The Effectiveness of the War Powers Resolution

An Honors Thesis (ID 499)

by

Rick Winegardner

Thesis Director

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"We live in an age of undeclared war, which has meant presidential war."

Senator Jacob Javits, 1971
THE EFFECTIVENESS OF THE WAR POWERS RESOLUTION

On November 7, 1973, Congress passed the War Powers Resolution over the veto of President Nixon. This act was designed to

fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both Congress and the President will apply to the introduction of United States Armed Forces into hostilities. . .¹

This bill was written in response to the widespread feeling in Congress that their war powers had been seriously eroded since the end of World War II, and especially during the Vietnam conflict. President Nixon’s belief that this resolution was both dangerous and unconstitutional led him to veto it. The growing crisis of Watergate and the memory of presidential exercise of war powers in Vietnam allowed proponents of the act to gain enough votes to override the President’s veto. This new law was hailed by many as "the first legislation in our history to establish a statutory framework in which Congress and the President could function so as to give meaning to the constitutional authority over war."²
After a decade and a half, the resolution remains controversial. Every President since Nixon has challenged the constitutionality of the law. Members of Congress have argued that presidents have ignored the law. Some want to strengthen the law by further restricting the President's power to send military forces into hostilities without Congressional approval. Others want to repeal the law. Most agree that the law has not accomplished what it was designed to do. All attempts to revise it have met with failure. It is clear, however, that the War Powers Resolution has not established the statutory framework needed to insure "that the collective judgment of both the Congress and the President" will be used when U.S. armed forces are introduced into hostilities.

This paper argues that the War Powers Resolution has not been effective in fostering trust and a good working relationship between the legislative and executive branches. It reviews the controversy surrounding the constitutionality of the resolution, presents a short history of the resolution, considers recent congressional and executive criticism of the act, and assesses proposed amendments to the act. This paper will show that the War Powers Resolution has been, and will continue to be, unable to accomplish its goal of forcing the President to involve the Congress in the decision to send troops into hostilities.
Any discussion about the effectiveness of the War Powers Resolution must begin with a discussion of its constitutionality.* The arguments over the resolution's constitutionality revolve around whether the President has the power to send forces into hostile situations abroad without a declaration of war or other congressional authorization. If he does, the War Powers Resolution is clearly unconstitutional. If the President does not have such authority, the basic premise of the resolution is constitutional (although specific sections may be held unconstitutional).

Those who believe that the President can act without congressional approval say that Congress has tried to force him to acknowledge their interpretation of the constitution, which is that he has very little power to introduce forces into hostilities on his own. Resolution opponents argue this attempt is unconstitutional because Congress has overstepped its boundaries of power by restricting the President's powers as Commander-in-Chief. Resolution supporters argue they have the power to limit

*See Appendix A for a discussion of the War Powers Resolution.
the presidential war-making power and the Constitution demands that they do so. In order to determine which view is correct, both sides agree, one should consider the text of the Constitution, the discussions of the framers, and the history of congressional and presidential war powers.

 Constitutional Interpretation

The text of the Constitution is not very helpful in resolving most disputes over the war power. It gives Congress the power to "raise and support Armies," "provide and maintain a Navy," "make rules for the Government and Regulation," "provide for the calling forth of the Militia," and the "power to declare war." On the other hand, it gives the President the power of the "Commander-in-Chief of the Army and Navy of the United States." These apparently conflicting powers have led to the debate over the control of the war powers.

Framer's Intentions

Because of these vague provisions, many look to the debates of the Constitution's framers and ratifiers to decide who has the power to make war. This search to find the framers' intent is difficult. The framers did not spend much time on questions of war and peace. When they did, they emphasized state versus federal authority, not congressional versus executive.
There was some discussion, however, of the executive’s use of the military. These debates focused on attempts to keep the President from using his Commander-in-Chief powers for tyrannical purposes at home. The main concern of these men was not how to keep the world safe for Americans, or the need for a quick military response to a crisis, but how to prevent a domestic military coup. The failure of the Confederation led the framers to want a president to execute national policy but the whole colonial experience left them in fear of executive despotism. It is clear that throughout the debate over the Constitution that the framers intended for Congress to set American policy.

Resolution supporters derive from the belief that Congress should set policy that the power to declare war gives Congress control "over all involvement of American Forces in combat except in response to sudden attack" on the U.S.4 Senator Cranston argues that "the Constitution’s authors vested in Congress the power to initiate hostilities."5 Louis Henkin, a noted constitutional scholar, agrees and says that "the framers original conception was that the President’s designation as Commander-In-Chief appears to have implied no substantive authority to use the armed forces. . .except as Congress directed."6 These assertions stem from James Madison’s belief that the President only has powers that the Constitution expressly gives him. Based on this
interpretation, the resolution is constitutional because the framers intended for Congress to have the central role in the decision to use military force.

Opponents of the resolution do not find much support from the published debates of the framers that the President can send forces into hostilities without congressional approval. The only debate during the convention that these scholars can look to was a debate over Article I, Section 8, Clause 11, in which the word "declare" was substituted for the word "make". This substitution seems to have been made in order to prevent Congress from controlling the conduct of the war (which was the Commander-in-Chief's job).

These opponents, however, have been unable to find any direct evidence from the framers' debates that the President can send troops into hostile situations without congressional authorization. They look instead, to the vague language of Article II of the Constitution to find this power. They defend this action by quoting Alexander Hamilton.

> It deserves to be remarked, that as the participation of the Senate in the making of treaties, and the power of the legislation to declare war, are exceptions out of the general 'executive power' vested in the President. They are to be construed strictly and ought to be extended no further than is essential to their execution.7

Based on this interpretation, the President can use force
without congressional approval because the Constitution
does not expressly forbid such action.

Those who believe in this less restrictive view of
presidential power argue that it is impossible to assert
the framers intended that only Congress could initiate
hostilities. The Constitutional Convention took place in
secret so it is difficult to know exactly what the framers
intended when they gave Congress the power to declare war
and the President the power to be Commander-in-Chief of the
armed forces. Even if some of the delegates favored
Madison’s restrictive view of the Presidency, the
fifty-five participants interpreted the specific language
of the Constitution differently. Just as today, there was
no consensus on whether the President could use force
without Congressional approval. Even proponents of the War
Powers Resolution admit that these are gray areas which
exist where the President and Congress have concurrent
authority. As Frederick S. Tipson, a resolution supporter
and former chief counsel to the Senate Foreign Relations
Committee, admits, "...you have to go on the basis of an
almost mystical interpretation of what the founding
fathers had in mind" when discussing who has the power to
send troops into hostilities.8

Historical Reward, Precedent and Case Law

While the "search for constitutional principles to
determine who has the power to use the armed forces of the
U.S. against another nation" may be to "search in vain," the history of the use of armed forces abroad reveals that presidents have sent troops into hostilities without congressional authorization.\(^9\) There have been over 200 instances in which the U.S. has introduced troops into foreign territory for other than peaceful purposes. From Washington to Reagan, presidents have sent troops into hostilities without first obtaining Congressional approval.

Washington’s two terms provide the country with important war power precedents. His policies helped to answer many questions about the war power brought on by the vague language of the Constitution. He chose to read into the Constitution the power to use military force without prior congressional authorization. For instance he authorized the use of force against British and French shipping without obtaining congressional approval.\(^10\) For actions like this, Washington set a precedent which gave presidents the ability to argue that they had constitutional authority to send forces into hostile situations abroad.

In the 1970’s and 1980’s, presidents have asserted that they have inherent constitutional authority to use force which Congress, through the War Powers Resolution, has restricted. According to Monroe Leigh, the legal advisor for the Department of State during the Ford
Administration, a president has the authority to introduce armed forces into hostilities to rescue American citizens abroad, foreign nationals (when it facilitates rescuing Americans), protect U.S. Embassies, suppress civil insurrection, implement terms of an armistice or cease-fire (to terminate hostilities between the U.S. and other countries), and to carry out security commitments contained in treaties.\textsuperscript{11}

He went on to say that this list was not a complete one and that no list could "encompass every conceivable situation in which the President’s Commander-in-Chief authority could be exercised."\textsuperscript{12} This belief stems from the general language of Article II and the historical precedents of the past 200 years.

Presidents not only point to historical precedents but also to court decisions when they claim their war powers. The Supreme Court has clearly said that the President can use force to protect American citizens abroad in cases such as the \textit{Slaughterhouse Cases} (1873) and \textit{In re Neagle} (1889).\textsuperscript{13} The Court also asserted that Congress cannot interfere with the President’s "command of the forces and the conduct of campaigns" in \textit{Ex parte Milligan} (1866).\textsuperscript{14} In \textit{United States v. Curtis Wright Export Corp} (1946), the Court said that "the President is the ‘sole organ’ of the federal government in the field of international relations, a power which does
not require as a basis for its exercise an act of Congress..."  

The President, and presidential staff, that these court decisions give him the authority to use force without congressional approval when it is necessary to carry out his foreign policy. 

Congress has recognized the President's historical power to use force and his broad power to conduct foreign affairs. The Senate Foreign Relations Committee has admitted that 

during the 18th Century, American Armed forces were used by the President on his own authority for such purposes as suppressing piracy, suppressing the slave trade by American ships, 'hot pursuit' of criminals across frontiers, and protecting American lives and property in backward areas or areas where governments had broken down. Such limited use of force without authorization by Congress, not involving the initiation of hostilities against foreign governments, came to be accepted practice sanctioned by usage though not explicitly by the Constitution.  

Ten years after the passage of the War Powers Resolution, some in Congress admitted that 

Presidents have historically had not only the power to negotiate and communicate, but also to deploy force overtly, sometimes for major campaigns, involving significant loss of life, without congressional approvals.  

Proponents of the resolution point out that, while the president may have deployed force overtly in the past, an unconstitutional power cannot be made constitutional just because of historical use. The Supreme Court has
repeatedly said that historical precedent cannot be used in defense of an unconstitutional act (i.e. Despite the fact that "separate but equal" facilities were used for many years, these facilities are unconstitutional). Since the President cannot use force abroad without Congressional assent (based on the framers' intent), resolution supporters contend that the presidential argument that his predecessors had the power to act alone is invalid.

Many resolution supporters do admit that the war powers of the President and Congress do overlap. They argue, however, that the legislature can regulate this gray area. They point to Justice Jackson's opinion in Youngstown Sheet and Tube Co. v. Sawyer to validate this view. He said that

when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. 18

Since it is difficult to tell if the President has his own constitutional power to send troops abroad, the explicit will of Congress as expressed in the War Powers Resolution, takes precedence over any vague claim of the President. Moreover, resolution opponents argue that Youngstown was a domestic case and Justice Jackson's opinion does not apply to foreign affairs, where the President is the "sole organ" of the government.
The constitutional debate has mainly focused on the broad issue of whether the President can send troops into hostilities without congressional approval. While this issue may never be settled, specific sections of the resolution have also come under attack for being unconstitutional. Section 2(c), which states when the President can send forces into hostilities does not include in its list the power to rescue U.S. citizens abroad. Most constitutional scholars acknowledge the President’s authority to rescue citizens and the Supreme Court has ruled in various cases (i.e. In re Neagle) that the President can use force to affect these rescues.

Another section that has come under attack is Section 5(c), which allows Congress, by concurrent resolution, to force the President to withdraw the armed forces from hostilities. This section creates a legislative veto. This resolution has the force of law even though it is not submitted for presidential approval. The Supreme Court in Immigration and Naturalization Service v. Chadha, ruled that legislative vetoes are unconstitutional because the Constitution requires all resolutions to be submitted to the President for his approval. Most constitutional scholars agree that Section 5(c) is "clearly invalid after the Supreme Court’s decision."

Since Congress apparently cannot force a troop withdrawal by a majority vote of both Houses, resolution opponents argue it should not be able to force such a
withdrawal through inaction after 60 days, as Section 5(b) provides. \(^{20}\) Under this section, hostilities could be continued only if Congress affirmatively acted to authorize their use. If the Chadha decision says that Congress cannot remove the troops through a concurrent resolution, resolution opponents assert, Congress should not be able to do through silence or inaction what it cannot do through positive action.

The courts have not attempted to decide whether the resolution, or any of its sections, is constitutional. They have ruled, in cases such as Crockett v. Reagan, that this issue is political and therefore not within their jurisdiction. \(^{21}\)

The courts have realized that the dispute over the resolution is really a dispute between the legislative and executive branches over the war power. Since it has proven difficult, or even impossible, to determine the proper distribution of the war powers between the branches, the courts have left the two sides to fight amongst themselves.

**History of the War Powers Resolution**

Since 1973, both proponents and opponents of the War Powers Resolution attempted to accommodate themselves to it. They have not been very successful in fulfilling the purpose of the resolution. The executive branch has claimed that the resolution is both
unconstitutional and dangerous. Presidents have attempted to circumvent and ignore the act. Some in Congress claim that, on several occasions, presidents have broken the law. Both proponents and critics of the resolution point to the history of the act and say it is unworkable in its current state.

The resolution’s ineffectiveness can be seen by reviewing the executive branch’s lack of compliance with the law and by the lack of political will by the Congress to force the executive to follow the law. Furthermore, the only time the resolution was invoked by Congress, the president refused to accept the validity of the resolution. In the decade and a half in which the resolution has been law, there has been no indication that the executive branch has complied with the law or that the legislative branch has been able to force the executive to play by its rules.

Presidents have submitted twenty reports relevant to the War Powers Resolution since it became law in 1973. Only once, in response to the rescue of the ship Mayaguez from Cambodia in 1975, did a President cite Section 4(a)(1), which triggered the ninety day time limit. This report was sent after all U.S. troops were removed from combat which made the ninety day limit meaningless. Congress has only invoked the resolution once during the Beirut crises, when it compromised with President Reagan by allowing the Marines to stay in Lebanon.
for eighteen months. Critics of the current act point to this dubious record when they argue that presidents have not complied with the act that Congress lacks the political will to invoke it.

Consultations

Presidential compliance with the resolution is measured by whether he consults with Congress before he introduces troops into hostilities (Section 3) and whether he reports to Congress under the correct subsection of Section 4(a). The President is supposed to consult with Congress "in every possible instance" before introducing U.S. forces into hostilities or into situations where imminent hostilities is clearly indicated. This consultation process was designed to be one of the major accomplishments of the War Powers Resolution. The evidence of the past fifteen years shows that there has been very little consultation with Congress over the introduction of troops into hostilities.

Because of the vague language of Section 3, presidents have been able to ignore the consultation requirement. The resolution does not define the nature and extent of the consultation, when consultation is required, and who should be consulted. Presidents have argued that merely informing congressional leaders of impending military action is sufficient to fulfill the consultation requirement. Members of Congress say that these
informational sessions are not sufficient. They point to the House report on the resolution which states that consultation "means that a decision is pending on a problem and the members of Congress are being asked by the President for their advise and opinions." Consultation should be made before the final decision to send troops into combat is ordered so Congress has the chance to show the President its support, or lack thereof, for his policy. Because the House interpretation of the consultation process were dropped in committee to gain votes, however, there is no legally binding definition of consultation.

Even if there was a clear definition of what the extent of consultations should be, there is still the questions of when the President must consult Congress. Section 3 says he must consult "in every possible instance" in which troops are introduced into hostilities (or imminent hostilities). It does not define what it means when it says "in every possible instance." Many argue that a President have to consult Congress if such consultation would endanger the mission. There is disagreement within Congress on whether this is a valid excuse for withholding consultation.

The history of consultation under Section 3 shows that Congress rarely has been able to give their advice and opinion when it comes to the introduction of troops into hostilities. In the Mayaguez incident and the Grenada
invasion, a handful of Congressmen were informed of the impending action but they had little input in the decision to actually launch the troops. Before the bombing of Libya in April, 1986, at least one Senator felt that the President implied that if there was a lack of consensus, among the small group of Congressmen he consulted, then the mission would be canceled. Only in the case of the Marines in Lebanon was there considerable negotiation over the use of the Marines. It must be noted, however, that this consultation took place after the Marines were already in Beirut. In some cases, such as the decisions to have the Navy protect tankers in the Persian Gulf and the Iranian hostage rescue attempt, the President did not consult Congress under the provisions established by Section 3 of the War Powers Resolution.

Reports

In order for Congress to have any real power over the war power, the President must report to as well as consult with Congress. If the President reports according to the letter of the law, any time troops are introduced into "hostilities or into situations where imminent hostilities is clearly indicated," the ninety day limit would be activated. Only once since the passage of the resolution, has a president reported that troops have been introduced into hostilities -- President Ford during the Mayaguez incident and activated the time limit.
Presidents have been able to resist reporting under Section 4(a)(1) -- the report that triggers the ninety day limit -- even though the armed forces were clearly involved in hostilities because the resolution does not force them to specify which subsection of Section 4(a) they are reporting under. This has allowed President Reagan to cite Section 4, and not 4(a)(1), when reporting that two Marines were killed in Lebanon. He was able to report "consistent with the War Powers Resolution" that he launched the invasion of Grenada. On numerous occasions in the Persian Gulf, he reported that, consistent with the War Powers Resolution, American military forces had attacked various Iranian military vessels. Because he never reported under Section 4(a)(1), the time limit was never triggered and the Marines in Grenada and the Navy in the Persian Gulf could stay in position as long as Reagan wanted.

Congress could have voted that the troops were introduced into hostilities and activated the time limit, but it was unable to define hostilities (or imminent hostilities). The original House report, defined hostilities as armed conflict or

a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict.

It went on to define imminent hostilities as "a situation in which there is a clear potential either for such a state of confrontation of for actual armed conflict."
this interpretation, the presence of troops in both Lebanon and the Persian Gulf, should have triggered the time limit. Some in Congress, however, disagreed with this strict interpretation of the terms hostilities and imminent hostilities. They argued that the Marines and the Navy were not sent into these situations with the intent to engage in hostilities. Since they were not introduced for the purpose of armed conflict, the resolution should not apply. Neither interpretation of the term hostilities has been adopted by the Congress. This leaves Congress without a clear idea as to what constitutes hostilities under section 4 (a)(1).

Congressional Vacillation

Many critics of the current resolution say the argument over the definition of hostilities is an excuse Congress uses to cover up its lack of political will to activate the time limit. Those that argue for a stricter War Powers Resolution assert that the current law leaves the President free to do whatever he wants because of Congress' inability to force him to obey the law. Since Congress has been reluctant to press for troop withdrawal once they have been deployed and presidents have been unwilling to obey the law, the law has become useless.

Congress has been unwilling, or unable, to enforce the law for a variety of reasons. "Low intensity and low risk conflict situation that produce quick and seemingly
favorable military outcomes" leave Congress very little power to enforce the resolution. If a military action is popular, as most usually are, Congress is going to be unwilling to criticize the President, even if he did not follow the law. Another problem is that most military missions are short lived. The Mayaguez rescue and the Libyan bombing took only a few hours. The last combat Marines left Grenada forty-eight days after they first landed. Given the Chadha decision, Congress cannot force troop removal for ninety days. Consequently, there is no way under the current resolution to prevent a short (under ninety days) military excursion.

Moreover, there is very little Congress can gain from invoking the resolution. If Congress forces the troops home, it will be blamed for an American retreat. If Congress allows the troops to stay, the President will probably get credit for any success and if the armed forces meet defeat, "Congress will have compromised its right to criticize."  

Lebanon - Congress invokes the Resolution

Congress may have compromised its right to criticize the only time it invoked the War Powers Resolution. After 1,200 Marines were dispatched to Lebanon to help maintain order there, and several casualties were sustained, Congress passed the Multinational Force in Lebanon Resolution (MFL). This act asserted that the ninety day
time limit was triggered on August 19, 1983 and authorized
the continued participation of the Marines for eighteen
months. The MFL was hailed by War Power Resolution
supporters as the first occasion in which members of
Congress "confronted the constitutional questions involved,
at least in the content of having to vote for specific
authorization when American lives were immediately at
stake."\textsuperscript{29}

President Reagan, who had been negotiating with
Congress in order to keep the Marines in Lebanon, signed
the MFL resolution on October 13, 1983. He did not accept,
however, the validity of the War Powers Resolution in this
case or the necessity for invoking the ninety day limit.
He said that his signing should not be viewed

\textit{\begin{quote}
as any acknowledgement that the President's constitutional authority can be impermissibly infringed by statute, that congressional authorization would be required if and when the period specified in Section 5(b) of the War Powers Resolution might be deemed to have been triggered and the period had expired or that Section 6 of the Multi-national Force in Lebanon Resolution may be interpreted to revise the President's constitutional authority to deploy United armed forces.\textsuperscript{30}
\end{quote}}

Despite Reagan's statement, resolution supporters were
happy. The negotiation over the legislation "essentially
started the process envisioned by the War Powers
Resolution." These supporters also believed that the MFL
"greatly strengthened the War Powers Resolution for the
future." They had even gotten a president to "genuflect to the resolution." Some supporters of the resolution do not believe that the MFL was such a strong precedent. Congress never forced the Marines to come home. There still is no precedent, under the War Powers Resolution, in which troops have been ordered home without presidential approval.

Some believe that the MFL was a fiasco because it forced Congress to share the responsibility for the death of over 250 Marines. Since Congress authorized the Marines to stay in Beirut, it must be held liable in the bombing of the Marine barracks. This tragedy may leave some Congressmen wary of trying to invoke the resolution again.

**Weaknesses of the War Powers Resolution**

Despite the fact that Congress has never used the resolution to bring a military force home, critics of the act have argued that such a possibility could be extremely dangerous. Critics also believe that the consultation and enforcement procedures could lead to leaks and indecisiveness. Some even believe that the enforcement procedures would allow Congress to avoid responsibility for a military retreat. Others caution against applying the resolution to anti-terrorist activities. These criticisms have lead both chairman of the Joint Chiefs of Staff Crowe
and former Defense Secretary Carlucci to urge Congress to repeal the act. They believe that it has "directly undermined important national objectives" and that it had "tempered U.S. actions." Admiral Crowe, who favored the resolution in 1973, said that it "has not functioned as originally envisioned and has definitely had some unanticipated adverse impacts." 32

Reduced Deterrence

The main fear of these critics is that the ninety day withdrawal provision in Section 5(b) "may reduce deterrence and increase American casualties." 33 While Congress is arguing whether the troops should remain in combat, the enemy may increase the fighting to achieve a political victory. The enemy may also lobby Congress by temporarily ending hostilities, hoping that Congress will bring the troops home. This would allow the enemy to attain their goal unmolested. One observer believes this scenario may have happened in 1975 in Angola. After Congress prohibited U.S. involvement in Angola, the Soviets resumed their airlift to communist rebels, which they had suspended during the Congressional debate. 34 Many people believe that North Vietnam did the same thing. Once Congress forbided future direct military involvement by the U.S., North Vietnam invaded the South.

Military experts also fear that, if Congress failed to vote on a president's military policy, the enemy would
know when the troops were withdrawing (sixty to ninety days after they arrived) and would be able to inflict heavy casualties on the retreating forces. The debate on whether to invoke the ninety day time limit can, in the words of an original cosponsor of the resolution, William Broomfield, "harm the troops morale," divide the country, communicate uncertainty to our friends overseas, and send a signal of vacillation to our opponents."

Reduced Security

Another fear is that the consultation requirement could cause leaks that would hurt the military effort. President Carter argued he could not consult Congress when he sent troops to rescue the American hostages in Iran because the consultation could endanger the mission. Admiral Crowe testified before the Senate Foreign Relations Committee that congressional debate "inhibits military planners once an action has begun." Many fear that any any consultation with a Congress that "has yet to organize itself in such a manner that it can be trusted with sensitive information" could actually hinder military planning and increase the possibility of casualties. The need for secrecy also complicates the issue of who should be consulted. Since the need for secrecy is high in any military action, the President usually waits until the last minute before telling Congress (if he tells it at all.) This leaves little time for the President to fully
brief and forge a consensus in Congress. Because the resolution is silent on who has to be consulted under Section 3, the President usually only tells the congressional leadership of the plan, in order to save time. There is no agreement, however, on who this leadership should be. Should it be the majority and minority leaders? These men plus the leaders of the Senate and House Foreign Relations Committees? The entire Committees? Even if it could be determined who should be told, there is no guarantee that the junior members would accept their leaders decisions.

Reduced Accountability and Expediency

Those who believe that Congress is no more susceptible to leaks that the executive branch still criticize the act. Section 5(b) of the resolution requires the President to terminate the use of the armed forces if Congress has failed to authorize their use. This has led to the question of who will be responsible for the ensuing pull out. Because Congress can force a pull out by refusing to vote on the president’s policy "the objective of holding the government responsible and accountable to the citizenry would be hurt, not helped."38 This section allows Congress to force a retreat without being held accountable for its actions.

Section 5(b) also raises the question of whether a policy is to be considered wrong just because Congress is
unable to come to a conclusion about its merits. Representative Frelinghuysen brought this question up during the floor debate on the resolution. He said that "if we cannot make up our minds... whether we should engage in hostilities or not, we are going to assume that the President is wrong." Just because Congress is dragging its feet, critics of the resolution say, is no reason to end a military action. Resolution supporters reply that if Congress failed to act within sixty days, with all the provisions for expedited action it would indicate "the most serious questions about the bona fides" of the military excursion.

There is evidence, however, that despite the rules for priority procedures, Congress could be unable to fully discuss the issue in the time allowed. In April 1975, President Ford asked Congress to authorize the humanitarian evacuation of Indochina. By the time communist troops overran Saigon and Phnom Penh three weeks later, Congress was still debating the proposed legislation. Some believe that "Congress is not structured to make rapid decisions." Since decisiveness is often essential in times of crisis, delay by Congress could lead to disaster.

Anti-Terrorist Activities

Some critics of the act, concerned with the inability of Congress to make rapid decisions, believe that the resolution is ineffective when it comes to terrorism.
Several Congressmen have asserted that the resolution covers anti-terrorist actions as well as traditional military excursions. Resolution opponents, however, believe that the act was never supposed to be used to restrict anti-terrorist activities. The resolution was intended to do one main thing: to keep what started out as 'one shot' in-and-out interventions into shooting wars, from turning into permanent commitments; permanent American involvement in those wars.\textsuperscript{42}

While the act may be useful for this purpose, the President needs to be able to initiate preemptive and retaliatory military strikes against suspected sources of terrorism without congressional approval if anti-terrorist activities are to be effective. The Reagan Administration felt that it already had this power. A State Department legal advisor, Abraham Sofaer, testified that the resolution was not meant to apply to the deployment of "anti-terrorist units, where operations of a traditional military character are not contemplated and where no confrontation is expected between our units and forces of another state."\textsuperscript{43} Senator Dole has attempted to make the administration's view law by sponsoring the Anti-terrorism Act. This act would give the President the power to use force against terrorist without consulting Congress or asking it for authorization. "The responsibility for the lives and safety of our armed forces is on his head." Senator Dole says, "Let him do his job, as the constitution prescribes and as the situation demands."\textsuperscript{44}
Presidents have used force against terrorists (the Libyan bombing, Achille Lauro hijacking) without congressional approval and will probably continue to do so. This is in direct opposition to the spirit, if not the letter of the War Powers Resolution. The failure of Congress to enforce the law, when it comes to terrorism or an invasion of a small Caribbean island, indicates that the resolution is not working. After more than a decade of experience, there is no evidence that it has "insured that the collective judgment of both Congress and the President" has applied to the introduction of troops into hostilities. The debate over the constitutionality of the act and the fight over the practicality of the bill has led to increased mistrust between the Congress and the President. There have been no signs that the resolution has been instrumental in bringing about a more cooperative partnership between the executive and legislature in regards to decisions about the use of the armed forces.

Instead of forming a cooperation between the two branches, the infighting over the meaning of hostilities and the accusations that both sides are acting in an unconstitutional manner have pitted the Congress and President against each other. 45

Proposed Changes in the War Powers Resolution

Some Congressmen have recognized that the War Powers Resolution is not working and have introduced amendments to
revise it. Proponents of the law want to further limit the President’s power to send troops into hostilities, place budget constraints on military excursions and involve the courts by asking them to interpret the resolution. Opponents want to weaken or repeal the resolution. Some Congressmen feel that the resolution works and does need amending.

Further Restricting Presidential Powers
Those that want to strengthen Congress’ war power want to define exactly when a President can use the armed forces. He would be allowed to use force without authorization in response to an attack on the U.S. or its possessions and to rescue U.S. citizens. Whenever he did use force, the President would have to consult Congress before the troops were actually sent into hostilities. This consultation would be made with, but not necessarily limited to, the leadership of both the House and Senate and the Chairmen and Vice-chairmen of the Intelligence, Armed Forces and Foreign Affairs Committees. The President would be required to seek the "advice and counsel" of these men, and not just inform them of an impending campaign.\(^{46}\)

The President would also be required to report that the troops are in hostilities (pursuant to Section 4 (a)(1) if they are indeed facing fire. Congress would then be required to either approve or disapprove of the troops’ presence in hostilities.
It would not be able to debate the issue for sixty days and then force the troops home without a vote.

Constraints
While these changes will help get Congress involved in the decision to introduce troops into hostilities, both proponents and opponents of the resolution argue that the only way to keep the President from sending troops into combat on his own is through purse-string restrictions. Critics of the law have always argued that Congress' power over the purse is sufficient to prevent presidential military excursions. When the nation, and Congress, got tired of the Vietnam War, Congress passed the Cooper-Church Amendment of 1973. This act prohibited the use of funds to support combat activities in Southeast Asia.\footnote{47} If Congress disapproves of a president's use of the armed forces, it can cut of funding and terminate the President's policy. Since the power of the purse is clearly given to Congress by the Constitution, the use of purse-strings bypasses the Constitutional questions brought up by the War Powers Resolution.

Those that want to strengthen the resolution say that it is almost impossible to cut off military funding while the "boys" are still fighting. If Congress has been unable to force troops home under the War Powers Resolution, with all the advantages built into the act which allows them to recall the forces, it will also be unable to bring the
troops home by voting for a funding cutoff. The resolution should be amended to include prior restraints. If Congress does not approve of the decision to send troops into hostilities, the prior restraints provision would automatically cut off the funding of the mission. This would ensure that "during the next involvement of the armed forces in hostilities, the Resolution will not be largely irrelevant."48 Others want to make sure Congress is fully involved in the decision to send troops by automatically cutting off funding if Congress does not approve of the mission before the introduction of the armed forces (except when the U.S. or its forces are attacked or when troops are sent to rescue U.S. citizens).49

These same people also want to get the courts involved. They want Congress to pass a non-binding resolution requesting that the courts rule on any disputes before the armed forces are deployed.

The effect of such a provision would be recognize the role of the courts as an impartial umpire in a kind of controversy which, by its very nature and by the circumstances in which it is most likely to arise can engender the most powerful and destructive passions.50

**Opponents’ Criticism**

Opponents of the resolution point out that the courts will be unable, and probably unwilling, to be the umpire between the two branches. Strengthening the act by adding
prior restraints will increase the mistrust between the two sides. Nothing the courts can do will be able to decrease this mistrust. In order to foster cooperation, Senator Goldwater, among others, has urged that Congress repeal the War Powers Resolution. Others, like Senator Dole, do not want to go that far. They believe that the resolution is useful in keeping the U.S. out of a prolonged war, but that it is not effective when it comes to terrorism. Congress should amend the resolution by giving the President a relatively free hand when it comes to dealing with terrorists.

There are some Congressmen who feel that the resolution is working and does not need to be amended or repealed. Dante Fascell, the Chairman of the House Foreign Affairs Committee, believes that "it has worked fine. . . ."51 A Democratic staff member states that the resolution has been successful in preventing presidential military excursions. "Thank God we have it," he declares. "It's a restraining influence on swashbuckling Presidents."52

Most experts, however, believe that the resolution "has obviously failed to have its intended effect of curbing presidential adventurism."53 Congress expected presidents to adhere to the resolution so when they did not "the whole procedural edifice turned out to be a house of cards."54 Despite this dissatisfaction over the resolution, no one has been able to change the law. Those who want to repeal
it are criticized for wanting to the President the power to get the country into another another Vietnam. Those who want to strengthen the resolution are criticized for wanting to unconstitutionally restrict the president’s commander-in-chief powers. Faced with these criticisms, neither side has been able to generate enough interest to get the law changed.

**Conclusions**

The War Powers Resolution has not been able to achieve its main goal of "insuring that the collective judgment of both Congress and the President" apply when U.S. troops are introduced into hostilities. Instead, it has increased the mistrust between the two branches. When the two sides do not cooperate, it hurts the effectiveness of our foreign policy. The resolution did not create the mistrust between the branches. Our constitutional system of the separation of powers and the Vietnam conflict are the main culprits. The resolution exacerbates this mistrust. It is clear that, if we want a more cohesive and effective foreign policy, Congress and the President must find a new way to deal with the war powers.

The War Powers Resolution’s goals are worthy and necessary. In a democracy, no President should be allowed to commit the nation to war without the approval of the people, or their representatives. On the other hand, in the twentieth century, the United States must be able to
deal quickly and effectively with those who want to inflict damage on it. If these two views are to be reconciled, both the legislative and executive branches must have faith in each other. Congress must trust that the President will consult with it before he uses the military and that he will not get the U.S. involved in a long, drawn-out, undeclared war. The President must trust that Congress’ suggestions, and even objections, for his policies are based on its belief that those suggestions are best for the country (and not just an attempt to discredit the President).

The way to foster this mutual trust is through consultation. The consultation provisions in the War Powers Resolution, however, have not worked primarily because the act pitted the two sides against each other. To reestablish this trust, the President must "actively consult with and report to Congress on all matters of concern." He should not have to do this because Congress forces him to. Instead, he should do it because he, and his policy, will benefit from the expertise of those Congressmen who are gifted in foreign policy analysis. The consultation process may give the President valuable new ideas on how a policy should be carried out and it will also show the President how much grass-roots support his policy has.

If the President consults Congress, and does not demand
to go it alone, many, like Senator Lugar, believe that Congress will give his policies the benefit of the doubt.\textsuperscript{55} Congress may still disagree with his policies, but at least they will not mistrust him from the very beginning. When the President automatically seeks the advice and counsel of Congress on possible foreign policy ventures, U.S. policy will be more effective because both branches are working together.

Congress must also do its part to foster cooperation between the two branches. It must heed Senator Vandenberg’s advice that partisanship must stop at water’s edge if it wants a more effective foreign policy. This is easy to say, but difficult to achieve. The opposition party gains very little from supporting presidential foreign policy. If it succeeds, the President will get most of the credit. If a policy fails, the opposition will have to share the blame. If Congressmen continue to criticize the President just to advance their political careers, however, the President will remain hesitant to work with them. While members can, and do, honestly disagree with the President, these disagreements should be kept from turning into bitter partisan disputes. The effort to restore the broad bipartisanship in foreign policy, which was lost during the Vietnam War, is vital if the U.S. is to have an effective foreign policy.

The War Powers Resolution has not restored bipartisanship in foreign policy. Its goals of prior
consultation and giving Congress a voice in the decision to engage in hostilities are meant to help restore this bipartisanship. Unfortunately, the act has failed to achieve its goals. Instead of being able to discuss the actual policy, Congress and the President end up fighting over procedural issues like whether the ninety day time limit was activated or if the President sent the correct report to Congress. This has increased the mistrust between the two branches and damaged U.S. policy.

Congress forced the War Powers Resolution on an executive branch which did not want it and has continued to demand that presidents accept the legislatures' view of the war power. Presidents have bristled under this congressional interpretation and have ignored the law. The constitutional debate and the lack of presidential compliance have poisoned the relationship between the two branches. To restore trust, the executive branch should announce that it will consult with certain members of Congress and agree to remove troops from hostilities if Congress passes legislation that is "clearly designed to stop the President's policy." In return, Congress should repeal the ineffective War Powers Resolution. Both sides could then work together to formulate a stronger and more effective foreign policy.
APPENDIX A

Analysis of the War Powers Resolution

The goal of the resolution is to involve Congress in decisions to send U.S. troops into hostilities and to give Congress the power to terminate the use of force if it so desires. The nine sections of the act prevent the President from sending troops into combat for more than ninety days without Congressional approval and allow Congress to order the troops home whenever it wants to.

The first section simply names the act "The War Powers Resolution". Section 2 states the law's purpose and policy. Section 2(a) asserts that the purpose is to "insure that the collective judgment of both the Congress and the President..." are used whenever U.S. armed forces are introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." Section 2(b) establishes the constitutional basis of the law. "Under Article I, Section 8, of the Constitution...Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other
powers vested by the Constitution in the Government of the United States. . ." This law, Congress argues, is necessary for carrying out its Constitutional powers.

Section 2(c) spells out when the President, as Commander in Chief, can introduce U.S. forces into hostilities (or imminent hostilities). These instances include when there is a declaration of war, specific statutory authorization to use force or a national emergency created by an attack upon the United States, its territories or possessions, or its armed forces.

Section 3 of the resolution requires the President, "in every possible instance," to consult with Congress before introducing armed forces into hostilities or imminent hostilities. This consultation is supposed to last as long as the armed forces remain in these situations.

Section 4 requires the President to formally report to Congress whenever he introduces troops into certain situations. These reports are supposed to give Congress the information it needs to carry out its "Constitutional responsibilities with respect to committing the Nation to war. . ." The President can send three different reports to Congress depending on the situation in which the forces are used. Section 4(a)(1) requires a written report within forty-eight hours if U.S. forces are introduced into "hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."
If a President sends a report under this Section (4(a)(1)), the ninety day time limit is triggered. If Congress refuses to authorize the President's policy, the troops will be required to come home after ninety days. Congress can also vote to have the troops withdraw at any time if they are engaged in hostilities.

Section 4(a)(2) requires a report when troops are introduced "into territory airspace or waters of a foreign nation, while equipped for combat." This report would be issued when forces are introduced into a country where there is little or no chance of actual fighting. This report does not activate the ninety day automatic time limit.

Section 4(a)(3) requires a report when troops are introduced "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation." This report also does not activate the ninety day limit. The rest of Section 4 requires the President to furnish "such other information as the Congress may request" in order for it to carry out its responsibilities (Section 4(b)) and requires the President to report to Congress at least every six months whenever U.S. forces are engaged in hostilities (Section 4(c)).

Section 5 is the main enforcement section of the resolution. It deals with what Congress can do if it receives a report under Section 4(a)(1). Section 5(a) states that, if a report is sent during a congressional
adjournment, the Speaker of the House and the President pro
tempore of the Senate can ask the President to convene Congress to consider the report. It also allows thirty percent of the members in each House to petition their leaders to request the President to convene Congress.

Section 5(b) requires the President to terminate the use of U.S. armed forces sixty days after a report "is submitted or is required to be submitted pursuant to Section 4(a)(1)" unless Congress has declared war or authorized the action, extended the period by law or is physically unable to meet as a result of an armed attack on the U.S. The sixty day limit can be extended to ninety days if the President certifies that "unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such forces" in order to remove these forces.

Section 5(c) requires the President to remove the armed forces from hostilities if Congress votes for withdrawal. This is a legislative veto where the president has no opportunity to override a Congressional decision.

Section 6 and 7 set up priority procedures so Congress can quickly decide whether to approve the military action. Section 8 deals with the interpretation of the Resolution. It says that the President can not use a law (i.e. the Tonkin Gulf Resolution) to send troops into hostilities unless the law specifically authorizes their use. Section
8(b) states that specific statutory authorization was not needed to permit U.S. forces to participate in the operations of "high-level military commands." These commands include NATO, NORAD and the U.N. Command in South Korea. Section 8 (c) asserts that U.S. forces cannot accompany regular or irregular military forces of other countries when they are engaged, or potentially engaged in hostilities. Section 8(d) states that the resolution does not alter the Constitution or give the President any more power to introduce forces into hostilities than he had prior to the enactment of the resolution.

Section 9 is entitled the "Separability Clause". It asserts that if any section of the resolution is declared unconstitutional, "the remainder of the joint resolution...shall not be affected thereby."
Endnotes


2 Jacob K. Javits, "War Powers Reconsidered," Foreign Affairs, Fall 1985, p. 130.

3 W. Taylor Reveley, III, "War Powers of the President and Congress: Who Decides Whether America Fights?" This Constitution, Fall 1985, p. 3.

4 Ibid., p. 4.


11 Ibid., p. 623.

12 Ibid.

13 Moore, op. cit, p. 12.


16 Franck, op. cit., p. 610


20 Turner, op. cit., p. 108.

21 Glennon, op. cit., p. 580.


26 Rubner, op. cit., p. 204.

27 Madison, op. cit., p. 989.

28 Craig, op. cit., p. 321.

29 Madison, op. cit., p. 993.


31 Madison, op. cit., p. 990.


33 Ibid.


37 Craig, op. cit., p. 322.

38 Ibid, p. 323.


40 Halperin, op. cit., p. 197.

41 Turner, op. cit., p. 110


45 Craig, op. cit., p. 324.


50 Ibid, p. 640.

51 Madison, op. cit., p. 989.

52 Ibid.


55 Lugar, *op. cit.*, p. 44.


57 The following information is taken from text of the War Powers Resolution.
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Halperin, Morton H. "Lawful Wars." Foreign Policy, Fall 1988, 173-195.


