

**The Law of the Stronger: Failures of the War Powers Resolution  
and Lessons for Reform**

*The standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept.*

“The Melian Dialogue,” Book V, Chapter 89  
Thucydides, *History of the Peloponnesian War*

As the end of 1973 drew near, the New York Times offered its take on the political fortunes of President Nixon:

This 93d Congress had destroyed President Nixon’s hegemony and forcefully asserted its own authority. The initiative had passed from the White House to Capitol Hill. Historians may some day mark the decline of what one of them has called “the Imperial Presidency” from Nov. 7, 1973, when Congress enacted the War Powers bill into law over Mr. Nixon’s veto.<sup>1</sup>

Though Nixon was reeling from the Watergate scandal and Congress had dealt him significant legislative blows, it would not take long for power to shift back toward the Executive. As some experts had forewarned, the War Powers Resolution did not restore Congress to its preeminent position on decisions of when to go to war. Indeed, it was not long after the final vote tally that Nixon Administration officials publicly discussed using the War Powers law to resume operations in Vietnam without Congress’ approval.<sup>2</sup>

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<sup>1</sup> "Political Reversal..." The New York Times. Available:  
<http://select.nytimes.com/gst/abstract.html?res=9D05EEDC1039E73ABC4B51DFB4678388669EDE&ref=warpowersactof1973>

<sup>2</sup> Eagleton, Thomas F. *War and Presidential Power: A Chronicle of Surrender*, p. 221.

Time and again, Presidents have bypassed Congressional authorization to use armed forces as they deem fit. Relying on their constitutional authority as Commander-in-Chief, Presidents have often rejected the validity of the law, while simultaneously giving the appearance that they are complying with it. Put simply, presidents do this because they can. Presidents often claim primacy in matters of foreign policy and charge ahead decisively. Although the Constitution clearly grants Congress the power to declare war, Presidents have established a powerful historical precedent of acting unilaterally in military matters. When backed by strong public approval, Presidents determined to wield military power are hard to stop. Like the Athenians at Melos, Presidents claim they are just in acting this way simply because they have the power to do so. Without action from Congress or the courts, who is to stop them?

If Congress is to reign in presidential war power and reassert its authority, it needs a serious legislative effort to shift the balance. The War Powers Consultation Act of 2014, sponsored by Senators Tim Kaine and John McCain, is the latest bill to reform the process by which America goes to war. Does the War Powers Consultation Act of 2014, in its current state, address weaknesses in the War Powers Resolution of 1973, which has failed to limit presidential war power? I argue the Consultation Act dodges fundamental constitutional questions that must be addressed in order to put forward meaningful reform. Furthermore, the Act offers the President wide latitude to intervene abroad without Congressional authority. By studying ways in which Presidents have justified the use of force since 1973, I will scrutinize the War Powers Consultation Act with these lessons in mind. The gaps in the War Powers Resolution and War Powers Consultation Act highlight potential pitfalls of future legislative efforts. Ultimately, Congress will

need to produce strong legislation to reassert its authority over when America goes to war.

The stated purpose of the War Powers Resolution is to, “fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities.” Together, both Congress and the President should decide when situations warrant the use of American forces and, after engaging in a conflict, whether their use should continue. America’s continued presence in Vietnam, despite the apparent stalemate, provided the impetus for legislation aimed and reasserting Congress’ Constitutional war powers.<sup>3</sup> Nixon’s ground invasion of Cambodia during the spring of 1970 proved to be the breaking point for Congress’ tolerance of unchecked presidential war power.

Frustrated by the misguided notion, held by many legislators, that Congress lacked the authority to reign in Executive war powers, Senator Eagleton began drafting legislation that delineated war power. Eagleton’s bill (Senate Joint Resolution 59) had four major aspects. It first required prior Congressional authorization of nearly all instances in which US Forces would engage in hostilities.<sup>4</sup> “Hostilities” were defined as covering land, sea, and air operations, as well as instances where US forces were used as advisers to foreign militaries. This “advisers” addition meant to cover situations similar to the lead up to war in Vietnam. Second, the bill recognized Congress’ authority to authorize war through a declaration, statute, or joint resolution. In all cases, Congress could stipulate the scope of actions, thereby limiting the President’s power to expand the

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<sup>3</sup> Eagleton, *War and Presidential Power*, Ch 7.

<sup>4</sup> *Ibid*, p. 121.

war, as Nixon had done in Cambodia and Laos. Third, the resolution spelled out instances where the President could expand an existing war into a neighboring country: 1) in “hot pursuit” of enemy forces that flee across the border, and 2) “when a clear and present danger exists of an imminent attack.”<sup>5</sup> Here again, Eagleton had in mind Nixon’s expansion of Vietnam operations. Finally, Resolution 59 made clear three exceptions where the President could act unilaterally: “(1) an attack upon the United States, (2) an attack upon United States forces, and (3) the protection of American citizens abroad who were under attack because they were American citizens.”<sup>6</sup>

It is unclear what impact provisions in the resolution might have had on presidential power. Though Eagleton set out to make his bill as clear as possible, its language would have been subject to extensive litigation. Was it in Congress’ power to define the scope of operations within a war, or did this fall under the President’s “Commander-in-Chief” authority? How does one define “clear and present danger” of an impending attack? Was the bill too restrictive in its distinction of attacks on US citizens abroad *because* they were Americans? Issues like these guide interpretation of the law and ultimately determine its efficacy. Congress labored over these points, but the end result in the War Powers Resolution was a product of compromise between the House and Senate versions. Indeed, the bill looked so different from what Eagleton set out to do that he later voted against it.

What Congress passed in 1973 had small, but meaningful differences from previous versions of the bill. The “Purpose and Policy” section points out that the President, as Commander-in-Chief, can only use US forces in hostilities *after a*

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<sup>5</sup> Eagleton, *War and Presidential Power*, p. 121.

<sup>6</sup> *Ibid*, p. 122.

declaration of war, specific Congressional authorization, or in the event of a national emergency created by an “attack upon the United States, its territories or possessions, or its armed forces.” The law attempted to institutionalize a consultative relationship between the Executive and Legislative branches: “The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.” Absent a Congressional declaration of war, if the President introduces forces into hostilities, or situations where involvement in hostilities is imminent, he must report on his reasons for using troops within 48 hours. Certain troop escalations and deployments can also trigger the reporting requirement. Additionally, this required report must indicate the constitutional and legislative authority under which the action took place, as well as the expected duration.<sup>7</sup> Barring subsequent Congressional authorization, the President must remove troops within sixty to ninety days after submission of the report, or – importantly – after *required submission* of the report.<sup>8</sup> The last section of the law, “Interpretation of Joint Resolution,” ends with the interesting statement that nothing in the law “shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities” which he would not have without the War Powers Resolution. Ironically, the bill seemed to have just the opposite effect.

It soon became apparent that the bill failed to limit presidential war power. In fact, the Resolution granted the President expanded powers to wage war, unhindered, for up to 90 days. Alarmed by the contradictory effects of the law, Eagleton voted against the bill

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<sup>7</sup> Sections 4(a)(2); 4(a)(3); 4(a)(3)(A); and 4(a)(3)(B).

<sup>8</sup> Section 5(b).

before it went to President Nixon and later voted to sustain Nixon's veto. Speaking at the time, Eagleton foresaw the consequences of the resolution, "If this becomes law we have given a predated declaration of war to the President and any other President of the United States."<sup>9</sup> Eagleton's words were prescient. Not long thereafter, the WPR had an early test with the "Mayaguez Incident."

On May 12, 1975 Cambodian patrol boats fired on and seized the US-flagged SS Mayaguez and its crew. In response to this, President Gerald Ford ordered reconnaissance flights and a naval interdiction operation around the island of Koh Tang, where US officials believed the crew was held. On the afternoon of May 14, Ford ordered US Marines to assault the island and secure the release of the crew. That evening the crew, which was being held aboard Cambodian fishing vessels, was released and boarded the USS Wilson. US forces began to disengage sometime on the evening of the 14<sup>th</sup>. Ford submitted his report to Congress within the required 48-hour window, but *after* US forces had started to withdraw.<sup>10</sup> He submitted his report, "in accordance with [his] desire that the Congress be informed" and "taking note of Section 4(a)(1)." The language is telling in that it was not "pursuant" to the law; Ford refused to recognize his legal obligation to inform Congress of the use of force. While not skirting the War Powers Resolution entirely, which could have had negative political repercussions, President Ford preserved his Constitutional room to maneuver on the use of American military power. Indeed, he cites "constitutional Executive power" and "authority as Commander-in-Chief" as his legal authority for acting. In doing so, Ford circumvented

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<sup>9</sup> Eagleton, *War and Presidential Power*, p. 218.

<sup>10</sup> "Gerald R. Ford: Letter to the Speaker of the House and the President Pro Tempore of the Senate Reporting on United States Actions in the Recovery of the SS Mayaguez." Available: <http://www.presidency.ucsb.edu/ws/index.php?pid=4913>

the War Powers Resolution while giving the appearance of compliance. The Mayaguez report set a precedent for numerous presidential wars that followed.

Speaking to reporters on August 20, 1982, President Ronald Reagan announced that US troops would participate in a multinational force to assist the Lebanese army in rooting the Palestinian Liberation Organization from west Beirut.<sup>11</sup> US forces were to play a “limited, noncombatant role” and stay no longer than 30 days. When 1,200 US troops began to arrive in Beirut, Reagan reported to Congress on September 29 according to his desire that Congress be informed.<sup>12</sup> Just as Ford had done, Reagan made clear he did not need Congress’ authority to deploy troops. Reagan claimed he was acting pursuant to his “constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief.” He further emphasized that US involvement in hostilities was both unintended and unexpected. In the summer of 1983 troops were still deployed to Lebanon and the situation had worsened. After the August 28<sup>th</sup> and 29<sup>th</sup> exchange of fire that killed two Marines, Congress found that US forces were undoubtedly engaged in hostilities. Seeking to limit US participation in Lebanon, Congress passed the “Multinational Force in Lebanon Resolution,” which, consistent with the War Powers Resolution, limited troop deployment to eighteen months and retroactively started the 60-day clock on August 29, 1983.<sup>13</sup> On signing the Resolution, Reagan thanked Congress for its support but argued that, “isolated or infrequent acts of violence against United States Armed Forces does not necessarily constitute actual or imminent involvement in

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<sup>11</sup> "Ronald Reagan: Remarks to Reporters Announcing the Deployment of United States Forces in Beirut, Lebanon." Available: <http://www.presidency.ucsb.edu/ws/index.php?pid=42876>

<sup>12</sup> "Letter to the Speaker of the House and the President Pro Tempore of the Senate Reporting On United States Participation in the Multinational Force in Lebanon." Available: <http://www.reagan.utexas.edu/archives/speeches/1982/92982e.htm>

<sup>13</sup> Senate Joint Resolution 159, Available at: <http://www.gpo.gov/fdsys/pkg/STATUTE-97/pdf/STATUTE-97-Pg805.pdf>

hostilities.”<sup>14</sup> Even though casualties resulted, US forces still were not involved in hostilities, according to Reagan. He further refused to cede power to Congress, citing his constitutional authority as Commander-in-Chief. Reagan clearly articulated the argument that Presidents employed time and again when sending troops overseas. Debates on semantics limit the efficacy of the War Powers Resolution, but a more significant disagreement over Constitutional authority mars the consultative process that the Resolution intended to bring about. President Reagan justified the 1983 invasion of Grenada on similar Constitutional grounds, citing his powers as Commander-in-Chief and ability to conduct foreign relations.<sup>15</sup> Although he reported “consistent with the War Powers Resolution,” President Reagan justified the use of force “pursuant to” constitutional authority regarding “the conduct of foreign relations and as Commander-in-Chief.” These arguments persisted throughout the history of military intervention since 1973.

On December 21, 1989 President George H. W. Bush reported to Congress that he had ordered troops to Panama, “to protect American lives, to defend democracy in Panama, to apprehend Noriega and bring him to trial ... and to ensure the integrity of the Panama Canal Treaties.”<sup>16</sup> Bush relied on his Constitutional powers to act, but also noted that the troop deployment was an act of self-defense, as allowed in Article 51 of the United Nations Charter. That article allows UN member states the “right of individual or

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<sup>14</sup> "Ronald Reagan: Statement on Signing the Multinational Force in Lebanon Resolution." Available: <http://www.presidency.ucsb.edu/ws/index.php?pid=40624&st=&st1=>

<sup>15</sup> "Letter to the Speaker of the House and the President Pro Tempore of the Senate on The Deployment of United States Forces in Grenada." Available: <http://www.reagan.utexas.edu/archives/speeches/1983/102583e.htm>

<sup>16</sup> "Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on United States Military Action in Panama." Available: [http://bushlibrary.tamu.edu/research/public\\_papers.php?id=1364&year=1989&month=12](http://bushlibrary.tamu.edu/research/public_papers.php?id=1364&year=1989&month=12)

collective self-defence if an armed attack occurs against” them.<sup>17</sup> It is unlikely that the situation in Panama constituted an armed attack against the US, as envisioned by the UN charter. President Bush noted the killing of a US Marine Officer and harsh treatment of a Naval Officer in his report. It is hard to see how that these acts fulfilled the intent of the UN charter, let alone merited increasing US troop levels in Panama from 11,000 to 24,000.<sup>18</sup> More important, however, is the question of whether Bush’s justifications constituted a “national emergency” created by an attack on US armed forces, as outlined in the “Purpose and Policy” section of the War Powers Resolution. Presidential war powers scholar Louis Fisher argues that the self-defense reasoning did not hold up to scrutiny and could easily be used to justify numerous invasions around the globe.<sup>19</sup> Regardless of Bush’s attitude toward the legality of the War Powers Resolution, the timeline of troop withdrawal gave the appearance of compliance with the Resolution’s 60-day window.<sup>20</sup> Like Reagan, Bush gave the appearance of compliance, while maintaining his independent authority to act.

Democrats, as well as Republicans, have been uninhibited by the War Powers Resolution. The failed Desert One operation was one such case showing Democrats’ use of the law. Following malfunctions of several helicopters, President Jimmy Carter aborted the mission to rescue hostages held in Iran. Upon take off to exit Iran, a helicopter and cargo plane collided, killing 8 American service members. President Carter reported the operation to Congress on April 26<sup>th</sup>, 1980, two days after he had initiated it. He reported “consistent” with the War Powers Resolution and according to

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<sup>17</sup> Charter of the United Nations. Available: <http://www.un.org/en/documents/charter/chapter7.shtml>

<sup>18</sup> Fisher, *Presidential War Power*, p. 166.

<sup>19</sup> *Ibid*, p. 166 – 167.

<sup>20</sup> *Ibid*, p. 166.

his desire that Congress be informed.<sup>21</sup> Though his report does not specify, it seems that Carter reported consistent with section 4(a)(2), since US forces entered Iranian airspace equipped for combat. However, he still bypassed the Resolution for authorizations and relied on his powers as Chief Executive and Commander-in-Chief to justify the action. He notes that the War Powers Resolution recognizes these powers under section 8(d)(1), which states, "Nothing in this chapter is intended to alter the constitutional authority of the Congress or of the President." Like Presidents before and after, Carter went directly to the Constitution to justify his actions.

On March 26, 1999, President Clinton reported to Congress that he had directed airstrikes in the Federal Republic of Yugoslavia to pressure the Serbian Army to stop attacks on Kosovars.<sup>22</sup> In his report, Clinton cites his constitutional powers to conduct foreign affairs and his power as Commander-in-Chief and Chief Executive. He also points to Congress' support expressed in Senate Concurrent Resolution 21 and House Concurrent Resolution 42. However, as the Supreme Court ruled in *INS v. Chadha*, concurrent resolutions are not binding law, because they are not presented to the President for his approval. Only bills and joint resolutions are presented to the President for his signature. Therefore, Clinton could only claim to have Congress' *support* and not its *authorization*.<sup>23</sup> The distinction is meaningful.

In the spring of 2011, Muammar al-Qadhafi's troops continued their campaign against the opposition, despite a United Nations resolution calling for an end to the

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<sup>21</sup> "Jimmy Carter: Rescue Attempt for American Hostages in Iran Letter to the Speaker of the House and the President Pro Tempore of the Senate Reporting on the Operation." Available: <http://www.presidency.ucsb.edu/ws/index.php?pid=33328&st=&st1=>

<sup>22</sup> "William J. Clinton: Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro)." Available: <http://www.presidency.ucsb.edu/ws/index.php?pid=57316&st=kosovo&st1=>

<sup>23</sup> Louis Fisher, *Presidential War Power*, p. 198.

violence. On March 21, President Obama reported to Congress that he had directed US forces to target air defense systems and military installations to prepare for a no-fly zone.<sup>24</sup> The US joined NATO allies in the airstrikes “to prevent a humanitarian catastrophe and address the threat posed to international peace and security by the crisis in Libya.” His constitutional authority was the same as that cited by Clinton: authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive. It is interesting to note that Obama submitted his report “consistent with the War Powers Resolution.” This fact suggests that the White House was reporting under one of the provisions in Section 4. When Congress subsequently requested an update on the situation in Libya, as required by the War Powers Resolution, the Administration furnished a report outlining objectives of the mission, as well as the White House’s legal analysis of the undertaking. The Administration’s legal analysis concluded:

the current U.S. military operations in Libya are consistent with the War Powers Resolution and do not under that law require further congressional authorization, because U.S. military operations are distinct from the kind of “hostilities” contemplated by the Resolution’s 60 day termination provision.<sup>25</sup>

This argument received due scrutiny in the media during the summer of that year. One weakness of the War Powers Resolution is evident from this debate. Vague language allows plenty of room for Presidents to maneuver within or around the law. Fisher argues

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<sup>24</sup> "Letter from the President regarding the Commencement of Operations in Libya." *The White House*.

Available: <http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>

<sup>25</sup> *Ibid.*

that a bombing campaign constitutes hostilities, even if ground troops are absent.<sup>26</sup> That seems reasonable; however, Fisher's argument refers to the initial bombing campaign that preceded the no-fly zone, whereas the White House position argued that "current" military operations did not constitute hostilities. If the bombing sorties had stopped and the US was only providing support, would that constitute hostilities? Moreover, the War Powers Resolution says that the President has 60 days from submitting the report to "terminate any use of United States Armed Forces *with respect to which* such report was submitted"<sup>27</sup> (emphasis added). If troops, initially used for hostile purposes, transition to a non-hostile role, then it is conceivable that their hostile use has been terminated, as the law requires. It seems, therefore, less a question of whether hostilities existed at the outset of the operation than whether hostilities existed after the no-fly zone was fully in place and the US role reduced. Many argued that the legal analysis strained to shirk the law, but it is important to note that the US continued its engagement while the media, Congress, and the public debated the point. The Libya debate raised another important question for war powers legislation: Did the continued use of armed drones after the initial bombing campaign constitute hostilities?<sup>28</sup> Senator Richard Durbin argued that they did. Such an argument suggests that Presidents need Congressional approval in order to use armed drones. The definitions that Congress uses to define its scope of oversight have implications for US actions. This was as true in Libya as it was in other uses of force.

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<sup>26</sup> Louis Fisher, "Military Operations in Libya: No War? No hostilities?" Available: <http://www.loufisher.org/wplibya.html>

<sup>27</sup> Section 5(b).

<sup>28</sup> Fahrenthold, David A. "Obama's Negation of 'hostilities' in Libya Draws Criticism." Available: [http://www.washingtonpost.com/politics/obamas-negation-of-hostilities-in-libya-draws-criticism/2011/06/20/AGV2zTdH\\_story.html](http://www.washingtonpost.com/politics/obamas-negation-of-hostilities-in-libya-draws-criticism/2011/06/20/AGV2zTdH_story.html)

President Obama's September 2013 decision to seek congressional authorization for strikes against Syria provides a useful counter example. Though he concluded that striking Syria was in the US' interest, he decided to take the case to Congress. However, his decision came with a caveat. Speaking in the Rose Garden he said, "While I believe I have the authority to carry out this military action without specific congressional authorization, I know the country will be stronger if we take this course and our actions will be even more effective."<sup>29</sup> This statement did not represent a shift in policy from that of his predecessors. Presidents regularly used US forces and, while maintaining their right to do so, urged Congress to support the decision. Reagan's words during the Lebanon Multinational Resolution signing ceremony are evidence of this. Though Obama's actions did not represent a departure from legal doctrine invoked by his predecessors, his precedent may have an effect on how US forces are introduced into hostilities in the future. Writing at the time in *Foreign Policy*, David Rothkopf argued that President Obama's decision to seek congressional support would, in practical terms, limit his ability to unilaterally initiate military action for the remainder of his tenure.<sup>30</sup> Legal questions aside, the decision was more an example of expediency than any statement on the separation of powers. Backed into a rhetorical corner from talk of the use of chemical weapons as a "red line," Obama risked looking weak from non-action. Consulting Congress on the matter provided political cover in the event that the US did not strike. With over half of Americans polled opposing a strike in Syria,<sup>31</sup> Congressional support would have shielded Obama from political repercussions, had he

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<sup>29</sup> "Syria." *The White House*. Available: <http://www.whitehouse.gov/issues/foreign-policy/syria>

<sup>30</sup> Rothkopf, David. "The Gamble." Available: [http://www.foreignpolicy.com/articles/2013/08/31/the\\_gamble](http://www.foreignpolicy.com/articles/2013/08/31/the_gamble)

<sup>31</sup> "U.S. Support for Action in Syria Is Low vs. Past Conflicts." Gallup, Inc. Available: <http://www.gallup.com/poll/164282/support-syria-action-lower-past-conflicts.aspx>

followed through on threats of military action. Rothkopf may be right that Obama limited his options for military intervention, but his decision is unlikely to deter future presidential wars.

Since passage of the War Powers Resolution of 1973, the US has engaged in a long list of relatively small and short conflicts around the world. In many of these cases, US interests have been ill-defined. Notable exceptions are Congress' authorization for the first Iraq war, the second Iraq war, and the authorization to target individuals responsible for the attacks on September 11, 2001. These instances aside, it is clear that the collective judgment of Congress and the President has not applied to an overwhelming number of instances of the use of US military force. By allowing the President to act first and ask for permission later, the Resolution relegates Congress to a secondary power, despite the fact that the Constitution enumerated to the Legislature the power to declare war. If Congress wants a role in determining when national interests call for the use of force, then reforming the War Powers Resolution is the logical first step.

The National War Powers Commission, led by former Secretaries of State James Baker and Warren Christopher, set out to enhance Congress' consultative role in deliberations on the use of force. The committee examined arguments surrounding the issue of constitutional war power and looked at the impact of the War Powers Resolution on Presidential actions. It proposed reforms in the War Powers Consultation Act of 2009. The Act repeals the War Powers Resolution and attempts a more workable solution to decisions on waging war. As the name implies, the statute hopes to gain consensus on military action through consultation. Senators Tim Kaine and John McCain introduced in the Senate a slightly modified version of the Commission's proposed statute on January

16, 2014. While the Resolution offers some necessary changes, it will not fundamentally alter the way in which Presidents use military force.

The War Powers Consultation Act of 2014 repeals the 1973 law and attempts to offer more precise guidance on waging war. Rather than use the term “hostilities,” the new Act applies to “significant armed conflict.” This is defined as a combat operation that lasts, or the President expects to last, more than seven days. Exceptions to this definition include instances where the President uses force to “repel attacks, or to prevent imminent attacks,” “limited acts of reprisal against terrorists or states that sponsor terrorism,” covert actions, and “missions to protect or rescue United States citizens” abroad. Under the Act, the President shall consult with a newly established Consultation Committee *before* ordering deployment into significant armed conflicts and on a regular basis in regards to “significant matters of foreign policy and national security.” Should the need for secrecy or an emergency prevent prior consultation, the President is required to report actions within three days of their commencement. Congress then has thirty days to introduce a joint resolution approving the action. Should that fail, the House or Senate shall introduce a joint resolution disapproving the use of force. The Act reserves the right of any member of Congress to introduce legislation to approve, disapprove, expand, narrow, or end a significant conflict.

Does the Consultation Act succeed where the War Powers Resolution failed? First, the Act concedes that it does not claim to “define, circumscribe, or enhance the constitutional war powers of either the executive or legislative branch.” In his analysis of the War Power Commission’s report, Louis Fisher lambasts the Commission for dodging constitutional questions and yet offering proposals that are not meant to privilege one

branch over another in decisions to go to war.<sup>32</sup> If the goal of the Consultation Act is to reassert Congressional authority to decide when to wage war, then the Act cannot be ambiguous on this fundamental point. Regarding this issue, two sections of the original War Powers law provide a useful juxtaposition. Section 2(c) elucidates the situations when the President can rightfully exercise his Commander-in-Chief powers: a congressional declaration of war, a congressional authorization, or a national emergency, while the “Interpretation” section [8(d)(1)] reads, “Nothing in this joint resolution is intended to alter the constitutional authority of the Congress or of the President.” Although they were not altering either branch’s constitutional authority, the drafters of the War Powers Resolution attempted to define how these powers are shared. The Consultation Act sidesteps the Constitutional power-sharing question entirely, favoring instead to establish a “constructive and practical” approach for deciding when to go to war. By starting from this weakened position Congress would be conceding too much ground. Unless Congress reestablishes its authority to declare war, Presidents will do what they find expedient and exploit ambiguities in the law to justify those decisions.

Definitions in the Act are also problematic. By setting the scope of Congressional oversight to “significant armed conflict,” the Commission gives the President vast room to use forces based on his own judgment. The Commission notes that the term “hostilities,” used in the War Powers Resolution, was “both inadequately defined it and swept too much into its net.”<sup>33</sup> Reagan’s air campaign against Libya, as envisioned by the Commission, would not constitute a significant armed conflict. Oddly enough, drafters of the original bill substituted “hostilities” for “armed conflict,” because the latter

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<sup>32</sup> Fisher. “The Baker-Christopher War Powers Commission,” p. 136.

<sup>33</sup> *National War Powers Commission Report*, p. 36. Available: <http://millercenter.org/policy/commissions/warpowers>

was thought to be too narrow.<sup>34</sup> The term “armed conflict” privileges the President over the Legislature by expanding the scope of operations that can be carried out under his sole domain. By defining armed conflict as a combat operation lasting longer than a week, the Act gives the President wide berth to intervene abroad. Military actions lasting less than a week can still involve great destruction and cause political complications that persist long after the shooting has stopped. Bombing raids like the 1986 strikes on Libya and the proposed strikes against Assad’s military in Syria deserve Congressional scrutiny to determine if they are in the US’ national interest.

Executive power is further enhanced from exceptions to the “armed conflict” definition. Of the seven exceptions noted in the act, perhaps the two most far-reaching are “acts of reprisal against terrorists or states that sponsor terrorism” and “covert operations.” As Fisher notes,<sup>35</sup> the terrorist reprisal exception provides latitude for the President to launch limited acts of reprisal against Cuba, Iran, Sudan, and Syria, countries that the State Department classifies as sponsors of terrorism.<sup>36</sup> Covert actions, too, can include a wide range of activities with far-reaching, long-lasting implications. Central Intelligence Agency operations to overthrow the Shah of Iran and support the Mujahedeen against the Soviets in Afghanistan are evidence of this. Arguably these CIA activities have had a greater impact on US foreign relations than military action covered under the definition in the bill. It is for this reason that Senator Eagleton tried,

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<sup>34</sup> Krotoski, Mark L. "Essential Elements of Reform of the War Powers Resolution," p. 658. Available: <http://digitalcommons.law.scu.edu/lawreview/vol29/iss3/6/>

<sup>35</sup> Fisher. "The Baker-Christopher War Powers Commission," p. 138. Available: <http://www.loufisher.org/wpr.html>

<sup>36</sup> "State Sponsors of Terrorism." *U.S. Department of State*. Available: <http://www.state.gov/j/ct/list/c14151.htm>

unsuccessfully, to include covert action in the original war powers law.<sup>37</sup> Congress would be hard-pressed to restrict the President's authorization of covert action through a war powers bill, since these actions arise not from the Constitution, but from the National Security Act of 1947. If Congress hoped to reign in covert action, separate legislation dealing with this explicit issue would be the best approach.

Without adequately defining the scope of a war powers bill, such legislation is moot. Libya in 2011 underscored this point. Despite the suspicion over the Administration's argument that the US was not engaged in hostilities, US forces maintained their support for NATO operations in Libya. Whether defined as "hostilities" or "significant armed conflict," the language of a bill is likely to admit some degree of circumvention. Indeed, it may be impossible to develop a "catch-all" term that eliminates instances of presidential wars. However, perhaps a definition would be more effective if its circumvention carried political costs. In the Libya case, politicians pointed to the fact that the Department of Defense granted imminent danger pay to service members as evidence of hostilities. Certainly at the time the existence of danger pay was not sufficient to prove that hostilities existed; US forces in Turkey, Saudi Arabia, and Greece also received it, despite the lack of hostilities.<sup>38</sup> Yet, what if Congress defined hostilities as situations where imminent danger pay is, or is expected to be, granted? Granted, this definition may encompass areas that are not typically thought of as hostile zones for US forces, such as Israel and Jordan. As such, the requirement for Congressional approval may be broader than necessary, but presumably having troops in these areas is not overly controversial, at least not to the same extent as deploying troops to combat zones.

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<sup>37</sup> Eagleton, *War and Presidential Power*, p. 189-193.

<sup>38</sup> Fahrenthold, David A. "Obama's Negation of 'hostilities' in Libya Draws Criticism."

Though there may be some debate, Congress would likely approve the presence of US forces in non-hostile, imminent danger pay zones. Furthermore, if the goal is to produce a system of introducing troops that is more consultative, then this definition would seem to achieve that end. Politically, this definition seems feasible. A president would be wary of sending troops into a conflict while denying that they deserve imminent danger pay. With this definition, Presidents may find it difficult to produce legal analyses arguing that danger pay and, consequently, congressional oversight do not apply. Some may argue that Congress, in applying such a rule, is using troops as a political tool. However, an effective counter argument is that the decision to send troops into areas of imminent danger should be highly scrutinized, so Congressional debate is a necessary step in deciding where America sends its troops. Such a definition may also have an unintended consequence of tighter scrutiny over where imminent danger pay is applied. In January 2014, the Pentagon removed more than twenty countries from the imminent danger pay list, citing reduced security risks and budget concerns.<sup>39</sup> Adjustments like this one would cause the Pentagon to focus its resources on high priority expenditures. Armed drones and Tomahawk missiles show clear limitations of an imminent pay definition. However, a definition that carries political costs when violated would help limit unilateral presidential action.

Enforcement is another critical area to address through legislation. Under the War Powers Consultation Act, Congress has the burden of taking action to deny support for the use of forces. While the Commission intended not to restrain the President in the event that Congress failed to act, it is unclear exactly what would happen should

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<sup>39</sup> "Pentagon Cuts by Third Places Where U.S. Troops Get Danger Pay." *Reuters*. Available: <http://www.reuters.com/article/2014/01/03/us-usa-pentagon-pay-idUSBREA020XT20140103>

Congress fail to pass a resolution approving or disapproving the President's action.

Under the War Powers Resolution, if Congress fails to act, then the President is required to terminate the use of unauthorized force in 60 to 90 days. However, the default position for the President under the Consultation Act is unrestricted, yet unauthorized, war. In the event of a presidential veto, a disapproval resolution would need a two-thirds majority in order to bind the President's actions.<sup>40</sup> Here again, the Commission has put the odds in the President's favor, since a two-thirds vote may be hard to muster in a divided legislature.

Given Congress' Constitutional power to declare war and the history of US involvement in conflicts since 1973, the default position of a war powers bill should override the President's decision. Congress' main source of power is the control it wields over funding, so perhaps a war powers bill could cut off financial support for the use of force unless congressionally-authorized. During the 1970 deliberations, legislators discussed the issue of cutting off funding but worried about the political implications of such a move.<sup>41</sup> Such a provision would be politically risky, as it may appear to undermine troops once they are deployed.

Another issue is Congress' ability to recall troops or limit their use once deployed. As currently written, the War Powers Consultation Act does not specifically mention Congress' ability to recall troops, as the War Powers Resolution did with the 60-day timeline. The Consultation Act only mentions procedures for passing a joint resolution of approval or disapproval. Whether the President is required to withdraw troops after Congress disapproves of their use is a matter of debate. The timing outlined in the

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<sup>40</sup> Fisher. "The Baker-Christopher War Powers Commission," p. 139.

<sup>41</sup> Eagleton, *War and Presidential Power*, Ch. 7.

Consultation Act is also problematic. While the President “shall consult” with Congress before ordering troops, the Act does not state that Congress must authorize the use of troops before they are actually deployed. Congress has no more than 30 days *after* a troop deployment to introduce a joint resolution of approval.<sup>42</sup> At this point, it is unclear how long Congress has to debate a use of force authorization, but Fisher estimates that the process could take up to two months.<sup>43</sup> Only *after* failure of a resolution to approve the action does the Act stipulate that Congress takes up a disapproval resolution. Another five to ten days would pass before the bill is approved and sent to the President for his signature.<sup>44</sup> Assuming he vetoes, Congress must then override with another vote. At best, this timeline is similar to the original War Powers Resolution. However, in the event of Congressional inaction, the President will have successfully waged war on his own.

The creation of a Congressional Consultation Committee is a valuable development in the Consultation Act. According to section six, prior to ordering the use of force, the President shall consult with the committee and provide to them a written report on the reasons necessitating an armed conflict. This consultation language is more explicit than the original war powers law, which requires consultation with “Congress.” The Consultation Committee is comprised of twenty members and includes its own bipartisan joint staff. It is unclear from the text of the bill what leeway this committee has to share information with other Members of Congress. Still, it marks an improvement over current consultation methods. The Committee includes relevant Senate and House Committee leadership (Senate Foreign Relations and House Foreign

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<sup>42</sup> Section 7(a)(1).

<sup>43</sup> Fisher. “The Baker-Christopher War Powers Commission,” p. 139.

<sup>44</sup> *Ibid*, p. 139.

Affairs, both Armed Services committees, both Intelligence committees, and both Appropriations committees) as well as its own staff to support the Committee's work. The composition of this Committee is an improvement over the "Gang of Eight" with which Administrations have shared intelligence on national security matters since 2001.<sup>45</sup> Importantly, the staff has access to relevant classified materials under the Committee's consideration. Members often lack sufficient access, staff counsel, and time to study intelligence reports, due to classification concerns. Without appropriate access, their ability to make informed decisions is limited. The structure of the Consultation Committee attempts to alleviate at least some of these concerns. However, it is important to note that the Act stipulates that reports on armed conflicts should be classified.<sup>46</sup> It would be more appropriate to make this an *ad hoc* decision, rather than stipulate that all reports should be classified. Classification may indeed be necessary in many cases, but perhaps not in all instances. The Consultation Act also stipulates that the President must "provid[e] sufficient time for the exchange of views regarding whether to engage in significant armed conflict."<sup>47</sup> "Sufficient time" is a vague term, surely subject to endless litigation. A stronger law would tie consultation to authorization of the use of force and provide sufficient time for Congress to organize a vote on the authorization bill. By tying the amount of time to a tangible action, the law would provide a clearer test of whether or not the notification on intent to use forces provided "sufficient time." A bill could go further to indicate a specific timeframe (i.e. thirty days), but this would seem too

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<sup>45</sup> "President Bush Restricts Disclosures to the Congress." Available: <http://www.fas.org/sgp/news/2001/10/gwb100501.html>

<sup>46</sup> Sections 6(b)(1)(B) and 6(d).

<sup>47</sup> Section 6(b)(1)(A).

constraining. The essential point is that consultation must end in decisive action on whether or not use of force is authorized.

Experience shows that presidents will use force when they determine it is in the nation's interest. With the exception of several major wars, presidents have acted independent of congressional authority. America's interventionist mentality has persisted despite the end of the Cold War, leading the US to commit to conflicts near and far. Frequently, these interventions occur in spite of a weak connection to US national security interests. Unless Congress compels the President to seek authorization before engaging in conflicts abroad, the Commander-in-Chief will use force when he can gain enough public support to back his position. Congress must utilize its constitutional power to legislate in order to reestablish its position as the branch that declares wars. Its power over the purse is a logical tool toward this end. Given the drawdown in Afghanistan and pullout in Iraq, the time is right for reform. As the Syria example illustrated, Americans are leery of actions that risk overextending the US military. To ensure that US combat operations carry Congress' full authority, legislation must require that consultation and authorization precede deployment. Such a consultative process would strengthen American foreign policy by presenting a united front to international partners and adversaries.

## Bibliography

- "Charter, United Nations, Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression." *UN News Center*. United Nations, Web. 7 Apr. 2014.
- Eagleton, Thomas F. *War and Presidential Power: A Chronicle of Congressional Surrender*. New York: Liveright, 1974. Print.
- Fahrenthold, David A. "Obama's Negation of 'hostilities' in Libya Draws Criticism." *Washington Post*. The Washington Post, 21 June 2011. Web. 1 Apr. 2014.
- Fisher, Louis. "The Baker-Christopher War Powers Commission." *Presidential Studies Quarterly* 39.1 (2009): 128-40. Print.
- Fisher, Louis. "The Law: Military Operations in Libya: No War? No Hostilities?" *Presidential Studies Quarterly* 42.1 (2012): 176-89. Print.
- Fisher, Louis. *Presidential War Power*. Lawrence, KS: University of Kansas, 2013. Print.
- "Gerald R. Ford: Letter to the Speaker of the House and the President Pro Tempore of the Senate Reporting on United States Actions in the Recovery of the SS Mayaguez." The American Presidency Project, Web. 10 Apr. 2014.
- "Jimmy Carter: Rescue Attempt for American Hostages in Iran Letter to the Speaker of the House and the President Pro Tempore of the Senate Reporting on the Operation." The American Presidency Project, Web. 10 Apr. 2014.
- Krotoski, Mark L. "Essential Elements of Reform of the War Powers Resolution." *Santa Clara Law Review* 6th ser. 29.3 (1989): 607-752. Web.
- "Letter to Speaker of the House of Representatives, John Boehner on United States

- Activities in Libya," *The White House*. The White House, Web. 10 Apr. 2014.
- "Letter to the Speaker of the House and the President Pro Tempore of the Senate on The Deployment of United States Forces in Grenada." Ronald Reagan Presidential Library, Web. 10 Apr. 2014.
- "Letter to the Speaker of the House and the President Pro Tempore of the Senate Reporting On United States Participation in the Multinational Force in Lebanon." Ronald Reagan Presidential Library, Web. 10 Apr. 2014.
- "Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on United States Military Action in Panama." *George Bush Presidential Library and Museum*, Web. 10 Apr. 2014.
- National War Powers Commission Report*. Rep. Charlottesville, VA: Miller Center for Public Affairs, 2008. Print.
- "Pentagon Cuts by Third Places Where U.S. Troops Get Danger Pay." *Reuters*, 03 Jan. 2014. Web. 10 Apr. 2014.
- "President Bush Restricts Disclosures to the Congress." Federation of American Scientists, Web. 8 Apr. 2014.
- "Political Reversal..." *Article*. The New York Times, 23 Dec. 1973. Web. 30 Mar. 2014.
- "Ronald Reagan: Remarks to Reporters Announcing the Deployment of United States Forces in Beirut, Lebanon." The American Presidency Project, Web. 10 Apr. 2014.
- "Ronald Reagan: Statement on Signing the Multinational Force in Lebanon Resolution." The American Presidency Project, Web. 10 Apr. 2014.
- Rothkopf, David. "The Gamble." *Foreign Policy*. Foreign Policy, Web. 10 Apr. 2014.

"State Sponsors of Terrorism." *U.S. Department of State*, Web. 10 Apr. 2014.

"Syria." *The White House*, Web. 07 Apr. 2014.

"U.S. Support for Action in Syria Is Low vs. Past Conflicts." Gallup, Inc., Web. 09 Apr. 2014.

"William J. Clinton: Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro)." The American Presidency Project, Web. 3 Apr. 2014.