

WAR POWERS: CONSTANT CONSTITUTIONAL CONFLICT

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ABSTRACT: This study highlights the perpetual constitutional conflict between the U.S. Congress's Article I power to declare war and the president's Article II authority as commander-in-chief. It does so by first tracing the history of war powers in the American Constitution. Next, the background, content, and passage of the 1973 War Powers Resolution are covered. Finally, arguments for and against the War Powers Resolution are weighed. The findings indicate a positive legacy for the aforementioned law.

Keywords: Constitution Article I, Constitution Article II, Korean War, Vietnam War, War Powers Resolution

I. HISTORY OF WAR POWERS

The Framers of the U.S. Constitution knew what they did not want in creating a new national government. Shay's Rebellion in early 1787 had exposed the national government's fecklessness in running a national army, so it was clear that they sought to prevent a repeat of the Massachusetts mess. But neither, once they decided to add an executive branch, did they intend to imbue the president with the same level of military authority as was granted to colonial governors or possessed by the British monarch [1].

Article I of the Constitution gives Congress the power to declare war. Meanwhile, Article II identifies the president's authority as commander-in-chief. Unfortunately, there doesn't seem to be agreement on either how to interpret those potentially conflicting roles or on which branch has the upper hand in exercising war powers. For Jerel Rosati and James Scott, the president has ultimate authority over the military: "By virtue of his position as president, he is treated like a six-star general, and when he gives an order, members of the military and the Department of Defense comply" [2]. In referring to commander-in-chief authority among other powers of the president, Donald Westerfield contends that "some of the executive powers are autonomous with respect to Congress and some are shared with Congress" [3]. For Francis Wormuth and Edwin Firmage, the president's commander-in-chief authority is based on both acts by Congress and on common law of war [4]. Alternately, Edward Keynes finds that there is no clear evidence from the Constitution or the intent of the Framers as to which branch has exclusive foreign and war powers [5]. Far from executive-controlled, shared, or unclear, Louis Henkin observes that, "[h]istory supports few limitations on the power of Congress in foreign affairs other than the Bill of Rights..."[6]

While there has been minimal controversy associated with declared wars in U.S. history, the hundreds of instances of military deployment overseas have received more scrutiny. In the late eighteenth and early nineteenth century, Americans were busy trying to dislodge foreign powers from the continent. Following the Civil War, the American government became more aggressive in clearing trade routes, policing areas within the region, and acquiring land by military means. The expansionism which characterized American policy directly before World War I reverted to isolationism in the years following the Great War [7].

Following World War II, the consensus about America's foreign policy goals began to erode, a consequence of several factors. First, the extent of communism's threat to democracy was open to debate even during the Cold War. Second, America was operating in a global environment where independence from colonial rule was fast becoming the norm. Third, U.S. ability to influence others abroad was gradually being constrained by diminishing resources at home. Finally, American public opinion became a critical factor in foreign policy decisions, so when it was divided, so was policy [8].

At the same time, the authority of the U.S. presidency in foreign and military affairs increased significantly after World War II. One reason for this trend was the permanent standing military which World War II ushered in. Another was the continuation of conscription. It is also important to note that with the creation of the United Nations, presidents could appeal directly to that world body for military action while

largely bypassing Congress, which is what happened in response to North Korea's invasion of South Korea in 1950. Finally, presidents used ostensible emergencies like the 1964 Gulf of Tonkin incident to initiate hostilities, for which Congress mostly acquiesced [9].

The War Powers Resolution of 1973 emanated from Congress's frustration with the manner by which various chief executives had prosecuted the Vietnam War, but it neither started nor ended the debate about who controls war powers under the Constitution.

II. VIETNAM WAR POLICY DURING NIXON ADMINISTRATION

President Lyndon B. Johnson's March 1968 announcement that he would not seek reelection as president was due to several factors, of which the lack of success in fighting the Vietnam War was paramount. When he left office in January 1969, there were a half-million American military troops in Vietnam. Richard Nixon had narrowly won the 1968 presidential election after promising a plan to end America's participation in the Vietnam conflict [10].

However, once in office, President Nixon recognized the challenge in protecting South Vietnam while simultaneously withdrawing forces. His policies in fighting the Vietnam War came under heavy opposition, eventually from his own party. For instance, the invasion of Cambodia in May 1970 to root out enemy troops along the Ho Chi Minh Trail was met with the Cooper-Church Act. In 1971, Congress rescinded 1964 Gulf of Tonkin Act amid growing disillusionment with the Nixon White House. After the Fall 1972 peace proposal between the U.S. and North Vietnam stalled, President Nixon ordered heavy bombing. When the bombing resumed in Cambodia after the agreement concluded, Congress passed the Case-Church Act. Several members of Congress sued the Nixon administration in Spring 1973 for continuing combat operations in Southeast Asia in absence of congressional authorization [11].

III. CHRONOLOGY OF WAR POWERS RESOLUTION

Using presidential archives, congressional records, and other primary sources, development of the 1973 War Powers Resolution can be viewed from its era's vantage point.

After the armistice halting the Korean War, Congress's Legislative Reference Service published a report at the request of U.S. House Majority Leader John McCormack. This study, released in 1956, included a list of all actions taken by the president as commander-in-chief from 1789 to 1955 [12]. While congressional demand for inclusion in military policy largely deferred to executive discretion following major events of the early 1960s—construction of the Berlin Wall in 1961 and the Cuban Missile Crisis of 1962 among them—legislative questioning of Vietnam War took a serious turn in the mid-1960s. For instance, two U.S. senators proposed an amendment to the Foreign Assistance Act which sought to limit funds for combat in Vietnam. Though unsuccessful, the Fulbright-Gruening Amendment was a harbinger of things to come [13].

At the outset of the 1970's, America's experience in Vietnam turned from bad to worse, with huge public protests, the expansion of the war into Cambodia, and an increasing number of American casualties. It was for that reason that early versions of the War Powers Resolution were introduced in both chambers of Congress during Summer 1970. In the Senate, Republican Jacob Javits of New York introduced an amendment to the National Security Act of 1947 which specified conditions under which the president could commit troops to military action [14]. In the House, Democratic Congressman Clement Zablocki (WI-4th) initiated a joint resolution limiting the war powers of the president. Though neither was passed the full Congress, both got the attention of White House personnel, as various memoranda reveal. Prior to a meeting between National Security Advisor Henry Kissinger and Senator Javits in February 1971, a memorandum from J.F. Lehman to Kissinger notes that "Javits wants daily consultation by the Executive with the SFRC." His request was soundly rejected [15].

Subsequently, Senator Javits introduced S. 2956 in December 1971, a bill designed to make rules governing the use of armed forces in the absence of a declaration of war. Its short title was the War Powers Act of 1971. This bill passed the Senate by a 68-16 vote in April 1972, but the clock ran out on a House vote during the session. In May and June of 1973, Zablocki and Javits reintroduced bills on war powers in the House and Senate, respectively. This time the bills were approved with bipartisan backing in both chambers, but due to differences went to conference committee. The Senate agreed to the report on October 10, 1973, with the House approving two days later. The combined legislation emerged as the War Powers Resolution of 1973 [16].

In seeking to restore the balance between the president and Congress in the area of war powers, the Resolution requires the president to inform Congress beforehand if possible when American military forces will be dispatched to a situation of imminent hostilities; to report on the operation within 48 hours of actually sending troops; and to remove troops from foreign hostilities within a 90-day period unless Congress specifically authorizes an extension or declares war [17]. According to Raymond Eresman, the authors of the War Powers Resolution had several objectives in advancing the legislation. Importantly, they recognized the

need for Congress to be involved at the outset of hostilities abroad, as it would be much more difficult to impact the situation later on [18].

Nixon Archive records indicate that after the War Powers Resolution was passed and sent to President Nixon for action, Office of Management and Budget (OMB) Director Roy Ash wrote a memorandum to the president outlining agency recommendations on the controversial legislation. The memorandum reveals that the resolution was “disapproved” by OMB, Department of Justice, Department of State, and the National Security Council. President Nixon waited until October 24, 1973 to veto the War Powers Resolution, which was the last day he could do so without the act becoming law sans signature [19].

In his veto message, President Nixon asserted that the legislation was unconstitutional, that it undermined the nation’s foreign policy, and that its provisions could be invoked automatically without formal congressional approval. As an alternative, the president proposed a commission which would examine the constitutional roles of the president and Congress. A Nixon Archives memorandum from David Parker to Alexander Haig on November 7, 1973 proposed inviting key supporters to the White House for “a couple of drinks” should be veto be sustained. However, the drinks would never be poured: both the House (284-135) and Senate (75-18) overrode the veto that day. The veto override was the fifth and final one which Congress accomplished during the Nixon presidency [20].

Clearly, the War Powers Resolution was part of a multi-year effort by Congress to confront perceived executive overreach and abuses. For instance, the Case Act of 1972 strengthened legislative oversight of treaties and international agreements. During 1973, the Nixon White House faced allegations over the Watergate scandal and the resignation of Vice President Spiro Agnew; Nixon resigned from office in August 1974. In 1974, Congress reined in budgetary tactics with the Budget Control and Impoundment Act. Likewise in 1974, Congress began to limit activities of the Central Intelligence Agency through the Hughes-Ryan Amendment. In passing the Arms Export Control Act of 1976, Congress imposed tighter regulation over the export of arms and military equipment [21].

IV. OPPOSITION TO WAR POWERS RESOLUTION

The reasons for opposition to the War Powers Resolution are constitutional, historical, political, and practical.

From the standpoint of history, a 1996 Congressional Research Service (CRS) report notes that American presidents sent troops overseas without a declaration of war or congressional authorization in hundreds of instances, which were individually documented in an earlier report by the CRS [22].

Legislative attempts to revise or rescind the War Powers Resolution have been constant since its passage. A bill to repeal the War Powers Resolution were introduced in the Senate in 1983 and the House in 1987. An attempt to revise the War Powers Resolution was introduced and debated in the Senate in 1988. In 1995, several members of the House and Senate again introduced bills to repeal the legislation. Finally, a 2008 bipartisan panel recommended repeal of the War Powers Resolution [23].

The courts have largely rejected involving themselves in War Powers Resolution disputes, which Susan Burgess attributes to the Supreme Court treating such matters as political questions. [24]. The two most serious legal cases directly involving the War Powers Resolution were decided in 1981 and 2000, respectively. In the 1981 case of *Crockett v. Reagan*, a Federal District Court judge rejected the claim that the nation’s military intervention in El Salvador represented a violation of the WPR. In 2000, the U.S. Court of Appeals for the District of Columbia affirmed a Federal District Court ruling in *Campbell v. Clinton* case, determining that the members of Congress who questioned the Clinton administration’s 1999 NATO mission in Kosovo using the WPR lacked legal standing [25]. The 1983 Supreme Court ruling in *INS v. Chadha*, which declared the legislative veto unconstitutional, also weakened the WPR’s provision specifying the procedure for retention or removal of forces from conflict [26].

The no-confidence vote that was the War Powers Resolution “sharply limited overseas adventures” for the rest of the 1970s [27]. However, Cecil Crabb and Kevin Mulcahy hold that one of the reasons why the WPR failed in later periods was that it “misjudged the mood of the American people in the post-Vietnam era” [28]. Flanders and Flanders point to several military missions starting in 1975 where the strictures of the War Powers Resolution were ignored, including the 1975 Mayaguez rescue, the aborted hostage rescue mission in Iran in 1980, 1982 Marine mission in Lebanon, 1983 Grenada invasion, and 1989 Panama mission [29]. Robert Turner adds the 1986 response against Libya for its role in several terrorist attacks [30]. Deese observes that the 1991 authorization of force against Iraq for its invasion of Kuwait did not include legal adherence to the War Powers Resolution [31].

Several writers note that conditions combined with emerging technology facilitate flexibility and quick action not anticipated in the original WPR [32]. John Alexander examines several new types of military weapons whose use is not clear as applied to the WPR [33]. Eleven years after he resigned the presidency, Richard Nixon warned that the War Powers Resolution prevents America from “holding our own in the crucial

battles of the Third World” [34]. Finally, Rosati and Scott find that among the explanations for the WPR’s fecklessness is the tendency of the American public and Congress to “rally around the flag” in the midst of a military crisis [35].

V. ASSESSING THE LEGACY OF THE WAR POWERS RESOLUTION

Despite the many cases where the War Powers Resolution was ignored, Congress did take actions after its passage which restrained executive war making, including operations in Angola in the 1970s, Nicaragua in the 1980s, and Somalia in the 1990s [36]. According to a Congressional Research service study in 2017, there have been more than 130 instances since passage of the WPR in which presidents have reported activities to Congress, claiming that they are being “consistent with” the WPR rather than being legally bound by it [37]. In the early 2020s, there were successful House and Senate votes to repeal the 2002 authorization Congress granted for the invasion of Iraq [38].

Admittedly, the 21st Century has seen a weakening of Congress’s role in authorizing war and overseeing certain aspects once begun. Even though they started with wide support, the military missions in Afghanistan and Iraq turned into prolonged, protracted efforts at nation building. The War on Terror brought asymmetrical warfare, such as the employment of drones to kill suspected terrorists. These activities, whether undertaken by Democrat or Republican chief executives, have been controlled by defense and intelligence agencies with minimal congressional interference.[39].

Through a series of Supreme Court rulings and a compliant Congress, Donald Trump’s use of the commander-in-chief power during his second term in office has further increased presidential discretion in the warmaking area. The Trump White House has used the military to destroy alleged drug-running ships and to apprehend a foreign leader wanted on criminal charges [40].

However, even with the recent record on its side, the Trump administration was called to some account for its 2026 attack on Iran. Both the U.S. Senate and House of Representatives voted on the War Powers Resolution as it pertains to the conflict with Iran. That each chamber narrowly rejected applying the half-century law—especially with the contemporary momentum on war making tilting toward the executive [41]—is telling.

VI. CONCLUSION: TIMELESS TUG-OF-WAR

For Ryan Hendrickson, the War Powers Resolution has helped to restore “the necessary checks and balances that are intrinsically part of democratic governance” [42]. Louis Fisher regards the WPR more as a “slow, evolutionary culture of institutional struggles and constitutional debate than as a narrow preoccupation with the Vietnam War” [43]. Pat Holt asserts that the War Powers Resolution represents an attempt by Congress to reassert what it considers its “ancient powers” [44].

The War Powers Resolution has contributed positively and significantly to the perpetual debate over war making authority between Congress and the president for fifty years and will continue to do so for the foreseeable future.

REFERENCES

- [1]. Samuel B. Hoff, A Bicentennial Assessment of Hamilton’s Energetic Executive, *Presidential Studies Quarterly*, Fall 1987, 17:4, 725-739.
- [2]. Jerel A. Rosati and James M. Scott, *The Politics of United States Foreign Policy* (Boston: Wadsworth, 2011), 58.
- [3]. Donald Westerfield, *War Powers: The President, the Congress, and the Question of War* (Westport, CT: Praeger, 1996), 16.
- [4]. Francis D. Wormuth and Edwin B. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law* (Urbana: University of Illinois Press, 1989).
- [5]. Edward Keynes, *Undeclared War: Twilight of Presidential Power* (University Park, Pennsylvania State University Press, 1991).
- [6]. Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (New York: Columbia University Press, 1990) p. 31.
- [7]. Stephen A. Flanders and Carl N. Flanders, *Dictionary of American Foreign Affairs* (New York: Macmillan Publishing Company, 1993).
- [8]. Samuel B. Hoff, From Agreement to Acrimony: The Decline of Bipartisanship in Presidential-Congressional Relations, 1953-1993, in Jerry Baydo, ed, *Modern America Examined* (El Cajon, CA: National Social Science Association Press, 2003),1-19.
- [9]. Rosati and Scott, 2011.

- [10]. Samuel B. Hoff, Vietnam Conflict, in John Powell, ed., *Magill's Guide to Military History* (Pasadena, CA: Salem Press/EBSCO, 2001), 1602-1606.
- [11]. Hoff, 2001.
- [12]. Dorothy Schaffter and Dorothy M. Mathews, *The Powers of the President as Commander in Chief of the Army and Navy of the United States* (Washington: Government Printing Office, 1956).
- [13]. Rosati and Scott, 2011.
- [14]. Jacob K. Javits, *The Autobiography of a Public Man* (Boston: Houghton-Mifflin, 1981).
- [15]. Memorandum for Henry Kissinger from J.F. Lehman, Nixon Archives, February 4, 1971
- [16]. War Powers Resolution Legislative History, fordlibrarymuseum.gov, accessed October 2023.
- [17]. Susan R. Burgess, *Contest for Constitutional Authority: The Abortion and War Powers Debates* (Lawrence: University Press of Kansas, 1992).
- [18]. Raymond S. Eresman, *The War Powers Resolution: Is it Time for a New Approach?* (Montgomery, AL: Maxwell Air Force Base, 1995).
- [19]. Samuel B. Hoff, Branch Battles: Nixon, Congress, and the Veto Power, *The Political Chronicle*, 1996, 8:2, p. 10-15.
- [20]. Hoff, 1996.
- [21]. I.M. Destler. 1986, *The Constitution and Foreign Affairs*, in James M. McCormick, ed., *A Reader in American Foreign Policy* (Itasca, IL: F.E. Peacock Publishers, 1986), 229-238. /John Spanier, *American Foreign Policy Since World War II* (Washington: Congressional Quarterly, Inc, 1992).
- [22]. Richard F. Grimmett, *War Powers Resolution: A Brief Summary of Pro and Con Arguments* (Washington: Congressional Research Service, June 5, 1996). /Ellen C. Collier, *Instances of Uses of United States Armed Forces Abroad, 1798-1993* (Washington: Congressional Research Service, October 7, 1993).
- [23]. James A. Baker III and Warren Christopher, *National War Powers Commission Report* (Charlottesville: University of Virginia Miller Center of Public Affairs, 2008).
- [24]. Burgess, 1992.
- [25]. Stephen M. Griffin and Matthew C. Waxman, *War Powers: Congress, the President, and the Courts—A Model Casebook Section* (Tulane Public Law Research Paper #20-18, Columbia Public Law Research Paper #14-669, 2020).
- [26]. David M. O'Brien, *Constitutional Law and Politics, Volume 1: Struggles for Power and Government Accountability* (New York: W.W. Norton and Company, 2017).
- [27]. Saul Landau, *The Dangerous Doctrine: National Security and US Foreign Policy* (Boulder: Westview Press, 1988), 114.
- [28]. Cecil V. Crabb and Kevin V. Mulcahy, *American National Security: A Presidential Perspective* (Pacific Grove, CA: Brooks/Cole Publishing Company, 1991), 56.
- [29]. Flanders and Flanders, 1993.
- [30]. Robert F. Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in US Foreign Policy* (Washington, DC: Brassey's, Inc, 1991).
- [31]. David A. Deese, ed, *The New Politics of American Foreign Policy* (New York: St. Martin's Press, 1994).
- [32]. Conrad Von Wald, *The War Powers Resolution: Its Impact on the American Public and Congressional Support Center of Gravity* (Montgomery, AL: Maxwell Air Force Base, 1995).
- [33]. John B. Alexander, *Future War: Non-Lethal Weapons in Twenty-First Century Warfare* (New York: Thomas Dunne Books, 1999).
- [34]. Richard Nixon, *No More Vietnams* (New York: Avon Books, 1985), 226
- [35]. Rosati and Scott, 2011.
- [36]. George Will, Congress's Unused War Powers, *Washington Post*, November 4, 2007
- [37]. Matthew C. Weed, *The War Powers Resolution: Concepts and Practice* (Washington, DC: Congressional Research Service, 2017).
- [38]. Ivanna Saric, *Senate Votes to Repeal Iraqi War Authorization 20 Years After Invasion*, *Axios.com*, March 29, 2023.
- [39]. Samuel B. Hoff, *War on Terror Has Problems to Overcome*, *Delaware State News*, September 10, 2025, 6
- [40]. Charle Savage, *Trump Tramples a Line, Worn Faint, on War*, *New York Times*, March 8, 2026, 1,12
- [41]. Lisa Mascaro, Stephen Groves, and Mary Clare Jalonick, *House Narrowly Rejects Iran War Powers Resolution*, *Associated Press*, March 6, 2026
- [42]. Ryan C. Hendrickson, *The Use of War Powers Must be Solely Vested in the Hands of the President: Con*, in Robert P. Watson and David A. Freeman, eds. *Debating the Presidency* (Dubuque, Iowa: Kendall/Hunt Publishing Company, 2005), 39.

- [43]. Louis Fisher, *Presidential War Power* (Lawrence: University Press of Kansas, 1995), 128.
- [44]. Pat M. Holt, *The War Powers Resolution: The Role of Congress in U.S. Armed Intervention* (Washington, DC: American Enterprise Institute, 1978), 39.

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