOLA (LSD 38). (Sec. 8110) |
| 10/18/1999 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2000 (HR 2606) Vetoed | 1. The Secretary of State shall consult with the appropriate committees and leadership of Congress to devise a mechanism to provide for congressional input prior to making any determination on the nature or quantity of defense articles and services to be made available to Taiwan (Sec. 593) |
| 10/5/1999 | National Defense Authorization Act for Fiscal Year 2000 (106-65) S 1059 Signing Statement: I am concerned with the tone and language of a number of provisions of S. 1059 relating to China, which could be detrimental to our interests. China is undergoing a profoundly important but uncertain process of change, and I believe we must work for the best possible outcome, even as we prepare for any outcome. The Act's provision requiring annual reports on Chinese military power, similar to those previously produced on Soviet military power, assumes an outcome that is far from | 1. The Secretary of the Navy is authorized to transfer certain vessels to Taiwan (Sec. 1018) 2. Annual report to the Congress on PRC's military power regarding its strategy toward Taiwan (Sec. 1202) |

Taiwan-China Timeline (Event Number: 12)

foreordained—that China is bent on becoming a military threat to the United States. I believe we should not make it more likely that China will choose this path by acting as if the decision has already been made.

Our long-term strategy must be to encourage China to grow into a more prosperous and open society; to integrate China into the institutions that promote global norms on proliferation, trade, the environment, and human rights; to cooperate where we agree, even as we defend our interests and values with realism and candor where we do not. We cannot do that simply by confronting China or seeking to contain it. We can only do that if we maintain a policy of principled, purposeful engagement with China's government and China's people.

I intend to implement the China provisions of the bill in a manner consistent with this policy, including, where appropriate, combining several of the reporting requirements.

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| 1/10/2001 | Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2002 (107-115) HR 2506 | 1. The president shall provide briefing and consult with the Congress regarding US's security assistance to Taiwan (Sec. 573) |
| 12/28/2001 | National Defense Authorization Act for Fiscal Year 2002 (107-107) S 1438 | 1. Authority to transfer naval vessels to Taiwan (Sec. 1002) |

Taiwan-China Timeline (Event Number: 12)

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| 9/30/2002 | Foreign Relations Authorization Act, Fiscal Year 2003 (107-228) HR 1646 Signing Statement: Section 1206 could be misconstrued to imply a change in the "one China" policy of the United States when, in fact, that U.S. policy remains unchanged. To the extent that this section could be read to purport to change United States policy, it impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs. | <ol style="list-style-type: none">1. Sense of Congress: resolution to Taiwan's strait's issues should be peaceful (Sec. 692)2. Taiwan shall be treated as though it were designated as non-NATO major ally (Sec. 1206)3. The president shall provide briefing and consult with the Congress regarding US's security assistance to Taiwan (Sec. 1263)4. Transfer certain naval vessels to Taiwan (Sec. 1701) |
| 12/2/2002 | Bob Stump National Defense Authorization Act for Fiscal Year 2003 (107-314) HR 4546 | <ol style="list-style-type: none">1. The president shall submit a report on the feasibility and advisability of conducting combined operational training with, and exchanges of general and flag officers between, the Armed Forces of the United States and the military forces of Taiwan (Sec. 1210) |

APPENDIX M:
POST-FIRST IRAQI WAR, IRAQ'S VIOLATION OF UN WEAPON
INSPECTION AND OPERATION DESERT FOX TIMELINE
(EVENT NUMBER: 13)

Post-first Iraqi War, Iraq's Violation of UN Weapon Inspection and Operation Desert Fox Timeline (Event Number: 13)

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| 11/13/1997 | Expressing the sense of the House that the United States should act to resolve the crisis with Iraq in a manner that assures full Iraqi compliance with United Nations Security Council resolutions regarding the destruction of Iraq's capability to produce and deliver weapons of mass destruction, and that peaceful and diplomatic efforts should be pursued, but that if such efforts fail, multilateral military action or unilateral United States military action should be taken (H Res 322) | 1. The House finds that Iraq has deliberately obstructed UNSCOM to inspect the production of WMD; the House urges the president to resolve the said crisis peacefully and multinationally. But US should unilaterally take military action if it is necessary to compel Iraq being complied with UN Security Council Resolutions |
| 8/14/1998 | Finding the Government of Iraq in unacceptable and material breach of its international obligations (105-235) SJ Res 54 | 1. The Congress finds that Iraq has materially breached its obligation with respect to chemical weapons inspections, nuclear devices, no-fly zone 2. The president is urged to take appropriate action to bring Iraq into compliance with its international obligations |
| 10/25/1999 | Department of Defense Appropriations Act, 2000 (106-79) HR 2561 | 1. The Secretary of Defense shall submit a report to the Congress on the conduct of Operation Desert Fox (Sec. 8125) |

Post-first Iraqi War, Iraq's Violation of UN Weapon Inspection and Operation Desert Fox
Timeline (Event Number: 13)

| | | |
|-------------------|--|---|
| 11/16/1990 | E.O. 12735 | <ol style="list-style-type: none">1. Proliferation of chemical and biological weapons constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States and hereby declare a national emergency to deal with that threat2. Sanctions against foreign countries and authorizes the Secretary of State to determine which countries has used chemical weapons and violate the international law |
| 5/24/1991 | A resolution commending the humanitarian relief efforts for Iraqi refugees (S Res 132) | <ol style="list-style-type: none">1. Sense of the Senate: supports the continuation of the benefits enacted by Congress for 'Operation Desert Storm' to the participants of 'Operation Provide Comfort' for the duration of that operation; the United States should respond immediately to the United Nation's appeal for increased assistance to the refugees |

Post-first Iraqi War, Iraq's Violation of UN Weapon Inspection and Operation Desert Fox
Timeline (Event Number: 13)

| | | |
|-------------------|--|---|
| 10/28/1991 | <p>Chemical and biological. Weapons Control and Warfare Elimination Act of 1991 (102-138) HR 1415</p> <p>Signing Statement: Title V, Chemical and Biological Weapons (CBW), raises concerns with respect to both the President's control over negotiations with foreign governments and the possible disclosure of sensitive information; Other provisions that might be construed to require disclosure of the content of sensitive diplomatic communications, state secrets, or intelligence information will also be interpreted consistent with the President's responsibility to protect such information. See, e.g., sections 506(b), and 508.</p> <p>11/16/1990 E.O.:</p> | <ol style="list-style-type: none">1. Multilateral efforts to controls on chemical and biological weapons control as US policy (Sec. 503)2. Once the president receive persuasive information regarding a foreign country has made substantial preparation to use or has used chemical or biological weapons, the president shall determine whether that government has used such weapons; the chairman of the Committee on Foreign Relations of the Senate and House may at any time request the president to consider the said information (Sec. 506)3. If the president determines that a foreign government has used such weapons, the presidential shall terminate assistance to that country except urgent humanitarian assistance and impose additional sanctions if certain conditions not met (Sec. 507)4. The president shall report to the Congress on the actions taken under this Act not later than 90 days after the enactment of this Act and every 12 months thereafter (Sec. 508) |
|-------------------|--|---|

Post-first Iraqi War, Iraq's Violation of UN Weapon Inspection and Operation Desert Fox
Timeline (Event Number: 13)

| | | |
|-------------------|---|--|
| 12/5/1991 | National Defense Authorization Act for Fiscal Years 1992 and 1993 (102-190) HR 2100 | <ol style="list-style-type: none"> 1. Sense of Congress: Iraq's noncompliance with United Nations Security Council Resolution 687 (unconditionally report on the locations of WMD) constitutes a continuing threat to the peace, security, and stability (Sec. 1095) 2. Sense of Congress: the Government of Iraq, through its ongoing suppression of the political opposition, including Kurds and Shias, continues to violate the Universal Declaration of Human Rights and United Nations Security Council Resolution 688 (Sec. 1096) |
| 7/10/1992 | NSD 70 | US Nonproliferation Policy |
| 10/21/1992 | E.O. 12817 | Transfer certain Iraqi government assets held by domestic banks |
| 10/23/1992 | Iran-Iraq Arms Non-Proliferation Act of 1992 (102-484) HR 5006 | <ol style="list-style-type: none"> 1. The president may provide assistance for UN Special Commission on Iraq (UNSCOM) regarding non-proliferation initiatives (Sec. 1505) 2. The president shall apply sanctions against Iraq to control Iraq from acquiring WMD (Sec. 1602) 3. The president shall submit an annual report on the action taken by the president regarding the said implementation (Sec. 1607) |
| 12/??/1993 | PDD 18 | Counter-proliferation Initiative |
| 2/10/1996 | National Defense Authorization Act for Fiscal Year 1996 (104-106) S 1124 (This act previously was HR 1530 but vetoed by the president) | 1. The president shall apply sanctions against Iraq to control Iraq from acquiring WMD (Sec. 1408) |
| 3/27/1996 | Expressing the sense of the House of Representatives concerning the eighth anniversary of the massacre of over 5,000 Kurds as a result of a gas bomb attack by the Iraqi government (H Res 379) | 1. Reaffirm the United States' commitment to protect and help the Kurdish people in Iraq |

Post-first Iraqi War, Iraq's Violation of UN Weapon Inspection and Operation Desert Fox
Timeline (Event Number: 13)

| | | |
|-------------------|--|---|
| 9/23/1996 | Defense Against Weapons of Mass Destruction Act of 1996 (104-201) HR 3230 | 1. In terms of the Iraq's possession of WMD, the president shall cooperate with Russia a program to eliminate the production of weapons grade plutonium and report to the Congress on such plan no later than 180 days after the enactment of this Act (Sec. 1432) |
| 5/1/1998 | 1998 Supplemental Appropriations and Rescissions Act (105-174) HR 3579 | 1. Sense of Congress: none of the funds may be made available for the conduct of offensive operations by United States Armed Forces against Iraq for the purpose of obtaining compliance by Iraq with United Nations Security Council Resolutions relating to inspection and destruction of weapons of mass destruction in Iraq unless such operations are specifically authorized by a law enacted after the date of the enactment of this Act (Sec. 17) |
| 10/17/1998 | Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (105-261) HR 3616 | 1. Authorization of one year extension for support of UNSCOM (Sec. 1531) |
| 11/18/1997 | National Defense Authorization Act for Fiscal Year 1998 (105-85) HR 1119 | 1. Authorization of one year extension for support of UNSCOM (Sec. 1308) |
| 10/5/1999 | National Defense Authorization Act for Fiscal Year 2000 (106-65) S 1059 | 1. Authorization of one year extension for support of UNSCOM (Sec. 1505) |
| 10/30/2000 | National Defense Authorization Act for Fiscal Year 2001 (106-398) HR 4205 | 1. Authorization of one year extension for support of UNSCOM (Sec. 1202) 2. Sense of Congress: it is the policy of US to continuously commit to the protection Kurdish (Sec. 507) |
| 12/2/2002 | Bob Stump National Defense Authorization Act for Fiscal Year 2003 (107-314) HR 4546 | 1. Authorization of one year extension for support of UNSCOM (Sec. 1204) |
| 12/28/2001 | National Defense Authorization Act for Fiscal Year 2002 (107-107) S 1438 | 1. Authorization of one year extension for support of UNSCOM (Sec. 1205) |

APPENDIX N:
SUDAN-AL QAIDA (TANZANIA AND KENYA EMBASSY BOMBING)
TIMELINE (EVENT NUMBER: 14)

| Sudan-al Qaida (Tanzania and Kenya Embassy bombing) Timeline (Event number 14) | | |
|--|---|---|
| 1/23/1995 | E.O. 12947 | 1. Definition of terrorist 2. Delegate authorization of designate foreign person as terrorist and blocked his property to the Secretary of Treasury |
| 6/21/1995 | PDD 39: U.S. Policy on Counterterrorism | 1. US shall have the ability to respond rapidly and decisively to terrorism directed against us wherever it occurs, to protect Americans, arrest or defeat the perpetrators, respond with all appropriate instruments against the sponsoring organizations and governments and provide recovery relief to victims, as permitted by law. |
| 4/24/1996 | Antiterrorism and Effective Death Penalty Act of 1996 (104-132) S 735 | 1. Congress's finding: the president should use all necessary means, including covert action and military force, to disrupt, dismantle, and destroy international infrastructure used by international terrorists, including overseas terrorist training facilities and safe havens. |
| 8/20/1998 | E.O. 13099 | 1. Osama bin Laden and al Qaida are added into the annex to E.O. 12947 as terrorists |

**APPENDIX O:
ADDITIONAL TABLES FOR CHAPTER 4**

**Appendix Table O.1. Number of Congressional Authorization or Regulation of
Military Deployment Bills**

| Event | No | Yes | Total |
|-----------------------|----|-----|-------|
| Drug Trafficking | 4 | 1 | 5 |
| First Iraqi War | 6 | 3 | 9 |
| Somalia | 10 | 2 | 12 |
| Panama | 6 | 0 | 6 |
| Lebanon | 1 | 1 | 2 |
| Bosnia | 24 | 10 | 34 |
| Haiti | 14 | 4 | 18 |
| Korea | 29 | 2 | 31 |
| Kosovo | 12 | 3 | 15 |
| Afghanistan | 26 | 2 | 28 |
| Second Iraqi War | 23 | 7 | 30 |
| Taiwan-China Conflict | 21 | 0 | 21 |
| Post-first Iraqi War | 15 | 2 | 17 |
| Sudan-al Qaida | 0 | 1 | 1 |

Appendix Table O.2. Number of Congressional Ex Ante Regulation in all Military Deployment Bills

| Event | No | Yes | Total |
|-----------------------|-----------|-----------|-----------|
| Drug Trafficking | 0 | 1 | 1 |
| First Iraqi War | 0 | 3 | 3 |
| Somalia | 1 | 1 | 2 |
| Lebanon | 1 | 0 | 1 |
| Bosnia | 6 | 4 | 10 |
| Haiti | 4 | 0 | 4 |
| Korea | 2 | 0 | 2 |
| Kosovo | 0 | 3 | 3 |
| Afghanistan | 1 | 1 | 2 |
| Second Iraqi War | 6 | 1 | 7 |
| Taiwan-China Conflict | 0 | 0 | 0 |
| Post-first Iraqi War | 2 | 0 | 2 |
| Sudan-al Qaida | 0 | 1 | 1 |
| Total | 23 | 15 | 38 |

Appendix Table O.3. Number of Congressional Ex Ante Regulation on Minor and Major Hostility Military Deployment Bills

| Event | Number of Congressional Ex Ante Regulation on Minor Hostility Military Deployment Bills | | | Number of Congressional Ex Ante Regulation on Major Hostility Military Deployment Bills | | |
|----------------------|---|----------|-----------|---|-----------|-----------|
| | No | Yes | Total | No | Yes | Total |
| Drug Trafficking | 0 | 1 | 1 | 0 | 0 | 0 |
| Somalia | 0 | 1 | 1 | 1 | 0 | 1 |
| Lebanon | 1 | 0 | 1 | 0 | 0 | 0 |
| Bosnia | 2 | 0 | 2 | 4 | 4 | 8 |
| Haiti | 2 | 0 | 2 | 2 | 0 | 2 |
| Korea | 2 | 0 | 2 | 0 | 0 | 0 |
| Kosovo | 0 | 1 | 1 | 0 | 2 | 2 |
| Second Iraqi War | 0 | 1 | 1 | 6 | 0 | 0 |
| Sudan-al Qaida | 0 | 1 | 1 | 0 | 0 | 0 |
| Post-first Iraqi War | 0 | 0 | 0 | 2 | 0 | 2 |
| Total | 7 | 5 | 12 | 16 | 10 | 26 |

Appendix Table O.4. Interaction Terms Included for Discourse Quality of Constitutional Content and Congressional Participation Structures

(ClosedRule/ Cloture x Political)

| | Dependent Variable= MajorContent | |
|------------------------|----------------------------------|---------------------|
| | Non-military Cases | Overall Cases |
| LawCharacter | -0.804 (-1.49) | -0.711 (-1.52) |
| HComHearing | -0.213 (-0.39) | -0.427 (-0.83) |
| SComHearing | -0.049 (-0.08) | -0.113 (-0.19) |
| ClosedRule | -0.429 (-1.15) | -0.581 (-1.74) |
| Cloture | 0.858** (2.34) | 0.87** (2.85) |
| HCom | 0.243* (1.88) | 0.289* (2.2) |
| SCom | 0.033 (0.16) | 0.003 (0.02) |
| Time | -0.012 (-0.17) | -0.033 (-0.5) |
| DividedGov | -1.193 (-1.61) | -0.935 (-1.08) |
| Election | 0.546* (1.69) | 0.406 (1.59) |
| Approval | 0.146 (0.11) | 0.281 (0.2) |
| PercentParty | -6.993 (-1.01) | -4.881 (-0.75) |
| ClosedRule X Political | 2.04 (0.53) | 0.95 (0.28) |
| Cloture X Political | -5.818** (-2.02) | -7.181** (-2.53) |
| Constant | 3.976 (1.15) | 2.554 (0.8) |
| N | 191 | 229 |

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