THE CONSTITUTIONALITY OF THE WAR POWERS ACT

by

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Ever since it's inception ten years ago, the debate over the War Powers Act of 1973 has raged. One side claims that the War Powers Act is a just return to the original intention of the Founding Fathers, while the other side claims that it is a dangerous solution to a problem that does not exist. Whichever side may be right, one thing is for certain; we must solve this problem (if one exists) now, before the country goes to war, because the last thing this country needs when we should be forced into combat is a debate over who should be running the war. This is the danger we now face, and should this country be in chaos when we or our allies are attacked, it would cost us dearly, perhaps cost us our freedom.

In the summer of 1801, Thomas Jefferson sent the United States Navy to protect American shipping interests in the Mediterranean Sea. He did this without Congressional approval because Congress was not in session at the time. Because of this, he ordered them to take defensive measures only. When Congress reconvened, Jefferson asked for and got their authorization.

In 1845, during the Mexican War, James Polk sent American troops to defend an undefined border in Texas (which was just annexed). The troops were then attacked, and Polk used this as a pretext for declaration of war by Congress. He got it. In effect, James Polk had maneuvered the United States into a position that it could do nothing less than
declare war. The U.S. had been attacked, and the Congress had to save face for the country. Abe Lincoln, then a congressman, said this: "Allow the President to invade a neighboring nation, whenever he shall deem necessary to repel an invasion... and you allow him to make war at pleasure."¹

In 1900, President McKinley sent five thousand troops to China without Congressional approval to protect Americans there and help put down the Boxer Rebellion.

Teddy Roosevelt once dispatched gunboats to the Canal Zone on his own authority. This could have easily provoked a battle, possibly a war.

In October of 1962, President Kennedy wielded the total power of war and peace. The need for quick communication, secrecy, unity, and flexibility made congressional consultation impractical, possibly dangerous.

From 1965-1972 President Johnson claimed sole authorization for the Vietnam War. In 1964, Congress passed the "Gulf of Tonkin" resolution in which it declared it's support for "the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression."² Also, President Nixon later asserted unlimited descretion over the deployment of American armed forces in Vietnam.

In short, "There is nothing Constitutionally illegitimate or even dubious about 'undeclared' wars. We and other nations have fought them frequently in the 18th and 19th centuries, as well as the 20th."³ In other words, the "presidential" or "undeclared" conflict is not an invention of the late twentieth century.

One author gives three reasons for the post-World War II changes in the American War Power. First, the emergence of the United States as a world power. Second, the emergence of the United States as a leader in the world of technological (nuclear) warfare. Lastly, the need for speed and secrecy in diplomatic relations, as proved in the Cuban Missile Crisis. He calls this "institutional capacities".⁴

The single most important reason that we have the War Powers Act today is the Vietnam War.

A hundred billion dollars, fifty thousand of our own dead, three hundred thousand personal casualties, the new chemistry of spoliation, and the old alchemy of bombs and napalm greater than any previous war in the history of mankind: headstones of American history in the late twentieth century.⁵

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Although most Americans were against the Vietnam War in its later years, support for the war was widespread, especially in Washington. The Vietnam war did not begin without Congressional authorization. U.S. involvement had strong support from both major parties until the Tet Offensive in 1968.  

This information brings us to an odd conclusion. The United States would have still entered the War in Vietnam even if the War Powers Act had been in effect. Congress would have granted Johnson a continuation if they had been asked, or, more probably, they would have granted a formal declaration of war. This would have probably meant that we would have been in Vietnam even longer, since one of the reasons we were able to get out of Vietnam and not lose much respect was because this was not a declared war.

As an example of strong support of the war in Vietnam, we can look to the Gulf of Tonkin Resolution. As was previously stated, it expressed approval and support of "the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." This resolution was passed in the Senate by a vote of 88 to 2, and in the House unanimously. This is certainly a strong show

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of support. Senator Javits, who later co-authored the War Powers Act, said then, "We who support the joint resolution (the Tonkin Gulf Resolution) do so with full knowledge of its seriousness and with the understanding that we are voting (for) a resolution which means life or the loss of it for who knows how many hundreds of thousands . . . ".

It is very easy, when discussing this subject, to fall back on our founding fathers for their prophetic council. However, although some of their ideas and thoughts will be examined here, one should by no means construe all of the words of Hamilton, Jefferson, Madison, or Marshall as totally applicable to the world today. For, as one author has put it, "It is psychologically impossible for a man of the twentieth century, however learned and sensitive, to perceive the world as the men of 1787 did."9

During the very early days of the colonies, the only thing that held the individual states together was the Articles of Confederation. This document, although flawed, had a very distinct influence on our Constitution. The problem with it was that the colonists had no sense of unity with one another. This was because there was no strong national government, and no strong national leader. When the founding fathers gathered to write the Constitution, their major problem was to create this federal system, which was to share power

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8Rostow, "Great Cases . . .", p. 882.

9Ibid, p. 844.
with the individual states, and yet avoid an emperial system, which they were so desperately fighting against at the time.

As Mr. Rostow has put it,

I should have supposed that if anything is clear about the intent of the Founding Fathers, it is that one of the major goals of the Philadelphia Convention was to remedy what was perceived as a critical weakness of the Articles of Confederation, namely, the absence of a strong and independent executive.

So, it was obvious to the men of the colonies that this nation be conceived with a strong executive, but not one with absolute power. It only makes sense that this philosophy also apply to the war powers.

One of the most frequently argued-about debates from that time was one in which the clause that Congress shall have the power to "make" war was changed to "declare" war. James Madison, who recorded the debates of the first Constitutional Convention, reports that it happened like this: 11

"To make War"

Mr. PINCKNEY opposed the vesting this power in the Legislature. Its proceedings were too slow. It would meet but once a year. The House of Representatives would be too numerous for such deliberations. The Senate would be the best depository, being more acquainted with foreign affairs, and most capable of proper resolutions. If the States are equally represented in Senate, so as to give no advantage to large States, the power will notwithstanding be safe, as the small have their all at stake in such cases as well as the large States. It would be singular for one authority to make war, and another peace.

Mr. BUTLER. The objections against the Legislature lie in great degree against the Senate. He was for vesting the power in the President, who will have all the

10 Ibid, p. 1195.

11 Van Alstyne, William, "Congress, the President ...", p. 6-7.
requisite qualities, and will not make war but when the Nation will support it.

Mr. MADISON and Mr. GERRY moved to insert "declare," striking out "make" war; leaving to the Executive the power to repel sudden attacks.

Mr. SHERMAN thought it stood very well. The Executive should be able to repel and not to commence war. "Make" better then "declare" the latter narrowing the power too much.

Mr. GERRY never expected to hear in a republic a motion to empower the Executive alone to declare war.

Mr. ELLSWORTH (said) (t)here is a material difference between the cases of making war and making peace. It should be more easy to get out of war than into it. War also is a simple and overt declaration, peace attended with intricate and secret negotiations.

Mr. MASON was against giving the power of was to the executive, because no safely to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating peace. He preferred "declare" to "make".

The motion was then voted on, and it passed overwhelmingly.

From this passage, the intent of the Framers seems to be clear, to leave the Congress the ability to formally declare war, yet leave the President the power to repel sudden attacks. It also seems clear that the framers did not wish to hamper the President in his power to conduct war. In other words,

It was the intent of the framers that massive economic and physical sacrifice by the nation in a military conflict be possible only with the approval of Congress, . . . . and it can be inferred that it was similarly their intent that the drastic moral and legal consequences of hostile action by the United States against another nation require the broad based support of congressional approval. 12

This is not a point to be debated. Obviously, when we are

involved in a war, Congress must consent to the employment of troops. This does not, however, answer all our questions. The problems of "limited" military action, and indirect "threat" to the security of our nation are still present.

The Founding Fathers were vague on many issues. Some would argue that this was an oversight. Probably not. The Fathers of our country were purposefully vague on many points, so that our country could be insured to be a democracy, and that we could get through troubled times on our own, without having to look to the past every time an issue was debated. They set down the framework, but it was and is still up to us to fill it in. As Justice Brandeis once wrote,

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save people from Autocracy.

As for another structure laid down by the Founding Fathers, Justice Burger illustrated the point that we can't confuse "filling in" the structure with changing it.

> . . . the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded.\[14\]

Even though the Fathers were vague in many substantive aspects

\[13\] Myers v. United States, 272 U.S. 52 (1926)

\[14\] Immigration and Naturalization Service v. Chadha et al., 103 S. Ct. at 2795 (1983)
of the Constitution, they were equally as precise in defining the procedural aspects, as echoed by Justice Burger. So it seems that the power of war is to be shared by the two branches of our government. And why should that be surprising? Is not most of the power in the country shared by the President and Congress? The problems arise when we try to define exactly which powers the President owns and which belong to the Congress. Professor Rostow, talking about the future War Powers Act (then a bill) reiterates this point by quoting George Ball,

the bill 'represents an attempt to do what the Founding Fathers felt they were wise enough not to do: to give precision and automatic operation to the kind of legislative-executive collaboration which they decreed essential to prevent the unrestricted pattern of monarch, while at the same time assuring him sufficient flexibility to defend the country against any threats that might suddenly appear'.

So, it seems, that to solve this problem, we must try to define exactly what powers the Legislature and the Executive have, and what powers they share, if any.

When one thinks of a democracy, visions of men in debate over public policy on the floor of the hallowed halls of the Congress come to mind. When we think of tyranny, we automatically think of one ruthless ruler; a totalitarian that goes against our every principle of freedom. However, to jump to this conclusion would be a mistake, indeed. A tyranny does not have to be ruled by one man. As far back as 1787, men of this country had the foresight to warn against a legislative usurpation of power. In the following

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15 Rostow, "Great Cases . . .", p. 900.
passages from The Federalist Papers, No. 48, James Madison explains:

The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex...

They (the legislature's) Constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.\(^\text{16}\)

There seem to be three basic interpretations of the Congressional war power. They are:

1. The power of the Congress is simply a ceremonial one.
2. The Congress has complete control over war situations, and the President may not act without Congressional declaration in any instance.\(^\text{17}\)

This paper shall not deal with numbers one or three, for it seems to be obvious that this country was born under a doctrine of separation of powers, and that neither the President nor Congress has complete control over something as incredibly important as the power of war. The framers of the Constitution clearly intended that a proper balance be struck in this regard, and it seems logical that war should require the cooperation and mutual trust of both the President and Congress. As one author has stated, "Presidents could not


\(^{17}\text{Van Alstyne, "Congress, the President...", p. 5.}\)
declare war, congressmen could not deploy troops. On this as on all lesser issues, these men were to check and balance one another. "\(^{18}\) The Constitution, however, does outline a difference in the power of the Executive and the Legislative branches. It distinctly gives the power to "raise and support" the armed forces to the Congress. This distinction has been drawn by many since the inception of the Constitution. As early as 1866, Justice Davis wrote:

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. \(^{18}\)

This shows that this is not a "new" debate in any sense of the word. If we assume that Congress does have a power beyond a "ceremonial" one, we must concede the existence of Congressional authorization of war in at least some instances. These can be divided up into three distinct categories:

1. Express authorization
2. Implied authorization
3. Presumed authorization \(^{20}\)

Express authorization would be a formal declaration of war, such as our declaration of war against Germany before World War I.

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\(^{18}\) Allison, "Making War...", p. 91.

\(^{19}\) Ex Parte Milligan, 71 U.S. (4Wall) 2 (1866).

\(^{20}\) King and Leavens, "Curbing the Dog of War...", p. 68.
War II. An implied authorization would be one such as the Tonkin Gulf Resolution, where the Congress does everything but actually declare war. "Presumed" authorization would occur if the country was invaded, or on the brink of being invaded. These would all be instances when the President would have the power to wage general war, and stay within the boundaries of the Constitution. However, there still exists the problem of the so-called "limited" war. As far back as 1801, the great John Marshall was discussing that very subject.

It is not denied, nor in the course of the argument has it been denied, that Congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.\textsuperscript{21}

Also, Justice Samuel Chase, even earlier in 1800:

\begin{quote}
...Congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, it's extent and operations are only restricted and regulated by the jus belli, forming a part of the law of nations; but if a partial war is waged, it's extent and operation depend on our municipal laws.\textsuperscript{22}
\end{quote}

So, there is indeed such a thing as a "limited" war. It, in fact, is a viable alternative to a "general" war, as Marshall alluded to, in that the "limited" war may cost us less in human lives.

\textsuperscript{21} Justice Marshall, Talbot v. Seemen, 5 U.S. (1 Cranch), (1801).

\textsuperscript{22} Justice Chase, Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800).
On the other side of this issue is the President. The Chief Executive of our country is in a precarious position when it comes to the war power. The Constitution gives him the title of "Commander-in-Chief" of all the armies, yet leaves it to the Congress to tell him when he can use this power. And yet, as shown above, Presidents since Jefferson have used their powers to put the military into action, with an increasing frequency in the twentieth century. Perhaps the President does have some power to mobilize the armies of this nation before Congress actually declares a war, but is it a Constitutionally sound practice? That probably depends on the circumstances surrounding the situation. There seem to be two types of command authority. The first is the President's authority to command and deploy troops during times of war. This seems to be a power that is absolutely unquestionable. The other is the authority to direct the forces in times of peace. This is where the problems occur.

The President was given power over the military for very good reasons. First of all, the framers wished to "take advantage of executive speed, secrecy, efficiency, and relative isolation from 'public passions." This is demonstrated in The Federalist, No. 74, when Alexander Hamilton writes:

Of all the cares or concerns of government, the direction of war must peculiarly demands those qualities which distinguish the exercise of power

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23 Rogers, "Congress, the President...," p. 1196.
by a single hand. The direction of war implies
the direction of the common strength; and the power
of directing and employing the common strength
forms a usual and essential part in the definition
of the executive authority. 24

Many would argue that this power should be in the hands of
the legislature, because it is somehow "closer" to the
people and more "representative" of them. That argument
was answered in 1926 by Chief Justice Taft:

The president is a representative of the people
just as the members of the Senate and of the House
are, and it may be, at some times, on some subjects,
that the President elected by all the people is
rather more representative of them all than are
the members of either body of the Legislature whose
constituencies are local and not countrywide... 25

So, no one can doubt that the President has control over our
armed forces in times of war, and very near to complete control
However, what about "peace-time" deployments? Technically,
we must define a peace-time deployment as any Presidentially-
authorized mobilization of armed forces for the purpose of
protecting the interests of this country. Obviously, if this
country were attacked, the President would have the power to
defend it with the armies. This is obviously the intention
of the Founders, as was shown in the debate recorded here
earlier. 26 But, is this the extent of the powers of the
President? According to Justice Story, it is not:

...the power to provide for repelling invasions
includes the power to provide against the attempt

24 The Federalist Papers, No. 74, p. 447.


26 See pages 6-7.
and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.

We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all persons. 27

This seems to put to rest the argument that the President is limited to military action only when Congress declares war, or when we are invaded. We obviously would not wait, if the Soviets decided to invade Canada, until they swung down around British Columbia and into the state of Washington.

There are three more landmark cases that should not be discussed. In the Prize Cases 28 the Supreme Court upheld President Lincoln's Southern blockade despite the absence of a formal declaration of war from Congress. The Court basically stated that when someone else initiates war, the President is not only authorized, but obliged to resist force with force, and that he had broad discretion in deciding exactly what measures should be taken. The Court based its decision on general Congressional sanction of the war and subsequent Congressional sanction of the war and subsequent Congressional ratification. This is very similar to what happened one hundred years later, with the Vietnam War and the Tonkin Gulf Resolution. The Prize Cases (1863) serves to further broaden the Presidential war power with respect to national security and invasion of foreign troops.


Another landmark case frequently referred to when debating the powers of the President is *Youngstown Sheet and Tube Co. v. Sawyer* (1952).\(^{29}\) All opponents of "The Imperial President" flock to the argument behind this case and use them to try and weaken the power of the President in every area possible. Basically, *Youngstown* invalidated Truman's seizure of United States steel mills during the Korean War. This did limit the President's wartime powers, but it is important to remember that it limited his *domestic* power in times of war, and never even debated his power over external affairs or foreign relations, so these arguments are inapplicable to the problem at hand.

The last important case that should be discussed at this point is *United States v. Curtiss-Wright Export Corp.* (1936)\(^{30}\) This case is to "Presidentialists" what *Youngstown Sheet and Tube* is to "Congressionalists." The court held that the President is not restricted by Congressional delegations of power in external affairs as he is in domestic affairs. This was, they said, because of his extensive independent authority in the realm of foreign affairs and the desired goal of allowing him maximum flexibility in exercising the authority he possesses in that realm. This case greatly broadens the President's power in external affairs, and

\(^{29}\) *Youngstown Sheet and Tube Corp. v. Sawyer*, 343 U.S. 579 (1952).

supports the argument that the President's war power goes beyond Congressional declaration of war or invasion. It alludes to a broader discretion, exercisable by the President, to be used when this country is in danger.

The next thing to be discussed is the main aspect of this paper, the War Powers Act of 1973. The War Powers Act, written and adopted as a result of the Vietnam War. Thirteen years ago, Professor Rostow, an avid opponent of the War Power Act, saw this happening and remarked,

... Senators Cooper and Stennis support the Javits Bill (which later became the War Powers Act) for another reason: They are trying to take advantage of the present state of opinion about Korea and Vietnam to establish certain Congressional prerogatives they have long urged in the perpetual conflict between Congress and the Presidency over their respective roles in making foreign policy.31

Professor Rostow has not changed his opinion on the matter at all. He stated, only two years ago, that "This baleful resolution has hobbled our diplomacy, robbed our deterrence of its credibility and therefore greatly increases the risk of major war."32 What the War Powers Act does, in effect is destroy the political process of going to war, with the Congress having the final say (through a declaration or a positive, firm resolution

31 Rostow, "Great Cases. . . ", p. 897.

stating opposition to it) as to whether this country enters a full scale war, and the President having the power to command troops in a limited war. What the War Powers Act creates is a barrier between the President and Congress, and destroys the political process necessary to diplomacy and the avoidance of full scale war.

One problem with the War Powers Act is that it seems to weaken the power of the President to act in emergency situations. It might actually weaken his power, but for right now, let us assume at least that it would appear to other nations that it does. This fact might be the final factor in determining whether another nation might choose to provoke a crisis somewhere in the world which would undermine international peace and security, not to mention making the prospect of a successful invasion by a foreign nation that much more successful. 33

Also, the War Powers Resolution ties the hands of the President when using diplomacy in some instances. For example, it would have been very difficult for President Nixon to persuade the Soviet Union not to blow up China's Nuclear plants if he had to follow the strict guidelines of reporting of the War Powers Resolution. 34

The War Power Resolution specifically spells out circumstances that the President may introduce United States Armed Forces into hostilities. They are: (1) a

33Rogers, "Congress, the President. . . ", p. 211.
34Rostow, "Repeal the War Powers Resolution".
declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories of possessions, or its armed forces. This short list leaves out many important cases where the President would have to use force without Congressional approval. For instance, if Canada was invaded by the Soviet Union, as in our earlier example, the President would have no legal right to employ our troops beyond our border before Congress could formally declare war. Also not included is the protection of American citizens abroad. This is the reason President Reagan invaded Grenada in 1983, but it is not one of the explicit reasons for Presidential use of force. Most experts do agree, however, that the President has the Constitutional power and right to protect Americans abroad. Also not included is the right to protect our embassies across the world, a necessary right.

Ironically, however, any attack on U.S. territories or the U.S. military would authorize a full-scale war. This means that firing on a PT Boat in the Gulf of Tonkin would authorize the President to attack. If the War Powers Act had been in effect in 1965, President Johnson would have had every legal right to do everything he did, and the Congress would not have had a Gulf of Tonkin Res-

36 Moore, "Rethinking...", p. 30.
olution to repeal in 1972 to try and stop the Vietnam War, it would have just gone on and on.

Besides the ridiculous listing of the only times a President can use the military, the War Powers Act requires the President to make a full report to Congress every sixty days, after which the Congress had the right to extend the war, or by keeping silent, end the war. This is what is known as a "legislative veto". It is where the legislature can "veto" the actions of the President, instead of the usual other way around. This section causes almost as many problems as the first.

For one thing, as Allison Graham puts it,

"... the need for a President, any President, to bargain continually with Congress in order to gain approval for 'his' war may force him to make significant concessions on other fronts and so reduce his unilateral authority." 37

In other words, the President might have to "bargain away" powers and rights that he should normally be afforded. This would obviously narrow the power of the President as given by the Constitution. Also, the fact that the President must consult with, and report to, Congress may seriously conflict with real Presidential requirements for secrecy. Imagine, for example, how President Kennedy could have secretly and swiftly negotiated with the Russians during the Cuban Missile Crisis if he had to re-

37 Allison, "Making War, .. .", p. 103.
port everything he found out to the Congress.

No one could deny the fact that the President is the Commander in Chief of the military. It is he who decides where, when, and how to employ troops in times of combat. The War Powers Resolution would probably force the President to tailor his strategies more closely to what Congress would like to see every six months, and thus compromise his position as Commander in Chief, clearly not wanted by the Founding Fathers.

Another problem could come about because of the "reporting" clause of the War Powers Resolution. Knowing when the required time for withdrawal of American troops is, foreign armies could inflict the maximum amount of damages on American troops possible under the circumstances, therefore causing the loss of many unnecessary lives.

The War Powers Resolution is illogical. It lets the President have almost unlimited power in war in sixty days or less, but gives him very little power in long campaigns. What this will cause is two things. In one instance, the President will opt for a short, quick victory, possibly using more force than is necessary to finish the job in less than the sixty days that he must first report to Congress. This just might make use of unnecessary force such as unneeded bombings resulting in the killings of civilians necessary. In the other instance, the President would probably opt for a long,
drawn out campaign (one which he could get the backing of people) to pressure Congress into declaring a war that they might not have if the circumstances were different.

Not only does the War Powers Act take away power from the President that is rightfully and Constitutionally his, but the Congress loses out as well. As one author describes it:

The War Powers Resolution, however, weakens the Congressional power to prevent military action by conceding, without effectively limiting or defining it, a Presidential power to start wars while only marginally strengthening the power of Congress to terminate them.\(^{38}\)

In other words, Congress probably did itself a disservice by giving the President a free hand in short wars, while only marginally increasing its power to terminate long ones.

One author even suggests that the Congress doesn't need the War Powers Act to terminate a war. The claim is that the Congress could pass a joint resolution that would end a foreign. This would, of course, be subject to the basic rights of the President to protect his troops during withdrawal. This resolution could even be passed over the President's veto if necessary.\(^{39}\)

The President could appeal the War Powers Act to the Supreme Court at any time, on the grounds that it unconstitutionally infringes on his rights as Commander in

\(^{38}\)Franck, "After the Fall...", p. 627.

\(^{39}\)Moore, "Rethinking...", p. 30.
Chief. As the court stands now, he could probably win on that argument alone. This could happen, for instance, right before the President decides to invade another country, and he could do it "on the gounds that the War Powers Resolution is unconstitutional anyway". This would happen at a time when the country least needs confusion as to who really controls the military in what situation. There is another aspect of the War Powers Act, however, that is equally as unconstitutional as well. It has already been decided that the legislative veto is an unconstitutional answer to the problems of overwork in the Congress today, and the War Powers Act is a prime example of the legislative veto. In his dissent, Justice White even mentions the War Powers Resolution as an example.\(^{40}\) This means that the War Powers Resolution is not only substantively unconstitutional, but procedurally unconstitutional.

The case that is referred to is INS v Chadha (1983).\(^{41}\) That case, which strikes down the legislative veto, was probably the most significant of the cases handed down during that term. There were many arguments provided by Chief Justice Burger, who wrote the majority opinion, why the legislative veto goes against the basic precepts of the Constitution, and the original ideas of the Found-


Fathers.

First of all one problem is that the President does not have the ability to review and the option to veto this decision by the legislature. As the Chief Justice put it:

The records of the Constitutional Convention reveal that the requirement that all legislation be presented to the President before becoming law was unanimously accepted by the framers.41

However, the argument still abounds that both Houses of Congress have many powers solely unto themselves, such as the Senate having the power to review many choices of the President for high-level positions. To this, the Chief Justice responded:

... when the framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action.42

This seems to be the main argument against the War Powers Act, and generally, the legislative veto.

On the other hand, many argue that the heavy workload of Congress makes it all but impossible to properly legislate without using the legislative veto. In the vanguard of this argument is Justice White, who dissented on this ruling. Although he admitted in his dissent that "The Constitution does not authorize or prohibit the legislative veto"43, he does argue that necessity makes the legis-

42Ibid, p. 35.
43INS v. Chadha, Justice White, dissenting, p. 12.
lative veto an acceptable tool. He argues:

It is an important if not indispensible political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking.44

To this, Burger responded:

Its wisdom is not the concern of the courts; if challenged action does not violate the Constitution, it must be sustained... By the same token, the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government...45

Therefore, the legislative veto and the War Powers Act are not acceptable methods of government in a Constitution-based society, as long as that Constitution restricts the use of the veto to the executive.

What if the War Powers Act had been in effect throughout our history? The effects could, and probably would, have been devastating. It probably would have hindered, if not prevented, President Kennedy from effectively and skillfully dealing with the Soviet Union and Eventually provoking peace in this hemisphere. The deployment of troops then would have been very difficult to do in such minimal, skillful, and subtle ways, and with such

44 Ibid., p. 7.
dispatch. Also, the reporting clauses of the War Powers Act would have made secrecy and speed all but impossible. President Kennedy brilliantly handled the situation he found himself in, but the War Powers Act could have easily handcuffed the President, and prohibited him from so skillfully getting out of that situation.

On the other hand, the bill would not have prevented the Vietnam War, which it basically was written to do. Our participation in Vietnam was authorized by Eisenhower's SEATO treaty, and the Tonkin Gulf Resolution. These were enough to qualify as "statutory authorization" as defined in the War Powers Resolution. It would by no means prevent another Vietnam from happening.

Another factor to consider is what the War Powers Resolution would have done to American politics in that time. Congressmen would have had to vote on the Vietnam war every six months, and as one author put it:

Vietnam divided this country as no other issue has in recent memory: under the War Powers Resolution, that fissure would have widened into a chasm.47

The major problem with laws like the War Powers Act is that the try to do procedurally what we should be doing substantively. In other words, we cannot use a procedural solution for a substantive problem. The real problem is that people have not learned well their world

47 Allison, "Making War...", p. 103.
history and politics, and Congressmen often are swept away from the "empassioned majority" our Forefathers were so afraid of. No law can fix what the true problem is in the field of foreign relations and war. What we truly need are Congressmen willing to work with Presidents who are willing to work with and seek the advice of Congressmen, and who respect the rights of Congressmen to have the final say in any long, expensive military action.

As Professor Rostow puts it,

"The assumptions made by the writers of the War Powers Resolution bring to mind an episode during the Constitutional Convention when someone proposed that the armed forces be limited to three thousand men. General Washington was heard to whisper that perhaps the Constitution should also deny any foreign power the right to invade the United States with more then three thousand troops."

Two weeks after Chadha the court was confronted with two separate legislative veto provisions in eight different cases. They subsequently affirmed the decision of the lower court (which was consistent with Chadha) in six of the cases, and denied writs of certiorari in the other two. The court shows no signs of wavering this issue, and it seems that the War Powers Act is soon to be next.

48 Rostow, "Repeal the War Powers Resolution".

The War Act is unconstitutional both substantively and procedurally. Substantively, the War Powers Act strips the President of his rightful powers as Commander in Chief, and strikes a bad bargain for the Congress by giving up all of its power in wars that are less than the requisite sixty days and only marginally extending its power to terminate long wars. Procedurally, the War Powers Act is directly in opposition to the basic precepts of the Separation of powers doctrine so present in our federal and state governmental systems. It removes the President's power to veto, guaranteed by the Constitution, and infringes indirectly but effectively on his rights as Commander in Chief, also guaranteed by the Constitution.

Some general recommendations are:
1. Repeal the War Powers Act
2. Reinforce the informational abilities of Congress
3. Preserve the ability of the President to act in emergency situations.
4. Congress must use the war powers it already has been given by the Constitution, such as the power to declare war, which would logically include the power to pass a resolution opposed to it.
5. Congress should use the power of the pursestrings to get what it wants.
To summarize, it would be best to utilize three quotes, one very famous, one not so famous, and one not at all famous.

Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give emanation to the words of a text or supply them. It is an inadmissably narrow conception of American Constitutional Law to confine it to the words of the Constitution and to disregard the gloss which life has written upon the. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on executive power vested in the President by Section 1 of Article II. 50

There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or the President. ... With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution. 51

Committees run nations, but men run wars.


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