

Fixing War Powers and Constraining Presidential Power?

Written by Seth Weinberger

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SETH WEINBERGER, JUL 18 2008

Last week, the US National War Powers Commission published its report on how to fix war powers. The Commission notes that the War Powers Resolution of 1973 has been monumentally ineffective at resolving fundamental questions — both constitutional and political — of war powers. The WPR is also, most likely, unconstitutional, as the stipulation that Congress need only pass a concurrent resolution to force the president to withdraw deployed troops seems to violate the prohibition on legislative vetoes established in *INS v. Chadha*. But, more importantly, the WPR wasn't really in tune with political reality:

...it too narrowly defines the president's war powers to exclude the power to respond to sudden attacks on Americans abroad; it empowers Congress to terminate an armed conflict by simply doing nothing; and it fails to identify which of the 535 members of Congress the president should consult before going to war.

Their recommendations:

Our proposed statute would provide that the president must consult with Congress before ordering a "significant armed conflict" — defined as combat operations that last or are expected to last more than a week. To provide more clarity than the 1973 War Powers Resolution, our statute also defines what types of hostilities would not be considered significant armed conflicts — for example, training exercises, covert operations or missions to protect and rescue Americans abroad. If secrecy or other circumstances precluded prior consultation, then consultation — not just notification — would need to be undertaken within three days.

To guarantee that the president consults with a cross section of Congress, the act would create a joint Congressional committee made up of the leaders of the House and the Senate as well as the chairmen and ranking members of key committees. These are the members of Congress with whom the president would need to personally consult. Almost as important, the act would establish a permanent, bipartisan staff with access to all relevant intelligence and national-security information.

Congress would have obligations, too. Unless it declared war or otherwise expressly authorized a conflict, it would have to vote within 30 days on a resolution of approval. If the resolution of approval was defeated in either House, any member of Congress could propose a resolution of disapproval. Such a resolution would have the force of law, however, only if it were passed by both houses and signed by the president or the president's veto were overridden. If the resolution of disapproval did not survive the president's veto, Congress could express its opposition by, for example, using its internal rules to block future spending on the conflict.

This is an admirable effort, and is infinitely better than the War Powers Resolution (not to mention that it solves the legislative veto problem). However, it is not likely to satisfactorily resolve the concerns over war powers.

On one hand, the proposed statute gives broad powers to the president, but still couches the commander-in-chief power under the domain of the legislative branch. It is not at all clear that the Constitution intends Congress to have any say whatsoever over the deployment of the armed forces of the United States. If the "declare war" of the U.S.

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Constitution clause is about the power to transform the legal status of the political arenas rather than the power to deploy troops or initiate hostilities, then giving Congress any power to force the president to bring deployed troops home is a violation of the separation of powers mandated by the Constitution.

Theoretically, the Constitution divides the war powers between the executive and legislative branches. It gives Congress the power to declare war and to raise and support armed forces with appropriations for up to two years. At the same time, it gives the president the role of commander-in-chief or, to quote the Federalist Papers — the papers that argued in favor of adopting the Constitution — “the supreme command and direction of the military and naval forces.”

Arguments demanding congressional authorization to deploy military force are rooted in Congress' power to declare war. But these arguments fail to acknowledge that Congress has formally declared war only five out of the more than 200 times that this country has deployed military force. And in almost none of these instances has Congress attempted to force the president to cease an ongoing military action.

Such a longstanding silence by Congress about this systematic practice of executive power, according to the late Supreme Court Justice Felix Frankfurter, has created a “gloss on the Constitution,” signaling that Congress accepts that commitments of military power without its express authorization are legitimate.

Further evidence of this is that, despite the longstanding pattern of troop deployment by the president, Congress continues to appropriate money for a standing army, even though it has no constitutional obligation to do so. Indeed, many crucial legal decisions affirm that continued congressional appropriations constitute an implied authorization for the use of force. If Congress, in any specific instance, opposed the continuation of hostilities, the rulings note, it could cut off funding to the troops or designate that the funds not be used for a specified conflict. By not doing so, Congress has deferred to presidential prerogative.

Although the president can initiate hostilities abroad without the express permission of Congress, he is powerless to control the domestic arena as a means of prosecuting a conflict. For instance, in World War II, Congress expressly gave the president “all the resources of the country” for the war effort. Without that authorization, which was contained within the declaration of war, President Franklin Roosevelt could not have appropriated and redirected domestic industry to the war effort.

Conversely, when President Harry Truman attempted to seize domestic steel mills and force striking workers back to their jobs during the Korean War (which was fought under a United Nations resolution and not a declaration of war), the Supreme Court declared the action unconstitutional, arguing that the president's role as commander-in-chief does not carry over into the domestic arena.

Indeed, if the president needs to seize an industry, establish rationing or suspend the writ of habeas corpus during hostilities, he must have a declaration of war from Congress. Constitutional theory and practice wisely give Congress a powerful check on the president's power to conduct a war.

On the other hand, the method by which the proposed statute functions is unlikely to satisfy proponents of a more robust role for Congress on the issue of war powers. Forcing the president to bring the troops home would require: 1) A vote to authorize the deployment to fail; 2) Both Houses to pass a “resolution of disapproval,” and; 3) Both Houses to override the inevitable presidential veto by a 2/3 vote. It is all but inconceivable that this would happen. Even in a fantastically unpopular war, like the current one in Iraq was during its darkest days, it is unlikely that enough of the president's fellow party members would defect. Furthermore, as Iraq has clearly demonstrated, even those congressmen vehemently opposed to the war are loath to go on record opposing the president, and even more hesitant to take actions to end the war when such actions would place blame and responsibility on their heads, rather than on the president's.

The report is a welcome improvement on the War Powers Resolution. But do not expect that it will have any meaningful impact on the balance of war powers between the president and Congress. It does mandate regular

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reporting on active troop deployments, and creates a clear mechanism for doing so, and that is a good thing. But, even while rejecting the War Powers Resolution, presidents have tended to regularly report to Congress, so not much will change there either. Still, the War Powers Resolution is a terrible piece of legislation, and deserves to be put to rest

Ultimately, however, Congress and the United States as a whole would be better served by diverting war powers concerns away from the issue of deploying force and initiating hostilities. Such concerns are almost always resolved in favor of the president. Rather, if Congress paid more attention to the legal issues surrounding the war on terrorism, issues such as warrantless wiretapping and the detention and trial of suspected terrorists may be able to be placed on firmer ground. To date, the Bush Administration has lost every legal challenge on questions of legal status, which does not auger well for the creation of sound policies to protect the U.S. More congressional input would help strengthen policy and make them more likely to withstand legal scrutiny (although it doesn't immunize policies, as the decision in *Boumediene* makes clear). And that is a most noble and necessary goal.

Seth Weinberger is Assistant Professor of Politics and Government at the University of Puget Sound. His book, *Restoring the Balance: War Powers in an Age of Terror* is under contract with Praeger Press and is scheduled for publication in 2009. His current research focuses on congressional-executive war powers and the signaling applications of international legal negotiations. Comments may be addressed to: sweinberger@ups.edu.