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Fixing the  
War Powers Act

*By Ronald D. Rotunda*



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# Fixing the War Powers Act

by Ronald D. Rotunda

In 1973, Congress enacted the War Powers Resolution over President Nixon's veto.<sup>1</sup> Supporters viewed the law<sup>2</sup> as an effort to prevent another Vietnam, while opponents saw it as an unconstitutional effort to restrict the Commander in Chief while not achieving its well-intentioned goals.<sup>3</sup> The law is now more than 21 years old. Like a young child growing up, it has reached its majority. Since then, liberals, conservatives, Republicans, and Democrats have all attacked the law. Former Senate Majority Leader George Mitchell (D-ME), for example, has complained that the law simply "has not worked." It "potentially undermines our ability to effectively defend our national interests" and "unduly restricts the authority granted by the Constitution to the President as Commander-in-Chief."<sup>4</sup> Former President Ford agrees, calling the law both "unconstitutional" and "impractical."<sup>5</sup> Presidents of both parties have been accused of ignoring it.<sup>6</sup> With a pedigree like that, now is a good time to reevaluate the resolution.

## Applicability of the War Powers Resolution

The coverage of the War Powers Resolution is broad, encompassing essentially every situation involving combat troops. Like most laws, it is written in the style of the Internal Revenue Code or the Treaty of Westphalia. Its intricate prose states that, *unless there has been a declaration of war*, the law applies to every case where the President introduces "United States Armed Forces into hostilities, or into situations where imminent involvement in

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- 1 87 Statutes at Large 555 (1973), codified at 50 U.S.C.A. §§1541-48.
  - 2 Although called a "resolution" because, at the time, that term was thought to be more "weighty and distinguished," it is real law, like any other statute. It was enacted by both houses of Congress, vetoed by President Nixon, and then passed over President Nixon's veto. See John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* 115 (1993).
  - 3 Had the War Powers Resolution been in effect at the time of the Vietnam War, it probably would have made no difference, because President Johnson would have complied with it. In 1964, Congress (by a vote of 504 to 2) passed the Southeast Asian Resolution, authorizing the Vietnam War. In 1966, when we had more than 200,000 combat troops in Vietnam, when we all knew that the United States was involved in more than a minor police action, the Senate (92 to 5) voted to table an amendment to repeal the Southeast Asian Resolution. Moore, *The War Powers Resolution Is of Doubtful Constitutionality*, 70 A.B.A.J. 10, 12 (March 1984).
  - 4 134 *Congressional Record*, 100th Cong., 2d Sess. (No. 71, May 19, 1988), at p. S6177.
  - 5 Statement of President Gerald Ford, *Hearings Before the Special Subcommittee on War Powers of the Committee on Foreign Relations*, U.S. Senate, 100th Cong., 2d Sess. (S. Hearing 100-1012, Sept. 15, 1988), at 161.
  - 6 When the President does issue a report, he routinely states that he is "conforming" to the resolution, rather than "complying" with it.



hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.”<sup>7</sup> In other words, the law applies to virtually everything.

**Declarations of War.** The exception for declarations of war means, in effect, that there are no exceptions, because no major power has declared war since World War II. Of course, the intervening years have witnessed major *undeclared* wars (the Korean War, the Vietnam War, and the Gulf War are obvious examples), as well as relatively minor ones (*e.g.*, Panama, Grenada, Somalia, Haiti, Bosnia).

While our Constitution provides that only Congress can “declare war,” the framers of our Constitution specifically rejected a proposal that would give to Congress the power to “make” war.<sup>8</sup> Instead, the framers made the President the Commander in Chief, and the decision to seek a declaration of war became a political question for Congress to resolve. A declaration is an escalation of the war effort; in only a few circumstances has Congress taken that symbolic step. It is too late in our history to argue that there can be no war unless the war is officially “declared.” Since our Declaration of Independence, our country has been in about 200 armed conflicts, while we have declared war only seven times. Not even the Civil War, the bloodiest in our history, was a declared war.<sup>9</sup>

**Situations that Develop into Hostilities.** The War Powers Resolution also applies to “the continued use of such forces in hostilities or in such situations.” Thus, if U.S. troops are already stationed in an area where there are no imminent hostilities, but then we are attacked, we have a situation where there is the “*continued* use of such forces in hostilities or in such situations.”

In short, the War Powers Resolution applies to everything that involves hostilities or that develops into hostilities. In our uncertain world, that covers a great deal.

## When the President Can Use Combat Troops Short of a Declaration of War

Three major parts of the War Powers Resolution merit specific emphasis. First, there is section 1541(c), entitled “Presidential Executive Power as Commander In Chief; Limitation.” It states that the President’s constitutional power to introduce U.S. combat troops is limited to only three circumstances: “(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”<sup>10</sup>

This section provides that the President is not allowed to send U.S. troops into combat unless Congress specifically gives advance approval; the only exception is if the President is responding to a national emergency created by an attack on U.S. territory or on U.S. armed forces.<sup>11</sup> Even then, the President must report to Congress immediately and then “terminate any use” of the troops within 60 days unless Congress specifically approves of further action.<sup>12</sup>

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7 50 U.S.C.A. §1541(a) (emphasis added).

8 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 313, 318-19 (rev. ed., 1937).

9 1 R. Rotunda & J. Nowak, *Treatise on Constitutional Law: Substance and Procedure* §6.9, at 528, & Appendix following §6.10, at 532-42 (West Pub. Co., 2d ed., 1992).

10 50 U.S.C.A. §1541(c).

11 John Hart Ely agrees that this is what the section means. Ely, *supra*, at p. 229. Any other interpretation leads to peculiar results, as Ely explains. *Id.* at 229-30.

12 50 U.S.C.A. §§1543; 1544(b).

Our history demonstrates that there are many other situations where Presidents have the constitutional authority to act. For example, the President may use the military to rescue U.S. citizens abroad, to rescue foreign nationals when that directly facilitates the rescue of our citizens abroad, to protect U.S. embassies abroad, to implement a cease-fire involving the United States, or to carry out the security commitments in a treaty.<sup>13</sup> The War Powers Resolution, oddly enough, does not even include the right of the President to deter an *imminent* attack on the United States. Section 1541(c) only covers the situation where there has been an actual attack! Professor John Hart Ely admits that “it truly is impossible to predict and specify all the possible situations in which the president will need to act to protect the nation’s security before he has time to obtain congressional authorization.”<sup>14</sup>

Over the years Presidents have justified military action without the specific consent of Congress, relying on various theories not found in the War Powers Act.<sup>15</sup> President Roosevelt sent troops to Iceland and Greenland in 1940, although federal legislation appeared to forbid it.<sup>16</sup> President Johnson initially justified sending Marines to the Dominican Republic to protect U.S. citizens; later Johnson relied on the Rio Treaty. President Clinton involved the military in Haiti without seeking congressional approval.

After the enactment of the War Powers Resolution, Presidents have simply ignored the strict limits of this section, as illustrated by incidents such as the *Mayaguez* rescue and the invasion of Grenada. Moreover, the American people (particularly our citizens abroad) would not want a President to follow this section: To do that would assure unfriendly governments and terrorists that American embassy personnel, tourists, and other American nationals abroad are all fair game, unprotected by the world’s only superpower. This section should simply be repealed.<sup>17</sup>

## The Reporting Obligation

Various sections of the law impose specific reporting obligations on the President. In general, the “President in *every possible instance* shall consult with Congress *before*” introducing troops into imminent hostilities and shall also consult with Congress regularly *after* the introduction of combat troops.<sup>18</sup> The President must also submit a detailed written report to the Speaker of the House of Representatives and the President Pro Tempore of the Senate within 48 hours after the introduction of combat troops.<sup>19</sup>

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13 Hearings on War Powers before the Subcommittee on International Security and Scientific Affairs of the House Committee on International Relations, 94th Cong., 1st Sess., 90-91 (1975), testimony of Monroe Leigh, Legal Adviser to the State Department.

14 Ely, *supra*, at 118 (footnote omitted).

15 See 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* §6.10 (West Pub. Co., 2d ed., 1992), which discusses various examples, including those discussed here.

16 Louis Henkin, *Foreign Affairs and the Constitution* 106 (1972).

17 Professor John Hart Ely, while flirting with an effort to make this section enforceable in the courts, and conceding that his “instincts” would make this section “operational,” ultimately admits that it should be repealed. Ely, *supra*, at 118-19.

18 50 U.S.C.A. §1542.

19 50 U.S.C.A. §1543(a)(2). The written report must explain why the President introduced troops, the constitutional and legislative authority relied on, and the estimated scope and duration of the hostilities. §1543(3)(A),(B), & (C).

In a democracy, it is essential that the President consult with Congress and the American people and report what he is doing. If the American people are being asked to send their sons and daughters into combat, the President should honestly explain why. Granted, there will be some circumstances when it may be more difficult to report to particular congressional leaders. President Ford, in referring to the evacuation of Danang in April 1975, illustrated the problem:

Congress was in a congressional Easter recess. Not one member of the key bipartisan leaders of Congress was in Washington. [H]ere is where we found the leaders of Congress. Two were in Mexico. Three were in Greece. One was in the Middle East. One was in Europe, and two were in the People's Republic of China. The rest were found in 12 widely scattered States of the Union.<sup>20</sup>

On the other hand, the law does not demand the impossible. The requirement of prior consultation only applies if it is "possible" to do so.<sup>21</sup> The requirement of subsequent consultation is similar. The law only obligates the President to consult "regularly with Congress" while our armed forces are in combat situations.<sup>22</sup> After he introduces troops, he must submit, within 48 hours, a written report to the House Speaker and the Senate President Pro Tempore explaining why he introduced the military, what authorized him to do so, and what is his estimate of the scope and duration of hostilities.<sup>23</sup>

This basic principle is a sound one. The President has the responsibility, in any democracy, to justify his actions to the American people in a candid way. Many of the explanations of our Vietnam policy were not candid, as Robert S. McNamara's recent memoirs acknowledged.<sup>24</sup>

### Automatic Withdrawal of U.S. Troops and the Legislative Veto

Section 1544(b) of the War Powers Resolution requires that "the President *shall terminate* any use of United States Armed Forces" at the end of the 60-day period unless Congress has either declared war or enacted a law specifically authorizing the use of this force.<sup>25</sup> In short, if Congress does nothing, within 60 days (or sometimes 90 days), the President must withdraw the troops. As one supporter of the War Powers Resolution explains this provision, "the president's authority to act in emergencies simply runs out in 60 days if Congress does nothing."<sup>26</sup>

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20 Statement of President Gerald Ford, *Hearings Before the Special Subcommittee on War Powers of the Committee on Foreign Relations*, U.S. Senate, 100th Cong., 2d Sess. (S. Hearing 100-1012, Sept. 15, 1988), at 161.

21 50 U.S.C.A. §1542.

22 50 U.S.C.A. §1542.

23 50 U.S.C.A. §1543(a)(3); see also §1543(b), (c) (dealing with periodic reporting).

24 E.g., George Melloan, "McNamara's War? You've Got To Be Kidding," *The Wall Street Journal*, April 17, 1995, at A13, col. 3-6 (midwest ed.).

25 The strictness of this law is illustrated by its narrow exceptions. It allows the President to extend the time period by an additional 30 days in certain circumstances and allows Congress to enact a statute to extend the 60-day period. The law also does not apply if Congress "is physically unable to meet," *but only* if it cannot meet for a specific reason: "as a result of an armed attack upon the United States." §1544(b)(3). The President cannot avoid the time limit by refusing to submit a report, because this section also covers the case where a report is "required to be submitted," even if not submitted.

26 Tipson, *The War Powers Resolution Is Constitutional and Enforceable*, 70 A.B.A.J. 10, 14 (March 1984).



Presidents and Congress have responded to this section by simply ignoring it. (Congress, for example, did not think that the 60-day clock should start running during the naval war against Iran in 1987-1988.<sup>27</sup>) Yet, its existence remains important. The inelegantly phrased language appears to give the President *carte blanche* authority for two months without any serious oversight.<sup>28</sup> It also allows the executive and legislative branches to blame each other for failure of will, for exercise of judgement. It obscures blame and muddies responsibility. It is better for people to know where the responsibility lies. Then we will know whom to blame, and to whom we should give kudos.

If section 1544(b) were repealed, that would not prevent Congress from making known its view. On the contrary, Congress has always had the power to pass a concurrent resolution indicating its position on a matter. A concurrent resolution is not a law, and thus not subject to presidential veto. While this resolution does not legally bind the President, that does not make it irrelevant. If the President decided to ignore such a resolution, the people would know exactly whom to blame (or to praise) for the involvement of American combat troops. And Congress would make its will known by doing something, rather than by doing nothing. Everyone in Congress would have to stand up and be counted.

Section 1544(c) goes beyond the prior section and creates what is known as a legislative veto. It provides that, notwithstanding the previous section, if both houses of Congress, by concurrent resolution, direct that the troops should be removed, the President *must* do so. This resolution, unlike a normal law, is not subject to presidential veto. Congress has always had the power to impose its will on the President by using its spending power to enact a law to limit presidential action, but a spending law would be subject to presidential veto. Section 1544(c) declares that it is not subject to veto but (unlike a normal concurrent resolution) must be treated the same as a statute.

Section 1544(c) is known as a legislative veto because it gives Congress the right to veto presidential action. As such, scholars have concluded that it is unconstitutional ever since *INS v. Chadha*,<sup>29</sup> a 1983 case that invalidated all legislative vetoes.<sup>30</sup> While Professor John Hart Ely argues that section 1544(c) is constitutional,<sup>31</sup> even Professor Laurence Tribe admits that this section is unconstitutional.<sup>32</sup> The only question is whether the existence of

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President Nixon complained that this provision allowed Congress, "by doing nothing and sitting still," to make foreign policy and restrict the President. Edward S. Corwin, *The President: Office and Powers, 1787-1984*, at p. 300 (5th rev. ed., by Randall W. Bland, Theodore T. Hindson, & Jack W. Peltason, 1984) (footnote omitted), quoting Robert J. Sickels, *The Presidency* 128 (1980).

- 27 Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 Colum. L. Rev. 1379, 1381-83 (1988). Congress knew exactly what was going on; during this time period, on July 3, 1988, an American missile accidentally downed a civilian Iranian airplane which entered what the Chairman of the Joint Chiefs of Staff called "a war zone." None of this was secret. Earlier, Iran planted mines that damaged a U.S. frigate, and an Iranian missile boat fired a missile at a U.S. cruiser. The Iranian missile missed its target, and U.S. missiles and bombs then destroyed the Iranian boat.
- 28 Edward S. Corwin, *The President: Office and Powers, 1787-1984*, at p. 300 (5th rev. ed., by Randall W. Bland, Theodore T. Hindson, & Jack W. Peltason, 1984).
- 29 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).
- 30 E.g., 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* §6.13, at 551 (West Pub. Co., 2d ed., 1992).
- 31 Ely, *War and Responsibility*, *supra*, at 119.
- 32 Laurence H. Tribe, *American Constitutional Law* 218 n. 25 (Foundation Press, 2d ed., 1988), referring specifically to §1544(c).

this unconstitutional section infects the entire resolution, as some commentators have suggested.<sup>33</sup>

## The Peace Powers Act of 1995

The constitutional and policy problems with the War Powers Resolution, and its apparent irrelevance to military hostilities since its enactment, have caused commentators to call for its repeal. That does not mean, however, that it should be replaced with a vacuum. People do want to avoid another Vietnam; they do want to have Congress involved; and they do want to control foreign adventurism by a President too quick to spill American blood.

Senator Dole (R-KS) and several other Senators have introduced S. 5, the Peace Powers Act of 1995. This bill continues the basic reporting requirements of the War Powers Resolution. It mandates that the President “in every possible instance shall consult with Congress *before* introducing” American forces into imminent involvement in hostilities.<sup>34</sup> The proposed law also requires that the President submit a written report to the House Speaker and Senate President Pro Tempore within 48 hours *after* introducing or substantially increasing armed forces into a hostile situation. This written report must explain why the introduction of armed forces is necessary, what is the legislative and constitutional authority, and what is the estimated scope and duration of involvement. The President must also supply periodic reports and respond to additional requests for information.<sup>35</sup> H.R. 1111, which is a bill that Congressman Dornan (R-CA) and others have introduced in the House, imposes similar reporting obligations on the President.<sup>36</sup>

Both bills avoid the unconstitutional legislative veto; both avoid trying to create a definitive list of circumstances where the President can use the armed forces. (Recall that Professor Ely warned that it “truly is impossible to predict and specify all the possible situations in which the president will need to act to protect the nation’s security before he has time to obtain congressional authorization.”<sup>37</sup>) Both avoid the situation where Congress imposes its will by doing nothing, by failing to take action.

And both avoid the problem of appearing to delegate to our court system important questions of national policy. As Dr. Morton H. Halperin has noted, one of the major problems with the War Powers Resolution is that it has led to legal line drawing by the executive branch: “What you don’t need is a legal opinion from your lawyers that you have not yet crossed some line drafted in a statute about how imminent the hostilities are.”<sup>38</sup>

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33 Edward S. Corwin, *The President: Office and Powers, 1787-1984*, at p. 301 (5th rev. ed., by Randall W. Bland, Theodore T. Hindson, & Jack W. Peltason, 1984): *Chadha* “clearly lays the ground for a serious constitutional challenge to the *entire resolution*” (emphasis added). Professor Ely expresses concern that *Chadha* “provides an excuse to condemn the *entire Resolution* as ‘unconstitutional.’” Ely, *War and Responsibility*, *supra*, at 119 (emphasis added). The resolution, however, contains a severability clause, §1548. On the other hand, one can argue that §1544(c) is central to large parts of the resolution—Ely calls it part of a “*package*” that includes §1544(b) (emphasis in original)—and that may be why some commentators suggest that this provision infects and invalidates the entire resolution.

34 S. 5, at §3.

35 S. 5, at §4.

36 H.R. 1111 (Mar. 2, 1995), a bill to clarify the war powers of Congress and the President in the post-Cold War period.

37 Ely, *War and Responsibility*, *supra*, at 118 (footnote omitted).

38 Statement of Morton H. Halperin, ACLU, *Hearings Before the Special Subcommittee on War Powers of the Committee on Foreign Relations*, U.S. Senate, 100th Cong., 2d Sess. (S. Hearing 100-1012, Sept. 20, 1988), at



The proposed Peace Powers Act also deals with an issue that Congress never really thought about in 1973: placing United States armed forces under foreign command. The United States has joined United Nations peacekeeping activities in the past, but it is only in recent times that the President has chosen to place U.S. troops under foreign command. The concern of many people is that foreign commanders may be more willing and ready to spend American blood than to spend the blood of their own countrymen. Just as many people are more generous when spending other people's money, so also we might expect that foreign military commanders, if given a choice of sending their own troops or American troops in harm's way, will prefer to spill American blood.

Consequently, Section 5 of the proposed Peace Powers Act provides that the President may not subordinate any element of the U.S. armed forces to any foreign national unless Congress enacts a law authorizing the subordination, or unless the President makes various findings and reports to various congressional committees. Sections 7 and 8 provide for prior congressional notification of proposed U.N. peacekeeping activities and require the President to identify the source of funding for these peacekeeping operations. These sections rely on Congress's spending power, which historically has been very broad.<sup>39</sup>

These sections do not put the President in any straitjacket, but are designed to assure candid consultation with Congress and the American people in matters involving foreign hostilities. In a democracy the people deserve no less. No overzealous President should involve the United States in unnecessary hostilities while avoiding congressional scrutiny. The War Powers Resolution has not worked; let us try something better: the proposed Peace Powers Act.



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39 U.S. Const., Art. I, §8, cl. 1. See also Art. I, §8, cl. 12, which authorizes Congress to raise and support armies, "but no Appropriation of Money to that Use shall be for a longer Term than two Years."