

Repeating History

The Ineffectiveness of the 1973 War Powers Resolution

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Abstract

Reluctant students often criticize the study of history as irrelevant to the present day. In the case of one important and controversial piece of legislation, nothing could be farther from the truth. The 1973 War Powers Resolution (WPR), which places limits on presidential power to deploy troops in combat situations, has ample application to the political functioning of the United States today. Thus, investigating and studying the resolution remains relevant and important today. The WPR became law in 1973, overcoming a predictable veto by President Nixon. The legislation has consistently been a flashpoint for political controversy – eliciting criticism by both parties, and both opponents and supporters of expansive presidential power. Not only has it created political controversy, but its effectiveness has been a constant source of study, debate, and disagreement. This thesis will argue that the WPR has been largely ineffective at achieving its goals of restricting presidential powers. It will analyze several conflicts that the United States has been involved in since its passage. This paper will examine the political climate at the time of its initial passage, and then examine the effect it has had on subsequent conflicts. Ultimately, this paper will contend that the WPR has been an ineffective attempt at restricting presidential war powers, due to its political nature, vague language, and the modern strength of the American president.

Repeating History

The Ineffectiveness of the 1973 War Powers Resolution

Students of history will quickly learn that what some dismiss as irrelevant to current events has important, real implications for the present day. One pertinent example of this is the War Powers Resolution (WPR) which was enacted in 1973 and continues to cause political controversy and influence war-making decisions to this day. The legislation has impacted political decision-making and wartime calculus, as well as sparking numerous debates about its exact meaning and effectiveness. These conflicts can only be resolved through a historical analysis of its use in different conflicts and under different presidents. Though an investigation of the conflicts during the Ronald Reagan, William Clinton, and George W. Bush administrations, the extent to which the WPR achieved its goal of restraining presidential war powers can be established. Overall, it becomes clear that the WPR has been largely ineffective at restricting presidential war powers, evidenced by its application in several conflicts.

The concept of presidential war powers has been controversial since the creation of the presidency. The Constitution set out a balance of war-making powers between Congress and the president, but this balance has faced challenges since its creation. Article II, section 2 of the Constitution gives the president the role of commander in chief,¹ while Article I, Section 8 grants Congress the power to declare war and raise armies.² Different presidents have navigated this tension differently. The controversy

1. U.S. Constitution, art. 2, sec. 2.

2. Ibid., art 1, sec 8.

“intensified after the Korean conflict,”³ under President Harry Truman, as the introduction of forces was not precipitated by congressional approval. As Louis Fisher argues, “President Harry Truman's commitment of U.S. troops to Korea in June 1950 still stands as the single most important precedent for the executive use of military force without congressional authority.”⁴

President Dwight Eisenhower relied on congressional approval for the military intervention in Lebanon in 1958.⁵ In 1957 Congress passed the Middle East Resolution, giving the president power to provide “economic and military aid to Middle Eastern countries threatened by communist aggression.”⁶ Senator Richard B. Russell explained the significance of this exchange by remarking that Eisenhower had successfully navigated “the constitutional shadowland between the President’s authority to use armed forces and the necessity for a declaration of war.”⁷ Eisenhower was able to engage in the conflict in a timely manner, while Congress was able to sustain a meaningful role in the military course the United States took. Scholars like Evan Thomas believe Eisenhower’s

3. Richard Grimmett, *War Powers Resolution: After Thirty-Six Years* (Collingdale, PA: Diane Publishing, 2004), 1.

4. Louis Fisher, “The Korean War: On What Legal Basis Did Truman Act?” *The American Journal of International Law* 89, no. 1 (1995): 21

5. Stephen Brown, “The Eisenhower Model of Shared War Powers,” *National War College* (1993): 1.

6. U.S. Congress, *Joint Resolution to Promote Peace and Stability in the Middle East*, 85th Congress, H.J.Res. 117 (March 9, 1957).

7. Brown, “The Eisenhower Model of Shared War Powers,” 1.

inherent disposition against conflict contributed to this unique navigation.⁸ Eisenhower himself once commented that “I hate war as only a soldier who has lived it can, only as one who has seen its brutality, its futility, its stupidity.”⁹ Eisenhower’s personal restraint and defense philosophy contributed to his rare ability to successfully engage in conflict within constitutional limitations.

Eventually the conflict in Vietnam prompted Congress to assert increased oversight surrounding presidential war-making. President John F. Kennedy used the Truman Doctrine to justify military engagement in South Vietnam, and although there was no Congressional declaration of war, U.S. troops, advisors, and supplies were sent to the conflict zone.¹⁰ After Kennedy’s assassination and Lyndon Johnson becoming president in 1963, Congress passed the Gulf of Tonkin Resolution in August 1964, which included language supporting “use of armed force” in the assistance of South Vietnam against the North.¹¹ Johnson interpreted the resolution as a green light for expanded use of military force in Vietnam.¹² The Resolution was approved quickly and with significant

8. Michael Doran, “Is Obama like Eisenhower?” *Brookings Institute*, last modified October 2013, accessed March 25, 2016, <http://www.brookings.edu/research/articles/2013/09/obama-middle-east-eisenhower-doran>.

9. Dwight Eisenhower, “Address before the Canadian Club,” *Eisenhower Presidential Library*, accessed March 25, 2016, https://www.eisenhower.archives.gov/all_about_ike/quotes.html.

10. Grimmett, *War Powers Resolution: After Thirty Six Years*, 3.

11. *Ibid.*, 21.

12. “Congress Passes Gulf of Tonkin Resolution,” *History Channel*, last modified 2016, accessed March 28, 2016, <http://www.history.com/this-day-in-history/congress-passes-gulf-of-tonkin-resolution>.

support, but some commentators later noted that the Gulf of Tonkin incident may have been intentionally exaggerated by the Johnson Administration to secure support for the congressional approval.¹³

On August 2, 1964, North Vietnamese torpedo boats fired upon the *USS Maddox* and the *Maddox* returned the fire. Two days later, the *USS Maddox* and the *USS Turner Joy* reported that they were under attack once again and the *Turner Joy* engaged the torpedo boats in response.¹⁴ Hanoi denied the second attacks and they were later believed to have been fabricated, but the response by the United States was swift – Johnson authorized retaliatory air strikes almost immediately. Johnson then submitted the Gulf of Tonkin Resolution without necessarily providing all relevant information to congressional leaders, including the possibility that the air strikes provoked further attacks. Instead, he claimed that the North Vietnamese were engaging in “open aggression on the high seas” and easily secured the Gulf of Tonkin Resolution.¹⁵

The Resolution prompted many debates about presidential war powers that would eventually lead to the passage of the War Powers Resolution. While the Gulf of Tonkin Resolution was used to justify continued engagement in Vietnam, Congress repealed it in January of 1971, as public opposition to the war mounted.¹⁶ The repeal is significant to

13. Ezra Siff, *Why the Senate Slept: The Gulf of Tonkin Resolution and the Beginning of America's Vietnam War* (Santa Barbara, CA: Praeger, 1999): 37.

14. *Ibid.*

15. *Ibid.*

16. Scott Bomboy, “The Gulf of Tonkin Resolution and the Limits of Presidential Power,” *National Constitution Center*, last modified August 7, 2014, accessed March 25, 2016, <http://blog.constitutioncenter.org/2014/08/the-gulf-of-tonkin-and-the-limits-of-presidential-power/>.

the progression of the war powers debate, as it demonstrated the desire of Congress and the public to limit the president's power to continue military engagement without congressional approval. It also highlights some of the problems the WPR would later encounter – after the Resolution was passed, public opinion and congressional approval shifted, which required repeal in order to halt the president's actions.

By August of 1968, Gallup Polls found that 53% of Americans thought that the entire engagement in Vietnam had been a mistake, rising 29 points since the beginning of the conflict.¹⁷ After his inauguration in 1969, President Richard Nixon ordered clandestine bombings in Cambodia, a mission without sanction by Congress¹⁸ that caused widespread protests when eventually reported. After news of the My Lai massacre in Vietnam, the mounting criticism of the war by the American public reached an all-time high.¹⁹ Amid the publishing of the Pentagon Papers in 1971, distrust of the military, the president, and the government also increased. As troops left Vietnam in 1973, the Senate Armed Service Committee began investigating the Cambodia bombings.²⁰ It was in this heated political climate that the War Powers Resolution was crafted.

Politicians and the public alike held conflicting views on the extent of presidential war powers. When the WPR was crafted, it was motivated and grounded in

17. Mark Gillespie, "Americans Look Back at Vietnam War," *Gallup*, last modified November 16, 2000, accessed February 27, 2016, <http://www.gallup.com/poll/2299/americans-look-back-vietnam-war.aspx>.

18. Congressional Quarterly, Inc., "Can Nixon keep bombing in Cambodia without Congressional approval?" *The Central Oregon Bend Bulletin*, April 20, 1973, 4.

19. Truda Gray and Brian Martin, "My Lai: The Struggle over Outrage," *Peace and Change* 33, no. 1 (2008): 90.

20. Grimmett, *War Powers Resolution: After Thirty-Six Years*, 22.

“incompatible principles”²¹ – with some legislators attempting to restrict and others working to expand the president’s powers. Senator Thomas Eagleton illustrated that the Senate and House “marched down separate and distinct roads, almost irreconcilable roads.”²²

One pertinent example of the way that conflicting goals resulted in confusing legislation lies in the WPR’s conditions for committing armed forces to conflicts in the confines of treaty obligations. As Andrew Schiff explains, “Congress removed the presidential prerogative to deploy United States combat forces pursuant to an existing or future mutual security treaty. Congress inserted a caveat allowing such a deployment if implemented specifically pursuant to the requirements set forth in other sections of the Resolution. Congress then exempted all existing treaties from the Resolution.”²³ The negotiations between the two houses resulted in a mix of requirements that were difficult to understand or apply to specific situations. The result was unclear language and potentially conflicting requirements that would cause confusion in the future.

Secretary of State William P. Rogers fought against passage, arguing in front of the Senate Foreign Relations Committee that the issue should be dealt with after “the

21. Louis Fisher and David Gray Adler, “The War Powers Resolution: Time to Say Goodbye,” *Political Science Quarterly* 113, no.1 (1998): 2.

22. Questions submitted to Department of State and responses thereto, March 30, 1988, in War Powers Resolution, Relevant Documents, Correspondence, Reports, p. 97-99, accessed on March 20, 2016, <https://www.loc.gov/law/help/war-powers.php>.

23. Andrew Schiff, “The War Powers Resolution: From the Halls of Congress to the Hills of Bosnia; Inertia Should Give Way to Post-Cold War Reality,” *American University International Law Review* 11, no 5 (1996): 877-915.

passions of Vietnam have passed.”²⁴ He was pressed by Senator Frank Church, who asked “what limits do you see to the President’s unilateral authority as commander-in-chief to make war in foreign lands without congressional consent?”²⁵ Ultimately, supporters of congressional checks on the president’s war powers overwhelmed the opposition by Nixon supporters or supporters of the engagement in Vietnam. Rogers went on to write “Congress, the President, and the War Powers” in the *California Law Review* in 1971, defending his position that the president held expansive war powers.²⁶

The majority of the House thought the president should have the flexibility to defend the United States in emergency circumstances without Congressional approval, while most in the Senate sought stricter language to restrict the president’s ability to act unilaterally.²⁷ After the House modified the WPR to include a time limit, the Senate agreed. The final bill specified that Congress had 60 days to declare war or authorize use of force, but that within that window the president could commit and send troops. The legislation also allowed Congress to pass a concurrent resolution at any time, to end the engagement the president had begun. The House passed the bill 238 to 123 and the

24. Irving Bryan, “Nixon v Constitution in War Powers Debate: A Peaceful Death,” *The Washington Post*, July 4, 1975, B3.

25. *Ibid.*

26. William Rogers, “Congress, the President, and the War Powers,” *California Law Review* 59, no. 5 (September 1971):1194-1214.

27. Grimmett, *War Powers Resolution: After Thirty-Six Years*, 6.

Senate passed it 75 to 20. On November 7th, 1973, the WPR became law, overriding Nixon's veto.²⁸

The WPR allows the president to authorize the sending of U.S. armed forces into combat or engagement by either "statutory authorization" by Congress or in the event of "a national emergency created by attack upon the United States, its territories or possession, or its armed forces."²⁹ The WPR specifies that the president is required to notify Congress within forty-eight hours of authorizing engagement and that force may only remain for sixty days without further authorization by Congress.³⁰

Since its rocky beginnings, the WPR has remained controversial. Its goals were unclear, and the extent to which it has achieved its goals has been hotly debated. Discovering the historical effectiveness of the WPR in restricting presidential war powers requires more than investigating its part in particular conflicts, it requires analyzing what it did to restrain particular presidents. This approach better explains long-term foreign policy decisions of presidents, and captures an administration's approach to the WPR and its possible strategies of circumvention. The three two-term presidencies analyzed are particularly suited for this study – each experienced challenges and criticism relating to the use of presidential war powers and their length in office provides a greater span of time and a greater number of decisions to analyze.

28. Richard Madden, "House and Senate Override Veto: By Nixon On Curb Of War Powers; Backers Of Bill Win 3- Year Fight," *Washington Post*, November 7, 1973, A1.

29. War Powers Resolution of 1973, 50 U.S.C.

30. *Ibid.*

Reagan faced numerous challenges relating to the use of presidential war powers. The Reagan administration denied the constitutionality of the WPR, but still attempted to explain its actions as consistent with it. When American peacekeeping forces were sent to Lebanon to prevent the breakout of a civil war, he signed legislation to allow an eighteen month extension of the Marine presence, but also made it clear he thought he should not have to. In his diary on September 21, 1983, he wrote that while signing the law he would “voice [his] reservations about the constitutionality of the War Powers Act.”³¹

Reagan came into the presidency with the explicit goal of “reassert[ing] presidential control of foreign policy.”³² Reagan strove to craft “centralized policy guidance and control” and shifted the role of the national security adviser to accommodate this change in control.³³ One of the first and most significant examples of this was the use of force in Grenada. On October 25, 1983, President Reagan announced that almost 2,000 United States soldiers and marines had begun an attack on the island. The rationale was three-fold: to protect approximately one thousand American citizens on the island, to “forestall further chaos,” and “to help in the restoration of democratic institutions in Grenada.”³⁴

31. Ronald Reagan, *The Reagan Diaries* (New York, NY: Harper Collins, 2009): 181.

32. Richard Hooker, “Presidential Decisionmaking and Use of Force: Case Study Grenada,” *The United States Army War College Quarterly Parameters* 21 (1991): 62.

33. *Ibid.*

34. “The Invasion of Grenada,” *The Washington Post*, October 26, 1983, accessed December 10, 2015, 1.

Debate over the WPR's applicability became relevant the second American troops hit the ground in Grenada. Section Three of the law states that the president must "in every possible instance" consult with Congress before committing troops to hostilities and must continue to consult with Congress once the forces are engaged until the operations have ceased.³⁵ Michael Rubner argues that the invasion of Grenada was clearly the type of situation the framers of the WPR were considering when crafting the legislation.³⁶ He explains that "the invading forces were engaged in fierce combat as soon as they landed" and that "two American Marines were killed during the first ten hours of the operation."³⁷ The question then becomes whether the Reagan administration notified and consulted Congress appropriately, per the stipulations of the WPR.

Reagan's diary records the tension the administration faced in balancing its desire to respond to contentious situations effectively and remain within legal bounds. In the case of the Grenada conflict, he records that "our gang³⁸ met upstairs in the W.H. & we told them of the Grenada operation that would take place in the next several hours. We gave them the complete briefing."³⁹ It is clear the administration believed they were

35. War Powers Resolution of 1973, 50 U.S.C.

36. Michael Rubner, "The Reagan Administration, the 1973 War Powers Resolution, and the Invasion of Grenada," *Political Science Quarterly* 100, no. 4 (1986): 628.

37. *Ibid.*, 630.

38. Reagan doesn't specify who he is referring to, but it is likely his closest advisors or his "Troika," including his Chief of Staff James Baker, Deputy Chief of Staff Michael Deaver, and Counselor to the President Ed Meese.

39. Ronald Reagan, *The Reagan Diaries* (New York, NY: Harper Collins, 2009): 190.

acting within the law by telling key members of Congress what would happen in the morning. Once the situation escalated in October, Reagan noted that the potential danger to the eight hundred Americans in medical school in Grenada meant that there was “only one answer”⁴⁰ he could give to the commanders waiting for his approval to engage.

Reagan’s memoirs also show that political concerns dictated his decision to keep the operation secret. He argued that the “post-Vietnam syndrome” or “the resistance of many in Congress to the use of military force abroad”⁴¹ influenced his decision. He was concerned that if any leaders were informed too early “there would be some who would leak it to the press”⁴² and jeopardize the mission.

Some records and testimony indicate that the administration did in fact comply with the WPR, including the statements by Deputy Secretary of State Kenneth Dam during hearings held by the Senate Foreign Relations Committee in October 1983. He claimed that “there was consultation with the leadership – bipartisan leadership of the House and Senate.”⁴³ Despite the typical claims of compliance by the administration, a critical examination of the events leading up to the invasion shows the Reagan administration’s circumvention of the requirements. The official records by the Foreign Relations Committee indicate that the order to begin the invasion was issued at 6:00 p.m.

40. *Ibid.*, 450.

41. *Ibid.*, 451

42. *Ibid.*

43. *GAO*, Report B-223011, December 24, 1986, accessed February 15, 2016, <http://www.gao.gov/products/B-223011>.

on Monday, October 24.⁴⁴ However, it was several hours later before a bipartisan group of congressional leaders was secretly brought to the White House and briefed on the military action.⁴⁵ Of the leaders present, many recounted the events, noting the lack of consultation that occurred. House Speaker Thomas P. O'Neill claimed "we weren't asked for advice," only that "we were informed what was taking place."⁴⁶ Senate Majority Leader Howard H. Baker said later on the Senate floor that the group was called to the White House to "advise us of this operation...I use the term 'advise' because it is true that we were not consulted in the sense that there was no solicitation of opinion."⁴⁷

In the sense of following the restrictions set out by the WPR, as well as following the spirit and intent of the law, the Reagan administration arguably failed. In this case, "circumvention" required much less legal maneuvering than other instances, primarily because the invasion was over and the majority of troops gone before formal investigations into the conflict began.⁴⁸ As Rubner describes:

since the stated intent of the resolution is to secure the collective judgment of both Congress and the president in decisions involving the introduction of U.S. troops into hostilities, it cannot be reasonably argued that merely briefing a group of legislators about imminent action based on a decision

44. "Grenada War Powers: Full compliance reporting and implementation," Markup before the Committee on Foreign Affairs, *Hathi Trust Catalog Record*, accessed January 3, 2016, <http://catalog.hathitrust.org/Record/002763602>.

45. *Ibid.*

46. "O'Neill Criticizes President; War Powers Act Is Invoked," *New York Times*, October 26, 1983, 29.

47. U.S. Congress, Senate, 98th Cong., 1st sess., 29 October 1983, Congressional Record 129:14912.

48. *Conyers v. Reagan*, 578 F. Supp. 323. D.C. 1984.

that had already been finalized qualifies as applying the judgment of Congress to such decision.⁴⁹

This particular case of the WPR's applicability and lack of compliance is important because it began to reveal a fundamental flaw with the law: vague language. The phrase "in every possible instance" allows room for argument that there are some instances in which consultation is simply not possible. In defense of instances like the Grenada invasion, scholars John W. Spanier and Eric M. Uslaner have argued that geographic limitations, such as inability to reach key legislators and communicate with them, may create situations in which prior consultation is impossible.⁵⁰

The ambiguity of the language resulted in conflicting interpretations of the correct action in the case of the Grenada invasion. Because Reagan believed that consultation would endanger the mission, it arguably constituted an instance in which consultation was not possible. However, the congressmen that were told of the invasion clearly felt that their input or oversight should have been solicited. The subjectivity of determining when consultation is possible or impossible makes the enforceability of the WPR incredibly difficult.

Another case that characterized the Reagan administration's approach to presidential war powers and the WPR was the conflict in the Persian Gulf. Border disputes and fears that the Iranian Revolution would inspire instability in other Arab

49. "The Reagan Administration, the 1973 War Powers Resolution, and the Invasion of Grenada," 632.

50. John Spanier and Eric Uslaner, *Foreign Policy and the Democratic Dilemmas* (Austin, TX: Holt, Rinehart, and Winston, 1982): 69.

nations had caused a full-blown war between Iran and Iraq in 1980.⁵¹ In early 1984, Iraq began attacking Iranian shipping in an attempt to provoke a sufficient Iranian response to ensure U.S. involvement, such as closing the Strait of Hormuz.⁵² The Reagan administration had promised to intervene if the Strait was closed and this potential for U.S. intervention brought to light another vague term integral to the implementation of the WPR – “imminent hostilities.”

On May 17, 1987, an Iraqi aircraft fired a missile on the *USS Stark*, killing thirty-seven U.S. sailors.⁵³ This incident made clear the ongoing debate concerning the possibility of hostilities in the region. Throughout 1987, the United States increased its forces in the gulf, including providing naval escorts for Kuwaiti oil tankers.⁵⁴ By the time the WPR became a relevant political issue, naval forces in the region had increased to 11 major warships; the *USS Bridgeton* and United States-chartered *Texaco-Caribbean* had struck mines; and a United States F-14 fighter plane had fired missiles at a potentially threatening Iranian aircraft.⁵⁵

Though each of these events clearly raised concerns, the question remained if they constituted “imminent hostilities” and should have been reported to Congress under Section 4 of the WPR. Amid increasing congressional concern, Reagan began submitting

51. Efraim Karsh, *The Iran-Iraq War: 1980-1988* (Oxford: Osprey Publishing: 2002), 7.

52. *Ibid.*, 50.

53. Grimmett, *War Powers Resolution: After Thirty-Six Years*, 16.

54. *Ibid.*, 17.

55. *Ibid.*

reports the administration claimed were consistent with the WPR.⁵⁶ While the Reagan administration began submitting reports, it denied that the previous events had constituted “hostilities” or “imminent hostilities,” as the United States’ action had been exclusively defensive.⁵⁷ While “imminent danger” pay had been announced for military personnel in the region on August 27, 1987, the administration maintained that this did not trigger Section 4 of the WPR and start the timeline of Congressional approval.⁵⁸ This tension was not lost on the public or the legislature. *The Los Angeles Times* reported in 1987 that Senator Carl Levin of Michigan commented upon the announcement that ‘the Administration can’t have it both ways.... I don’t see how the Administration can avoid invoking the War Powers Act’⁵⁹ once the bonus had been authorized.

The political battle over Reagan’s use of force in the Persian Gulf would prove to highlight not only the issue of vague language, but the issue of the political climate necessary to enforce the legislation. In this case, both houses of Congress attempted, in multiple ways, to intervene. A primary problem for those that wished to reclaim Congress’s role in war-making was the widely differing approaches by legislators.⁶⁰ The Senate voted 50-41 to table an amendment to the Defense authorization bill to apply the WPR to the conflict and require consultation from the president; and the Senate passed a

56. *Ibid.*, 18.

57. *Ibid.*

58. John Broder, “Pentagon Oks Danger Pay for Gulf Duty,” *Los Angeles Times*, August 27, 1987, 1.

59. *Ibid.*

60. Grimmett, *War Powers Resolution: After Thirty-Six Years*, 17.

measure that called for a report by the President within thirty days and expedited procedures for a joint resolution, but the House dropped it.⁶¹ H.J. Res 387 exemplified the problems with enforcement – it sanctioned continued presence, but was nevertheless an attempt at asserting congressional control. This would remain an important difficulty of enforcement – how to support a military engagement without supporting the executive overreach that authorized it.

Some attempts focused on forcing the president to report U.S. actions, others attempted to cut off his funding for any engagement in the conflict, and others sought to officially sanction the use of force. There was no consensus on the kind of action that Congress wanted taken, and so there was little political will to either stop or sanction what the president was doing. Additionally, the House and the Senate generally took different routes towards oversight – the House focused on enforcing the WPR, while the Senate sought to carve out a Congressional role in the conflict without invoking it.⁶²

Not only were the legislative attempts troubled, but the attempt by some legislators to use the courts to enforce the law also failed. In August 1987, over one hundred members of Congress filed suit in the U.S. District Court for the District of Columbia, requesting that the court declare that the administration file a report under section 4 of the WPR.⁶³ In December, the court dismissed the case, under the political question doctrine, arguing that the dispute was one that the congressmen had “primarily

61. Ibid.

62. Ibid., 19.

63. Ibid.

with fellow legislators.”⁶⁴ This response by the court typified the rest of these interactions – the courts often ruled on the political question doctrine, or argued that if the legislators were concerned, they should have enacted legislation halting the conflict in question. In yet another way, Reagan’s presidency crystalized some of the central problems with the enforceability of the WPR – not only did vague language hinder it, but political climates would dictate if it was enforced, and the courts would consistently avoid dealing with it.

Another issue with the WPR that the Reagan administration exposed was the effect the legislation potentially had on adversaries of the United States. When the United States was engaged in Lebanon under President Reagan, Special Envoy to the Middle East Donald Rumsfeld noted that a “Jordanian official told me the Syrians had analyzed America’s War Powers Resolution carefully. They knew that congressional support for our involvement in Beirut was fragile and vulnerable to the slightest shift of activity in the region.”⁶⁵ During a contentious point of international relations, the difficulty that the WPR had to actually restrain presidential powers was clear, but it still had the diplomatically ill effect of letting opponents believe they had an advantage. This would later become the exact reason Reagan gave for not entirely fulfilling the consultation requirements of the WPR in the case of Grenada – he didn’t want to risk the information leaking and harming the mission.⁶⁶ Clearly this concern would continue influencing presidents’ decisions to evade or follow the WPR’s constraints.

64. *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987).

65. Donald Rumsfeld, *Known and Unknown* (Westminster: Penguin, 2011):24. New York, NY: Harper Collins, 2009): 190.

66. Reagan, *The Reagan Diaries*, 451.

The presidency of William Clinton would continue to raise issues concerning the implementation of the WPR. His use of military force would raise questions about how long congressional authorization lasts and whether commitments to operations spearheaded by the U.N. required additional congressional approval or consultation.

After Operation Desert Storm ended in 1991, U.S. military forces continued involvement in the region to deal with continuing conflicts or emergency situations in Iraq. Throughout the presidencies of George H.W. Bush and Bill Clinton, these activities brought into question exactly how long a congressional authorization for force lasts. During the immediate aftermath of the operation, President Bush used military force multiple times in support of UN Security Council resolutions condemning actions by the Iraqi government. Bush reported the military actions to Congress, but there was no official consultation or congressional action.⁶⁷ Upon the start of President Clinton's first term, he announced that his administration would "adhere to the policy toward Iraq set by the Bush administration."⁶⁸ On multiple dates during 1993, U.S. aircraft fired at targets in Iraq, suspected of violating U.N. resolutions. Clinton also reported to Congress on June 28, 1993, that on June 26, naval forces had launched an attack on Iraqi Intelligence Service command and control complex in Baghdad.⁶⁹

These events raised an important question about the stipulations of the WPR. While there had been an Authorization for the Use of Force (a joint resolution granting

67. Grimmett, *War Powers Resolution: After Thirty-Six Years*, 24.

68. *Ibid.*, 25.

69. William Clinton, "Letter to Congressional Leaders on the Strike on Iraqi Intelligence Headquarters," *United States Government Publishing Office*, June 28, 1993, 1.

congressional authorization for military engagement) issued in January 1991 for the use of force in Iraq, it was uncertain if that same resolution covered the U.S. following the U.N. Security Council cease-fire.⁷⁰ It had authorized the president to use force “pursuant to U.N. Security Council Resolution 678 to achieve implementation of previous Security Council Resolutions relating to Iraq’s invasion of Kuwait.”⁷¹ However, the conclusion by Congress was that further authorization was not required if the use of force was intended to enforce the cease-fire resolution later adopted by the Security Council.⁷²

During 1993, 1996, and 1998, Clinton authorized strikes against Iraq at numerous times and for various reasons. The United States completed at least 130 strikes due to violations of the no-fly zone and many were in response to “Saddam Hussein’s military actions against Kurdish resistance groups in the north.”⁷³ However, there was very little consultation with Congress during these military engagements. Ryan Hendrickson explains that while Clinton attempted to communicate prior to the strikes with Congressman Ron Dellums, he failed to reach him and no other evidence of attempts to contact congressional leaders exists.⁷⁴ According to Hendrickson, no members of

70. Grimmett, *War Powers Resolution: After Thirty-Six Years*, 25.

71. Ernst Simone, *Foreign Policy of the United States, Volume 1* (New York: Nova Publishers, 200), 181.

72. Ibid.

73. Ryan Hendrickson, “Clinton, Bush, Congress and War Powers: A Comparative Analysis of the Military Strikes on Iraq and Bin Laden,” Paper presented at the Wilson Center Congress and U.S. Military Interventions Abroad Seminar, Washington, D.C. May 2004.

74. Ibid.

Congress were involved in the discussions of Iraqi complicity in the strikes.⁷⁵ However, little backlash to the lack of communication ensued, as there existed a high level of political support for the strikes.⁷⁶

Not only does this example during Clinton's presidency provide insight into the complexities of combining congressional approval for specific actions with compliance with U.N. Security Council resolutions, it once again highlights the problem of shifting political will. The WPR's intent was to ensure that Congress maintained greater oversight over presidential war powers, but this has been an issue historically only when the use of force becomes politically unpopular. These actions following Operation Desert Storm were not, and so there was much less congressional opposition than in other conflicts.

Another issue interpreting the WPR occurred during Clinton's presidency – the issue of whether treaties or international organizations were precluded from the dictates of the law. Actions in Bosnia and the former Yugoslavia took place within a NATO framework, raising the question of whether action under this framework (or for that matter, within any treaty-based organization) was subject to WPR requirements. Article 11 of the North Atlantic Treaty states that actions under the framework should be carried out by the states “in accordance with their respective constitutional processes,”⁷⁷ implying that Congress has a role to play and the WPR should apply to some extent.

75. *Ibid.*, 6.

76. *Ibid.*, 7.

77. The North Atlantic Treaty, April 4 1989, North Atlantic Treaty Organization, Article 11.

Additionally, Section 8 of the WPR states that war-making authority should not be inferred from treaties unless specific legislation is enacted.⁷⁸

This framework would soon be tested. On August 13, 1992, the U.N. Security Council adopted Resolution 770, authorizing for “all measures necessary” to deliver humanitarian assistance to Bosnia. On August 11, 1992, the Senate approved the administration advocating for such a resolution, but specified that no military personnel should be engaged in hostilities “without clearly defined objectives.”⁷⁹ On that same day, the House passed legislation urging for the same measures, but included the use of force. On February 10, 1993, the Secretary of State, Warren Christopher, announced that diplomatic solutions were being encouraged and if they were successful, United States forces would help enforce them.⁸⁰ Over the course of 1993, the United States “participated in airlifts into Sarajevo, naval monitoring of sanctions, and aerial enforcement of a ‘no-fly zone.’”⁸¹ On March 31, the Security Council instructed member states to “take all necessary measures” to enforce the “no-fly zone.”⁸²

As the conflict dragged on, the situation only became more complicated and congressional and public opinion more divided.⁸³ Chairman of the Joint Chiefs of Staff

78. War Powers Resolution of 1973, 50 U.S.C.

79. Grimmett, *War Powers Resolution: After Thirty-Six Years*, 29.

80. Warren Christopher, “New Steps Toward Conflict Resolution in the Former Yugoslavia,” U.S. Department of State, Office of the Spokesman, February 10, 1993.

81. Grimmett, *War Powers Resolution: After Thirty-Six Years*, 30.

82. *Ibid.*

83. *Ibid.*

Colin Powell thought that the “no-fly zone” was an overreach of executive power and the public was largely confused by U.S. intervention at all.⁸⁴ Representative Richard Durbin described the problem by saying “This is why you really have to have a decision made in advance. There is usually a strong bipartisan sentiment to provide military and moral support to the troops.”⁸⁵ While some in Congress may have disapproved of expansive executive powers, those that also supported this particular intervention declined to support enforcing the WPR. The alternative was also true – Senator Bob Doyle of Kansas “reluctantly” supported the president’s move, saying that regardless of if the Congress approved of the particular action, “the president has the authority under the Constitution to do so.”⁸⁶

The lack of any significant consensus on the issue effectively killed Congress’s ability to intervene and enforce the WPR. This highlighted another problem with enforcing the WPR: what happens when Congress cannot reach a clear consensus? Congress did more than face indecision in the matter of the military engagement; there was little consensus on what Congress should do to reign in the president. As Adler notes, “a Congress unwilling to exercise its constitutional authority in making decisions on war and peace” could not be expected to either enforce the constraints on Clinton’s

84. Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002), 251.

85. Tim Poor, “Bosnia Plans Highlight Uselessness of War Powers Act,” *St. Louis Dispatch*, December 3, 1995.

86. *Ibid.*

action or enact punishment for them.⁸⁷ This second important military engagement of Clinton's presidency highlights an important problem with the enforceability of the WPR – it relies upon not only the willingness of Congress, but on the coherency of Congress' opinion on the conflict. When Congress is fractured and the perspectives are varied, enforcing the WPR becomes impossible.

In George W. Bush's presidency, the struggle to apply and enforce the WPR continued. While Bush faced many of the same conflicts as Clinton, a different set of conflicts raised more important questions for the WPR. As the nature of war evolved, the types of decisions and the timetables for making them have changed for commanders in chief. The conflicts that characterized Bush's presidency were often fought with advanced technology by smaller units and with quicker timeframes than traditional land armies or navies.⁸⁸ Additionally, these conflicts had often indistinguishable opponents, vague goals, and poorly defined tactics.⁸⁹ Donald Rumsfeld, the president's Secretary of Defense, said of the WPR that “despite its questionable and still untested constitutionality, [it] undercut the President's ability to convince troublemakers of America's staying power”⁹⁰ in conflict.

After the September 11, 2001 terrorist attacks, Bush “characterized these attacks as more than acts of terror” and instead claimed they were “acts of war” and that

87. David Gray Adler, “The Law: The Clinton Theory of the War Power,” *Presidential Studies Quarterly* 30, no. 1 (2004): 160.

88. Judah A. Druck, “Droning on: The War Powers Resolution and the Numbing Effect of Technology-Driven Warfare,” *Cornell Law Review* 98, no. 1 (2012): 212.

89. John Yoo, Applying the War Powers Resolution to the War on Terrorism, *Green Bag* (2003): 181-2.

90. Rumsfeld, *Known and Unknown: A Memoir*, 15.

“freedom and democracy [were] under attack.”⁹¹ This new approach, later coined “the war on terror” would require an entirely new framework for evaluation. The “war” was unconventional in every sense – not only did it consist of largely clandestine operations, intelligence gathering, and smaller military engagements, it also was fought against an unconventional opponent. After the attacks, Bush consulted Congress about the response the United States should have. As a result of those discussions, a joint resolution passed both houses, the “Authorization for Use of Military Force Against Terrorists” (AUMF).⁹² The legislation passed 420 to 1 in the House and 98 to 0 in the Senate.⁹³ The legislation was overwhelmingly popular in the wake of the devastation over the attacks. The legislation authorized the president to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”⁹⁴ The joint resolution went so far as to explicitly declare that its intent was to “constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution,” but that “Nothing in this resolution supercedes any requirement of the War Powers Resolution.”⁹⁵

91. Grimmett, *War Powers Resolution: After Thirty-Six Years*, 39.

92. *Ibid.*

93. “S.J.Res. 23 (107th): Authorization for Use of Military Force,” *Gov Track*, accessed February 28, 2016, <https://www.govtrack.us/congress/bills/107/sjres23>.

94. *Ibid.*, 40.

95. *Ibid.*

This decisive move by Congress seems to be a stunning example of the WPR at work – Congress was consulted, and then used legislation to give authority to the president to engage militarily. However, this was just the beginning of the conflict. As Bush’s actions in the “war on terror” increased and public and political approval of the actions decreased, questions of WPR compliance became clear. Even prior to the AUMF’s enactment, some in Congress were concerned that the president would view the legislation as an invitation to ignore the reporting requirements of the WPR.⁹⁶ One of the primary reasons for this concern was how radically this new “war” departed from conventional war-fighting. Senator Russ Feingold, as the Chairman of the Subcommittee on the Constitution, explained that the “war on terror” is a war against “a loose network of terrorists,” instead of the traditional “state with clearly defined borders.”⁹⁷ This makes the questions of what the president has been authorized to do very difficult to answer, since the amorphous terrorist group can span different borders, people groups, and tactics.

Although Congress had authorized the president to fight against those that contributed to the September 11 attacks, the war slowly broadened to include terrorism as a concept, something characterized by a “highly mobile, diffuse enemy that operates largely beyond the reach of our conventional war-fighting techniques.”⁹⁸ Not only does this make defining what the president has been authorized to do difficult, it complicates the traditional means of congressional involvement. As Feingold continued, “there can be

96. *Ibid.*

97. Yoo, “Applying the War Powers Resolution to the War on Terrorism,” 181.

98. *Ibid.*, 182.

no peace treaty with such an enemy,” and “likewise, there can be no formal, public declaration of war.”⁹⁹

As President Bush noted in his memoirs, his presidency was important for creating and introducing legal concepts and political mechanisms for addressing this unique threat. He argues that “we were in the early years of a long struggle. We had created a variety of tools to deal with the threats” and Bush contended to “turn those tools into institutions and laws that would be available” in the future.¹⁰⁰

Additionally, the fact that the AUMF authorized the president to wage war against “organizations” raises questions about how the WPR interacts with this congressional authorization. As Bradley and Goldsmith describe, “the contours of an ‘organization’ are much less settled than the contours of a ‘nation’ or a ‘person.’”¹⁰¹ This ambiguity of congressional authorization matters – if the president takes action against those loosely aligned with the groups the AUMF intended to target, does that require another authorization or does it start the timeline for withdrawal? These questions went largely unanswered by the Bush administration and congressional leaders. Instead, the questions highlighted the inherent and unresolvable nature of the ambiguities in the WPR and its ineffectiveness.

Only a year after the AUMF, concerns and scholarship increased that questioned the WPR’s ability to adequately ensure cooperation between the branches. Council on

99. Ibid.

100. George W. Bush, *Decision Points* (New York: Broadway Books, 2011): 175.

101. Curtis Bradley and Jack Goldsmith, “Congressional Authorization and the War on Terrorism,” *Harvard Law Review* 118, no. 7 (2005): 2108.

Foreign Relations fellow Alton Frye, in a hearing before the Senate Judiciary Committee Subcommittee on the Constitution, explained that “continuing consultation” was not only necessary for an effective “campaign against terrorism,” but could not “be mandated; it must flow from mutual sensitivity between leaders.”¹⁰² He argued that to keep the spirit of the WPR would require diligence the law simply could not force, but that “incentives for such consultation” could “certainly be enhanced.”¹⁰³ While full compliance was not legislatively possible, it would require the attention of congressional leaders to ensure as much consultation as possible. Without “firm assertion of congressional prerogatives,”¹⁰⁴ the executive would not have any incentive to follow the requirements set by the WPR. This highlights another problem— not only do political conditions alter the chances the WPR is enforced by Congress, but its goals are inherently impossible to artificially produce by law.

This argument, that the consultative mechanism must be strengthened, continues today. In 2014, Senators Tim Kaine and John McCain introduced the War Powers Consultation Act, which would strengthen the consultative process between the president and Congress.¹⁰⁵ The Senators began reviewing ways to reform the system in July 2013, describing the WPR as “ineffective at establishing a consultative process...over our

102. Alton Frye, “Applying the War Powers Resolution to the War on Terrorism,” Senate Judiciary Committee Council on Foreign Relations (2002).

103. *Ibid.*

104. *Ibid.*

105. “War Powers Consultation Act of 2014,” *Council on Foreign Relations*, last modified January 16, 2014, accessed February 26, 2016, <http://www.cfr.org/wars-and-warfare/war-powers-consultation-act-2014/p36302>.

nation's most important decision – whether or not to send our men and women in uniform into harm's way."¹⁰⁶ This reform attempt was prompted by Kaine and McCain's concern over President Barack Obama's use of force in Syria in August 2013.¹⁰⁷

When the bill was introduced on the Senate floor, McCain explained that “the Constitution gives the power to declare war to the Congress, but Congress has not formally declared war since June 1942, even though our nation has been involved in dozens of military actions of one scale or another since that time.”¹⁰⁸ The War Powers Consultation Act would create a “permanent consultation committee” of congressional leaders and the military conflict-related committees, Intelligence, Armed Services, Foreign Relations, and Appropriations.¹⁰⁹ While the legislation has not been passed, its introduction and bipartisan nature¹¹⁰ show that Congress is interested in curtailing the perceived overreach of presidential war power.

A second but related WPR issue encountered by the Bush administration was its use of drone warfare. New technology has always impacted the way leaders wage war – it alters their tactics, adjusts their mindsets, and sometimes, lowers the cost of risky

106. Ibid.

107. Ibid.

108. Ramsey Cox, “Senate bill amends War Powers Act,” *The Hill*, last modified January 16, 2014, accessed March 6, 2016, <http://thehill.com/blogs/floor-action/senate/195704-senate-bill-amends-war-powers-act>.

109. Ibid.

110. The language and intent of the bill was based on recommendations by the bipartisan National War Powers Commission, led by James Baker and Warren Christopher.

maneuvers.¹¹¹ In the case of drone warfare, new technology fundamentally changed the concerns presidents entertained when considering potentially illegal action. Druck argues that “by ameliorating many of the concerns often associated with large-scale wars, technology-driven warfare has effectively removed the public’s social and political limitations that previously discouraged a President from using potentially illegal military force.”¹¹² The use of unmanned combat aerial vehicles has increased as technology has allowed for greater capabilities and stealth. As Druck argues, this increase has caused fundamental changes in thinking about presidential war powers, because the repercussions of military engagement have decreased.¹¹³

As the “war on terror” has progressed, the rapidly changing face of warfare and the technology used to wage it has not been met with equally evolving legislation. Laney contends that “decision making regarding the deployment of drones is concentrated in the hands of an alarmingly small number of individuals” in a fashion that is “removed from democratic processes.”¹¹⁴ He argues that “the evolution of drones...has occurred without the accompanying legislative infrastructure.”¹¹⁵ The drone warfare that began during Bush’s presidency is a powerful example of how the WPR’s ineffectiveness has only grown over time. As technology and the way presidents have used it has changed, the

111. David Cortright, “License to Kill,” *CATO*, January 2012.

112. Druck, “Droning on: The War Powers Resolution and the Numbing Effect of Technology-Driven Warfare,” 210.

113. *Ibid.*

114. Brock Laney, “Drone Strikes and the War Powers Resolution,” *BYU Prelaw Review* 27 (2013): 16.

115 *Ibid.*

WPR's assumption of traditional "boots on the ground" engagement has proved less applicable. The consequences of engaging autonomous technology are significantly less than sending troops, in terms of both lives lost and public approval ratings. As these changes occurred and the applicability of the WPR decreased, its ineffectiveness to restrain presidential power increased.

Ultimately, the WPR has been ineffective at limiting the scope of presidential war powers. It faces problems of implementation, application, and enforceability. Its enforceability is hindered by the shifting tides of political climates. Its language is vague, even in traditional conflicts, and this problem was magnified when modern conflicts began to alter the way wars are fought. These issues have clearly influenced three modern two-term presidencies. An analysis of the administrations of Ronald Reagan, William Clinton, and George W. Bush, illuminates the problems with the WPR. Analyzing three different presidencies allows for more comprehensive analysis. The WPR is not just ineffective because a particular administration was skilled at circumvention, each administration proved the law's inability to restrain power.

Recent attempts to reform the WPR prove that legislatures, scholars, and the public are concerned with the law's ability to produce genuine consultation between the executive and the legislative branches. As conflicts continue to evolve farther from traditional means of warfare, the importance of evaluating the WPR's ability to restrain abusive executive power cannot be overstated.

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