

Disposition of the WPR

The War Powers Resolution remains problematic. Many in Congress think it has established a process through which they can wrestle with the president; they would prefer shoring up the Resolution. Many whose prejudice lies in preserving the Constitution, its checks and balances, and the rule of law would repeal the Resolution. Presidential imperialists accept the Resolution's weakness and talk around the Constitution.

Repair the War Powers Resolution.¹ Several proposals have been made to repair the War Powers Resolution to deal with the issues of speed, secrecy, legislative veto, judicial review, and redelegation. The most obvious patch is replacement of “concurrent resolution” with “joint resolution” to address the problem of legislative veto. But the requirement for the supermajority to overcome the likely presidential veto would remain.

Several attempts have been made to establish a standing consultative committee in Congress. It could improve consultation, should the president so deign. It could improve the speed and secrecy of the consultative process. But the authority to use force cannot be redelegated from Congress to a committee. Members of the committee would have to return to their respective houses to initiate debate and legislation, thus sacrificing speed and secrecy. Consultation might improve; authorization would not.

When presidents act without congressional authority, the courts have refused to adjudicate, often citing the *political question doctrine*, treating it as a disagreement on substance rather than on constitutional law. On other occasions, the courts have refused to hear congressional filings claiming that the members of Congress lack standing. Proposals have been made to provide the legislation giving members standing, but there is no guarantee that the courts would concur and adjudicate.

There is more at stake than providing a workable process of consultation. It is a principle of republican government that the wisdom of the many is superior to the wisdom of one. As Adler reminded us, “an elected president may lack the wisdom, temperament, and judgment, not to mention perception, expertise, and emotional intelligence, to produce success in foreign affairs. Those qualities, which to be sure are attributes of the occupant and not the office, cannot be conferred by election.”²

Ignore the War Powers Resolution. Those who favor an imperial presidency need take no specific stand on the Resolution. Since its passage, each president has doubted its constitutionality and has refused to be bound by it. Given that modern presidents have refused to be bound by the Constitution, it is doubtful that they would feel bound by a new and improved statute.

Presidents, White House insiders, and presidential aspirants tend to favor clear presidential dominance. Richard “Dick” Cheney and Newt Gingrich fall into this camp. Cheney, the “uncontested champion of executive excess,” argued for expanding executive powers while he was an aide to Nixon as the president was driven from office.³ Cheney continued those calls from the office of the vice president. “In thirty-four years, I have repeatedly seen an erosion of the powers and the ability of the president of the United States to do his job.” Gingrich, even though he disagreed with Clinton’s Bosnia policy, deferred to presidential lead on principle. John McCain also deferred to Clinton.

Repeal the War Powers Resolution. Other politicians put the Constitution first, and defend the separation of powers. They argue that the Resolution has actually eroded Congress’s constitutional authorities. Prior to passage in 1973, “Unilateral presidential war was a matter of usurpation. Now, at least for the first ninety days, it was a matter of law.”⁴ “Our constitutional system is better protected by requiring presidents to act in the absence of law and later obtain legal sanction from Congress, rather than by having Congress authorize in advance, as with the War Powers Resolution, unilateral action.”⁵

The longest-standing protector of Congress’s constitutional authorities is Senator Robert Byrd, Democrat from West Virginia. Representative Henry B. Gonzales of Texas repeatedly brought articles of impeachment against successive presidents whenever they violated the Constitution. John Conyers Jr. is

¹ CRS, *WPR after 33 Years*, 51-55.

² Adler, *Virtues of the War Clause*, 780.

³ Nichols, *Genius of Impeachment*, 64-65.

⁴ Schlesinger, *Imperial Presidency*, 434-435.

⁵ Fisher and Adler, *WPR Goodbye*, 18.

another constitutionalist who, after considering charges of impeachment of Nixon for initiating war against Cambodia, said “There is no subversion greater than the misappropriation—through lies, false constructs and secretive scheming—of its power to declare war that had been afforded only to Congress.” Democratic senator Russ Feingold from Wisconsin voted against dismissing impeachment charges against Democrat Clinton and asked the Senate to censure Republican Bush for wiretapping. In regard to Clinton’s action in Bosnia, Feingold said, “The president has in effect rendered Congress’s role meaningless”⁶ When the Senate voted 98-1 for the Patriot Act granting the president extraordinary powers, Feingold cast the only nay.⁷

With the WPR repealed, how could Congress perform its duties? The power of the purse is used ineffectually. When Congress disagrees with a president’s use of military force, it will deny authorization but appropriate the funds—support the troops but not the policy. It does not take a stand on constitutional grounds.

Rely on the Constitution. Presidents can easily skirt Congress to initiate hostilities, and they often have initial support from a deferential public. But when wars drag on, and the costs mount, the people ask why. Those presidents who did not bother to build the consensus to commitment pay the price. Before entering the Second World War, FDR painstakingly built a consensus to commitment over time. Truman, Johnson, and Bush did not. Presidents can request a declaration of war or authorization to use force, and Congress can carry on a vigorous public debate to build a consensus or not.

Congressional authorization is the output of a process, and the process has a deeper purpose. The very process of public debate held in the people’s branch engages the wisdom of the many. The post-Cold War vacuum at the level of national security strategy makes ad hocery the only option (discussed in Chapters 4 through 6). Congress is a poor place to formulate grand strategy, but it is precisely the place to hold the public debate. A president who successfully engages Congress in the process will institutionalize the decisions made. Congressional committee members will affect oversight of the many programs it takes to implement strategy. Without commitment to broad and enduring national strategic policy, Congress is dragged into the tactical where the president always wins. Presidents come and go abruptly. Congress, by design, changes slowly and incrementally, thus providing greater stability than a transient president can achieve.

Furthermore, Congress and the public should adhere to Teddy Roosevelt’s admonition that war time is precisely the time to argue for and against the use of force. Nothing is more democratic, and nothing is more American. Such challenges should be the norm and those who demonize it recognized as the unpatriotic.⁸

The Framers of the Constitution had a remedy for presidents who would be king. That remedy is impeachment. Members of Congress, who have sworn to defend the Constitution, should be prepared to impeach every time a president uses force without authorization, whether or not they agree with the use of force. They should be prepared to lose, but they should never shrink from their responsibility. Impeachment should be common enough to be an effective check on presidents. When the government fears the people, there is liberty; when the people fear the government, there is tyranny.⁹

The shame of Congress is that it impeached Bill Clinton for lying about a sexual encounter and turned its head when he defied Congress, bypassed the Constitution, and waged an unauthorized war.

Amend the Constitution. David Mervin points out that the Constitution’s framers were not infallible. They spoke in less than enlightened terms of women, Africans, and American natives. Just as those pronouncements came from an anachronistic value system, so too do congressional war powers. David Adler acknowledges those constitutional defects, but counters by saying that those anachronistic positions were altered by the constitutionally prescribed amendment process.

⁶ Hendrickson, *War Powers*, 254.

⁷ Schlesinger, *Imperial Presidency*, xviii.

⁸ Nichols, *Genius of Impeachment*, 81.

⁹ This assertion is frequently attributed to Thomas Jefferson, but it does not appear in any of his known writings. The veracity of the statement will have to stand on its own merits.

What is at stake here is nothing less than the rule of law, the marrow of which consists of presidential subordination to the Constitution. ... If a president strongly, even fervently, believes military force is necessary, he is allowed to argue his case before Congress. But he may go no further if constitutional government is to command any respect.¹⁰

Either abide by the Constitution or amend it by the constitutional process to grant the president the war making powers of the old European monarchs.

¹⁰ Adler, *Virtues of the War Clause*, 777-782, 782.