

War Powers Oversight, Not Reform

Published Nov 19, 2019, 3:55 AM

Source: <http://warontherocks.com/2019/11/war-powers-oversight-not-reform/>

Editor's Note: This is an essay from "Policy Roundtable: The War Powers Resolution → <https://tnsr.org/roundtable/policy-roundtable-the-war-powers-resolution/>" from from our sister publication, the Texas National Security Review. Be sure to check out the full roundtable.

President Donald Trump's impetuosity and the American public's frustration with interminable military conflicts have sparked renewed interest in war powers, including calls to restore what some reformists believe should be Congress' constitutional primacy in initiating war. The 1973 War Powers Resolution → <https://fas.org/sqp/crs/natsec/R42699.pdf>, which generally requires presidential consultation with Congress and congressional authorization to continue U.S. military involvement in "hostilities" after 60 days, has failed to dramatically shift power back from the president to Congress. Thus, reformists are often in search of an improved, overarching legal framework to bolster Congress' prerogative.

Proposals for overhauling war powers take many forms. Some recommend scrapping the War Powers Resolution and requiring advance consultation and subsequent votes of approval or disapproval by Congress. A proposed "War Powers Consultation Act → <https://www.kaine.senate.gov/press-releases/kaine-mccain-introduce-bill-to-reform-war-powers-resolution>," for example, would direct the president to confer with Congress before ordering troops into significant conflicts and would require Congress to vote in support or disapproval of the conflict within 30 days. Some would like to see the existing War Powers Resolution enforced more assertively → <https://www.vox.com/201>

9/5/27/18634590/nancy-pelosi-donald-trump-supreme-court-war-power and consistently by Congress, including through litigation seeking judicial enforcement of Congress' prerogatives. Others believe that the resolution already gives the president too much leeway → http://constitutionproject.org/wp-content/uploads/2014/03/2014.03.20_S.1939.pdf — for instance, it allows the president to intervene for 60 days without congressional approval — and that any significant military action ought to require Congress' express authorization.

For several interrelated reasons, a general legal overhaul of war powers is neither workable nor needed. First, the causes of the historical shift in those powers from Congress to the presidency — including that Congress, as a whole, is at best institutionally ambivalent about wielding them — are not going away. Second, military conflicts and interventions are too diverse to regulate effectively with any single legislative scheme or type of authorization. Third, whatever agreement exists about the need to reform war powers masks deep disagreement and questionable premises about the purposes of such reform.

Instead of a legislative overhaul or requiring any single form of congressional authorization, Congress ought to exercise its existing oversight powers more effectively and consistently — including focusing more on how interventions are conducted and what is their endgame. Congress has the tools to do so. The obstacles are therefore political, not legal.

Congress' Political Incentives and Powers

Let's stipulate, for argument's sake, that the constitutional founders originally placed decisions about going to war exclusively in the hands of Congress (except to repel sudden attacks), but that over time that power has shifted → https://www.amazon.com/Imperial-Presidency-Pa-04/dp/0618420010/ref=tmm_pap_swatch_0?encoding=UTF8&qid=&sr= to the president. We should take a hard look at *why* that shift occurred. One reason is that presidents have, in general, asserted aggressively

broad unilateral authority. Another reason, though, is that Congress has ceded control. Any war powers reform effort should begin by questioning whether Congress is truly committed to retaining the full and exclusive war powers that reformers often idealize.

This is not to argue that Congress *should* get to decide what powers it wields. After all, the Constitution allocates → <https://press.princeton.edu/books/paperback/9780691025520/war-and-responsibility>. not just authority but responsibility. But if Congress — and that really means individual members of Congress — does not assert and vigorously defend its powers, they will erode.

Political scientist Edward Corwin famously described → <https://www.amazon.com/President-office-powers-1787-1957-analysis/dp/B0006AV4XG> the allocation of constitutional foreign relations powers as an “invitation to struggle” between the executive and legislative branches. This has never been an even match, though, especially when it comes to war powers. The executive branch has a much easier time agreeing and acting on a unified view of its powers than the legislative branch, which is divided into two houses and pulled apart by partisan fissures and competing committees. It has been true since the founding that American security policy often demands swiftness and agility of which the executive is more capable than the legislature. The post-World War II strategic context, in which the United States has perpetually maintained high levels of military mobilization and alliances to defend global interests, expanded those demands while ensuring that the president → <https://www.tandfonline.com/doi/full/10.1080/0163660X.2019.1621652> always has ample military forces at his ready disposal.

At the same time, the politics of military intervention contribute to congressional passivity when it comes to making decisions about going to war. Members of Congress often have little to gain electorally by taking a firm stand on military intervention and much to lose if those military campaigns go awry. When a crisis erupts, the

executive branch must make a decision, even if it is not to take any action. Members of Congress, on the other hand, have the luxury of watching, waiting, and criticizing from the bleachers.

One way of understanding the 1973 War Powers Resolution was as an attempt to force Congress → <https://www.amazon.com/War-Responsibility-John-Hart-Ely/dp/0691025525> to take a stand, whether it wanted to or not. By requiring the president to report to Congress on new American military interventions and then to withdraw forces if Congress does not formally approve the action by a certain date, this law was intended first to compel the president to go to Congress and then to compel Congress to act.

Experience to date, however, shows not just the president's tendency to work around the War Powers Resolution but also Congress' tendency to wriggle free of its own self-imposed constraints. In interventions such as Bosnia and Kosovo during the 1990s, and more recently in the 2011 intervention in Libya, Congress neither mustered a sufficient majority to formally approve U.S. actions within 60 days nor, in some cases, did it push back vigorously when the executive branch adopted interpretations that watered down the War Powers Resolution's requirements — such as reading congressional appropriations as implicit approval for military action or restricting the resolution's definition of "hostilities" → <https://fas.org/sgp/crs/natsec/R42699.pdf> that triggers the 60-day rule.

This is not to say that the War Powers Resolution fails to constrain the executive branch at all, or to deny that it gives Congress additional tools in pushing back against military interventions. It does both to some degree. Many reform proposals want to go much further, though, and aim to strengthen requirements for a congressional vote on all significant military actions. In light of recent experience, however, it is hard to imagine Congress truly binding itself so effectively.

Moreover, focusing only on formal congressional action obscures the more subtle but substantial ways in which Congress influences decisions about military intervention. Crucially, the fact that the president often initiates military campaigns without express authorization by Congress does not mean that congressional checks are altogether absent. Political science and history strongly suggest that, notwithstanding the often-weak electoral incentives of congressional members to formally approve or disapprove military interventions at their outset, congressional politics weigh heavily in presidential decision-making.

Studies show that congressional politics affect both the frequency with which presidents use force abroad and the probability that they will respond militarily to crises. There are many ways in which Congress influences presidential uses of force, which include not only the introduction of legislation to authorize or curtail a use of force but also congressional oversight hearings and influencing public debate over military policymaking. Congressional action or inaction also sends signals about domestic resolve → <https://onlinelibrary.wiley.com/doi/abs/10.1111/ajps.12298> to foreign parties — both adversaries and allies alike — thereby affecting the president's calculus regarding using force. Such political checks are especially pronounced → <https://www.amazon.com/While-Dangers-Gather-Congressional-Presidential/dp/0691134626> when Congress and the presidency are controlled by opposing parties. Focusing solely on whether and how Congress formally approves military action on the front end often neglects these other significant ways Congress can influence the use of force and how they might be enhanced.

The Diverse Forms of Modern Conflict

Military conflicts and interventions arise in too many ways and forms to regulate them effectively with a single statutory scheme or a single form of authorization. For the existing War Powers Resolution and some of the proposals to strengthen it, relatively clear lines

are often seen as a virtue, because they reduce — though don't eliminate — opportunities to interpret away requirements. However, trying to draw statutory lines at specific thresholds like armed "hostilities" (as in the War Powers Resolution) or "significant armed conflicts" (as in the proposed War Powers Consultation Act) is a poor way of deciding which types of conflicts should require formal congressional approval.

From the earliest days of the republic, the United States faced varied military contingencies for which neither war declarations nor simple congressional force authorizations were well suited. In the modern era, American conflicts and security crises are even more diverse. They could begin because of a U.S. first strike or an enemy first strike, an attack by or against a U.S. ally, or a breakdown in deterrence or a miscalculation. They might include large-scale ground wars, one-off airstrikes, or a combination of the two, and increasingly they feature cyber operations as well. They can be overt or covert, or both. They may be geographically confined or global, or expected to be short or long. They are waged against states or nonstate groups, with or against a state's proxy forces, and with or without the help of allies.

Recent controversies over war powers illustrate this point. In 2019, concerns about insufficiently checked presidential war powers have arisen in three vastly different contexts: continuation of a geographically sprawling and indefinite war against terrorist groups, support for a Saudi war in Yemen, and the possibility of a major U.S. war with Iran. The first began after a direct attack on the U.S. homeland, the second is a regional proxy war, and the third could arise through deliberate preemptive U.S. action, a miscalculated spiral of violence, or some other way. Stepping back, the key policy questions about force in each case differ widely. The first is mostly about where and what type of force is used, the second has to do with

whether to cut off operational support to a partner, and the third is about how to wield threats of force for deterrence and coercive diplomacy.

Although recent war powers debates have sometimes focused on regional conflicts in which the United States does not put many troops directly in harm's way (at least not initially), a key aim of war powers reform is often said to be making sure that "big" wars — those that put many vulnerable American boots on the ground — are formally authorized by Congress. Historically, however, the Korean War stands out as the only exception to the tendency of presidents to seek congressional authorization in advance of large ground wars. In any event, these are the types of conflicts for which political checks often work most effectively.

Smaller-scale and less visible conflicts attract less public attention, but their consequences can be significant. "As a matter of democratic principle," Jack Goldsmith and I have argued → <https://www.tandfonline.com/doi/full/10.1080/0163660X.2016.1204305>, treating low-intensity warfare waged stealthily and from a distance (or in cyberspace) as more appropriately conducted unilaterally than large-scale ground campaigns "probably has matters backwards":

Light-footprint warfare is still lethal and very consequential warfare, and the lightness of the tools make them relatively easy for a President to deploy extensively. Light-footprint warfare thus has large foreign policy, strategic, and reputational consequences for the United States, akin to much heavier deployments, yet much less public examination. The President's legal theories treat this as a feature of such warfare. But it is also a bug for U.S. democracy, since the stealthy features mean that public debate and political checks—which reduce error as well as excess, and promote legitimacy—function ineffectively.

This arguably indicates the need to expand or clarify the War Powers Resolution's definition of the situations requiring explicit congressional approval. But any politically plausible attempts to delineate with bright-line rules which types of military action require specific forms of congressional authorization will probably function poorly in practice, where contextual variables are complex and fast-moving. Such attempts may also still exclude those conflicts for which stronger congressional scrutiny is appropriate. Alternatively, a more flexible legal standard would likely be even easier for the executive branch to bypass. A wide range of military conflicts and challenges warrant a wide range of congressional oversight tools. Moreover, as explained below, requiring congressional approval → <https://www.tandfonline.com/doi/full/10.1080/0163660X.2016.1204305> at the beginning of a military intervention often fails to encourage the right kind of congressional scrutiny.

The Purposes of Legislative Checks

Periodic pushes from both members of Congress and the public for stronger congressional checks on war powers can conceal divisions and uncertainty about why those checks are needed. Some of the goals of these efforts for congressional oversight also point to different solutions.

Sometimes, supporters of war powers reform are pushing for change simply as a matter of constitutional principle. If one believes that Article I's directive that Congress has the power to declare war includes any use of military force (other than in defending against invasion), and one believes that the president's Article II roles as chief executive and commander-in-chief confer no authority to initiate such actions, then nothing short of formal congressional authorization for any military intervention is likely to be satisfactory. But there have always been gaps and ambiguities in these constitutional clauses, and many (though not all) war powers reformers believe in evolving constitutional interpretation to meet evolving national con-

ditions in other areas of law. There are good arguments to justify adapting the original allocations of military powers given the dramatic changes over 200 years in American military power, strategy, and interests, as well as dramatic changes in the way other, related constitutional powers are exercised. Reasonable people may disagree about the strength of those arguments and even whether they work in favor of or against presidential discretion, but rigid formalism does not point toward a practical solution.

Other proponents of stronger and formal congressional checks justify them in policy terms: Imposing legislative requirements would help to restrain military adventurism. The expectation here is often that the need to obtain congressional authorization serves as a brake on military responses to crises, whether because Congress is slower to act than the executive branch or because it is more sensitive to certain costs and risks, or just because more procedural hurdles means less action. Strategically, though, foreign policy retrenchment — or even perceptions of it — carries its own dangers. How well requirements for formal congressional force authorization contribute to peace and stability is also far from clear, since some conflicts stem → https://www.yalelawjournal.org/pdf/1626.Waxman.1691_sg4xicfv.pdf from breakdowns in deterrence. Politically, commitment to this goal is also often tied to who holds presidential office, and is therefore fleeting.

A third justification for war powers reform is that requiring congressional authorization promotes sounder policy through inter-branch deliberation. Such requirements, the argument often goes, push the executive and legislative branches to consult one another more thoroughly, and the processes of persuasion and consensus-building result in more consistent and sustainable security policy. This claim has logical appeal, though empirical support is uneven. The 1991 and 2003 Iraq Wars were both authorized → <https://www.politico.com/magazine/story/2015/02/aumf-congress-obama-115132>: The second

turned out to be badly misguided and congressional scrutiny of the first failed to question core planning assumptions that turned out to be wrong. In any event, a legislative overhaul is not needed to achieve better interbranch deliberation.

Improving Legislative Oversight

For all of these reasons, war powers reform should not focus on strengthening any single, formal congressional approval requirement. Instead, Congress should improve the use of its existing tool set for overseeing security and defense policy. As noted above, Congress has a range of tools available to shape and restrain military policy. These include hearings, spending bills, and actions to shape public opinion. Importantly and unlike legislative overhaul proposals, some of these tools do not require Congress as a whole to act — they can be wielded by individual members, especially in key committee positions. In recent years, Congress' foreign policy and defense committees have atrophied → <https://www.amazon.com/Watchdogs-Hill-Congressional-Oversight-Relations/dp/0691151628>, holding fewer oversight hearings → <https://www.foreignaffairs.com/articles/2018-08-13/unconstrained-presidency>, than in the past. A first step to boosting influence is ensuring that foreign relations, armed services, and intelligence committee members have adequate experience and resources, as well as a commitment to shaping and auditing security strategy.

Wars rarely begin out of the blue → https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2127&context=faculty_scholarship, but instead are the result of a long series of steps and counter-steps, actions and inactions. This means that Congress needs to focus more heavily on overall military strategy and how American military resources are wielded well in advance of a crisis, rather than treating the outbreak of a crisis as Congress' moment for influence. Regularly scheduled posture hearings and annual defense authorization bills, for example, should be understood and treated as core parts of Congress' war powers.

Fixating on congressional authorization of conflicts risks distracting or relieving lawmakers from the important duty of overseeing their conduct. Recent authorized wars in Afghanistan and Iraq show that congressional action at the front end of a conflict does not equate to thorough scrutiny — let alone consensus — of whether means and ends are well aligned or planning assumptions well tested. Congressional oversight of military intervention and conflict should be continuous and focused more heavily on the conduct of campaigns → <https://www.lawfareblog.com/congress-should-oversee-americas-wars-not-just-authorize-them> long after their initiation. So, for instance, the outdated 2001 Authorization for Use of Military Force directed at al-Qaeda and its allies ought to be revised → <https://www.lawfareblog.com/draft-aumf-get-discussion-going>, but as an addition to, not a substitute for, unrelenting congressional review of how the various parts of that conflict are waged. The energy of reformists in Congress would be better spent on overseeing ongoing conflicts than on pushing new overarching frameworks that are unlikely to be adopted. Plus, the prospect of probing oversight during conflicts would bolster Congress' political influence over decisions to intervene militarily to begin with.

Some will criticize this oversight agenda as too modest. And yet, it stands a more realistic chance of addressing the problems and improving the political checks laid out above than a dramatic legislative revamping would. Others will criticize it as politically unworkable, essentially asking for a different type of congressional membership, with different political incentives and institutional commitments, than the one that exists. That may be so. If that is the case, though, then ambitions for a radical legislative overhaul — especially one that sticks — do not stand a chance.

Matthew C. Waxman is Liviu Librescu Professor of Law at Columbia Law School and an adjunct senior fellow for Law and Foreign Policy at the Council on Foreign Relations.

Image: White House (Photo by Shealah Craighead) → [https://commons.wikimedia.org/wiki/File:President_Trump_Meets_With_Congressional_Leadership_\(45966024294\).jpg](https://commons.wikimedia.org/wiki/File:President_Trump_Meets_With_Congressional_Leadership_(45966024294).jpg)