# Topic K rd 5

It’s the same k as round 3 – The only difference is this card in the 2nc

#### The WPR is a useless document – Congress doesn’t work to avoid it, and the president effectively uses it as toilet paper

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By now, the general pattern concerning presidential treatment of¶ the WPR should be clear: when faced with a situation in which the WPR should, by its own terms, come into play, presidents circumvent its application by proffering questionable legal analyses. Yet, as was frequently the case following the aforementioned presidential actions, those looking to the courts for support were disappointed to learn that the judiciary would be of little help. Indeed, congressional and private litigants have similarly been unsuccessful in their efforts to check potentially illegal presidential action. The suits arising out of possible WPR violations are well-documented and therefore only require a brief review. Generally, when faced with a question concerning the legality of presidential military action, courts have punted the issue using a number of procedural tools to avoid ruling on the merits. For example, when twenty-nine representatives filed suit after President Reagan’s possible WPR violation in El Salvador, the U.S. District Court for the District of Columbia dismissed the suit on political question grounds. Similar suits were dismissed for issues involving standing, mootness, ripeness, or nonjusticiability because Congress could better handle fact-finding. Despite the varying grounds for dismissing WPR suits, a general theme as emerged: absent action taken by Congress itself, the judiciary can not be counted on to step in to check the President. To be sure, the judiciary’s unwillingness to review cases arising from WPR disputes arguably carries some merit. Two examples illustrate this point. First, although a serviceperson ordered into combat might have standing to sue, congressional standing is less clear. Indeed, debates rage throughout war powers literature concerning whether congressional suits should even be heard on their merits. And though some courts have held that a member of Congress can have standing when a President acts unilaterally, holding that such unauthorized actions amount to “disenfranchisement,” subsequent decisions and commentators have thrown the entire realm of legislative standing into doubt. Though the merits of this debate are beyond the scope of this Note, it is sufficient to emphasize that a member of Congress arguably suffers an injury when a President violates the WPR because the presidential action prevents the congressperson from being able to vote (namely, on whether to authorize hostilities), thereby amounting to disenfranchisement by “preclu[ding] . . . a specific vote . . . by a presidential violation of law . . . .” As such, under the right circumstances, perhaps the standing doctrine should not be as problematic as history seems to indicate when a congressperson attempting to have a say on military action brings a WPR suit. Secondly, and perhaps more importantly, it is arguably unclear what, if any, remedy is available to potential litigants. Unlike a private lawsuit, where a court can impose a simple fine or jail sentence, suits against the executive branch carry a myriad of practical issues. For example, if the remedy is an injunction, issues concerning enforcement arise: Who enforces it and how? Or, if a court makes a declaratory judgment stating that the President has acted illegally, it might invite open defiance, thereby creating unprecedented strife among branches. Yet, a number of possible remedies are indeed available. For one, courts could simply start the WPR clock, requiring a President to either seek congressional approval or cease all actions within the time remaining (depending on whether the court starts the clock from the beginning or applies it retroactively). In doing so, a court would trigger the WPR in the same way that Congress would have had it acted alone. On a similar note, a court could declare the relevant military conflict illegal under the WPR, thereby inviting Congress to begin impeachment proceedings. Although both cases require some level of congressional involvement, a court could at least begin the process of providing a suitable remedy. Thus, the more questionable issues of standing and remedies should not (under the right circumstances) prevent a WPR suit from moving forward. What about the pragmatic issues associated with involving the judiciary in foreign affairs? After all, we might not want our judiciary entering the world of realpolitik by forcing a President’s hand; doing so would require a large political (and administrative) undertaking that might take us beyond the bounds of the judiciary’s institutional role. And as previously mentioned, courts do not, and perhaps should not, want to be in the business of telling the President when or how to act, especially when such conflict might result in presidential defiance. This position might make sense in a system where we could rely on congressional action to prevent unilateral action. But given the dysfunction that overwhelms the legislative branch whenever a President violates the WPR, the entire premise of a system emphasizing no unilateral military action is inverted when the onus is placed squarely on Congress. If Congress could not go to the courts in order to prevent further presidential WPR violations, it would be required to turn to its legislative powers. But doing so would require the approval of at least a majority of Congress, though two-thirds would seem more reasonable given the likelihood of a presidential veto. Requiring such an overwhelming level of congressional support and unity to act is irrational and unreasonable, especially after considering the ways in which most Congresses have failed to act on prior occasions. Given this high burden placed on any Congress, even one with majority control, the judiciary must play some role when a President violates the WPR. Though the pragmatic issues around judicial intervention require some recognition, they are, in some respect, the lesser of two evils. But beyond the technical barriers courts impose (and the practical reasons behind them), their consistent refusal to reach the merits in WPR cases is more fundamentally problematic given the ways in which early U.S. courts handled cases involving unilateral presidential action. One case in particular illustrates the conflict between the historical and contemporary judicial handling of military cases. Little v. Barreme involved the U.S. seizure of a Danish ship sailing from a French port pursuant to direct orders from President John Adams that ran contrary to congressional authorization. In concluding that the captain of the U.S. vessel could be held personally liable for damages, Chief Justice John Marshall (on behalf of a unanimous court) held that the President could not circumvent congressional authority, thereby creating a framework wherein “congressional policy announced in a statute necessarily prevails over inconsistent presidential orders and military actions.” Perhaps most notably, Chief Justice Marshall never even considered the political question doctrine or any other judicial avoidance tool in reaching this conclusion. Thus, Little seemingly stands for the proposition that the prevention of unilateral presidential action is not merely an issue of public policy, but rather part of the structure of the courts’ constitutional power. Consequently, per Little, judicial intervention into military affairs should not be problematic. But we have clearly shifted toward a new judicial framework that does not assert the type of judicial authority Chief Justice Marshall contemplated. The result is that all members of Congress who attempt to challenge presidential military action fail, casting into doubt the future of WPR suits. C. Congress Under the WPR Of course, despite these various suits, Congress has received much of the blame for the WPR’s treatment and failures. For example, Congress has been criticized for doing little to enforce the WPR in using other Article I tools, such as the “power of the purse,” or by closing the loopholes frequently used by presidents to avoid the WPR in the first place. Furthermore, in those situations where Congress has decided to act, it has done so in such a disjointed manner as to render any possible check on the President useless. For example, during President Reagan’s invasion of Grenada, Congress failed to reach an agreement to declare the WPR’s sixty-day clock operative, and later faced similar “deadlock” in deciding how best to respond to President Reagan’s actions in the Persian Gulf, eventually settling for a bill that reflected congressional “ambivalence.” Thus, between the lack of a “backbone” to check rogue presidential action and general ineptitude when it actually decides to act, Congress has demonstrated its inability to remedy WPR violations. Worse yet, much of Congress’s interest in the WPR is politically motivated, leading to inconsistent review of presidential military decisions filled with post-hoc rationalizations. Given the political risk associated with wartime decisions, Congress lacks any incentive to act unless and until it can gauge public reaction—a process that often occurs after the fact. As a result, missions deemed successful by the public will rarely provoke “serious congressional concern” about presidential compliance with the WPR, while failures will draw scrutiny. For example, in the case of the Mayaguez, “liberals in the Congress generally praised [President Gerald Ford’s] performance” despite the constitutional questions surrounding the conflict, simply because the public deemed it a success. Thus, even if Congress was effective at checking potentially unconstitutional presidential action, it would only act when politically safe to do so. This result should be unsurprising: making a wartime decision provides little advantage for politicians, especially if the resulting action succeeds. Consequently, Congress itself has taken a role in the continued disregard for WPR enforcement. The current WPR framework is broken: presidents avoid it, courts will not rule on it, and Congress will not enforce it. This cycle has culminated in President Obama’s recent use of force in Libya, which created little, if any, controversy, and it provides a clear pass to future presidents, judges, and congresspersons looking to continue the system of passivity and deferment.