

Restore. Protect. Expand.

Amend the War Powers Resolution



Center for Constitutional Rights

The Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.

CCR uses litigation proactively to empower poor communities and communities of color; to guarantee the rights of those with the fewest protections and least access to legal resources; and to train the next generation of civil and human rights attorneys.

Formed in order to work hand in hand with people's movements, CCR has lent its expertise and support to a wide range of movements for social justice. We strive to complete the unfinished civil rights movement through targeting racial profiling and other modern-day manifestations of racial and economic oppression and through combating discrimination that is based on gender or sexuality and struggling against government abuse of power.

For decades, CCR has pushed U.S. courts to recognize international human rights and humanitarian protections – and we have had groundbreaking victories that established the principle of universal jurisdiction in this country and extended human rights standards to abuses committed by corporations and other non-government groups.

The Center for Constitutional Rights was the first organization to fight for the rights of the men held at Guantánamo Bay and has been at the forefront of the battles to end the use of offshore prisons; to end the practice of “extraordinary rendition” and torture; and to restore the fundamental right of habeas corpus and due process under the law.

Restore. Protect. Expand The Constitution: Amend the War Powers Resolution

Executive Summary

At the heart of American constitutional democracy is the concept of checks and balances: limits on the reach of each branch of government so that none can act unilaterally or exercise power without accountability. The power to initiate warfare, because of its grave and potentially long-term consequences for the entire republic, is rightly assigned to the entire Congress under the American system, rather than to the President, a single individual. Wisely, the Constitution provides that the decision to go to war should be debated thoroughly and openly in Congress, rather than carried out by a secretive order, on the judgment of one person.

The 1973 War Powers Resolution, which sought to reassert Congressional control over executive war-making, has failed since its inception to rein in the executive. The legislation was seriously flawed at the time, and has proved inadequate to deal with contemporary issues of conflict and the division of powers. Every President since 1973 has asserted that it is unconstitutional; Congress has been loath to challenge non-compliance. Despite numerous challenges to Presidential war making, many by the Center for Constitutional Rights, the courts have refused to adjudicate claims of violations.

In this context, the Bush administration has been able to greatly extend the practical usurpation of war powers by the executive, as part of an unprecedented expansion of executive power overall. Not only did the Bush administration overreach its authority by wresting control of war-making from Congress, but it did so on the basis of false information and, in some cases, authorizations from Congress for the limited use of military force were used as blanket authorizations for of all kinds of ongoing policies, programs and hostilities. In other cases, the executive acted secretly and unconstitutionally to carry out “military actions” of various magnitudes without accountability.

President Obama must pledge to help restore the balance of power and work with Congress to support a reform and revision of the War Powers Resolution. As a matter of constitutional integrity, all executive acts of war must be prohibited without Congressional authorization, and must comply with international law. President Obama must also end the wars launched, illegally, by the Bush administration.

Background

The United States Constitution assigns to Congress the power to declare war, as well as the power to issue letters of marque and reprisal referring to hostilities short of full-scale war, and to control funding for the armed forces. The President, as commander in chief, is given the power to lead the armed forces. Since World War II the United States has not formally declared war; contemporary conflicts – including the wars in Korea and in Vietnam, and military actions against non-state forces – have not been declared wars. It is in this context that Congress and the President have battled over the question of authority for taking the country to war.

In 1973, after years of undeclared war in Vietnam, Congress passed the War Powers Resolution with the intention of restoring Congressional authority to decide when the United States should go to war or engage in military action that might lead to war. The resolution declares that “[T]he President, in every possible instance, shall consult with Congress” before introducing US Armed Forces into hostilities or imminent hostilities, and that the President must report within 48 hours any such introduction of forces. Once such a report is submitted, Congress has 60 days to authorize such use of United States forces or extend the time period, and if it does not do so, the President’s power to use those troops automatically terminates and they must be withdrawn. Although President Nixon vetoed the resolution, it was overridden by a two-thirds vote in both houses of Congress and became law.

Since 1973, however, US presidents have generally ignored the War Powers Resolution, and have argued that it is unconstitutional. Though presidents have submitted reports and requests for authorization of military force to Congress more than 100 times since then, covering everything from embassy evacuations to the Kosovo intervention, the executive branch has continued to insist that the authority of the commander in chief means that presidents are not bound by the War Powers Resolution. In fact, in only one case, (the 1975 *Mayaguez* seizure) did the executive acknowledge that it was acting pursuant to the War Powers Resolution, thus triggering the time limit, and in that case after the action was over and US forces withdrawn. On only one occasion has Congress exercised its authority to determine that the time requirements of the act would become operative and extended the time period through passage of the 1983 Multinational Force in Lebanon Resolution.

Both Democratic and Republican presidents have claimed the right to engage in wars without Congressional authorization. For example, in 1990, George H. W. Bush claimed that he could go to war in Iraq, and in 1999 Bill Clinton used force against Yugoslavia after the House had refused to specifically authorize hostilities. The 1999 war against Yugoslavia clearly violated the War Powers Resolution in that it lasted more than 60 days without Congressional authorization.

Both Bush administrations claimed, in 1991 and 2002 respectively, that even though Congress enacted

resolutions authorizing force, they still exercise independent executive authority to continue and expand wars and are not bound by the actions of Congress. They articulated broad theories of presidential power, under which the President alone can use force in a broad array of circumstances. As President George H. W. Bush put it, “I didn’t have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait.”

In a great many instances, neither the President nor Congress, nor even the courts have been willing to trigger the War Powers Resolution mechanism. This is in part because the courts will not enforce the Resolution where Congress is either silent or acts ambiguously, even though the law clearly requires the troops to be withdrawn in such circumstances. In 1999, in the case of Yugoslavia, Congress voted not to authorize war, yet failed to pass legislation ordering the troops home and in fact funded the military action. Clearly, without reform of the legislation to address its weaknesses and without a concerted effort by a new executive in concert with Congress, the debate over war powers and responsibilities will remain paralyzed.

War Powers in the George W. Bush Years

In instances where Congress is too opposed, divided, conflicted or unsure to affirmatively authorize warfare, both the Constitution and the War Powers Resolution require that the United States not go to war. And yet, the Bush administration repeatedly forged ahead in defiance of the law, relying on an unconstitutional claim of executive power and the cynical political expectation that Congress would not want to be responsible for withholding support from American troops or ending a war once it was launched.

Post 9/11 Authorization for the Use of Military Force

In the immediate aftermath of September 11, 2001, President Bush and Congressional leaders negotiated legislation authorizing the President to take military steps to deal with the parties responsible for the attacks on the United States. The Authorization to Use Military Force (AUMF) was passed on September 14, 2001, giving the President powers to “use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks...or harbored such organizations or persons, in order to prevent any future acts of international terrorism....”

The resolution stated that it was intended to “constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution,” and that “[n]othing in this resolution supersedes any requirement of the War Powers Resolution.”

President Bush, for his part, asserted that the AUMF “recognized the authority of the President under the Constitution to take action to deter and prevent acts of terrorism against the United States.” He said,

“In signing this resolution, I maintain the longstanding position of the executive branch regarding the President’s constitutional authority to use force, including the Armed Forces of the United States, and regarding the constitutionality of the War Powers Resolution.” In this way, both the President and Congress maintained their positions on the constitutionality of the War Powers Resolution and the responsibilities of the President under it, even as Congress found a way to support the President’s immediate response to the attacks.

The Bush administration, however, subsequently cited the 2001 AUMF as justification for virtually every “anti-terrorist” program it would carry out over the next 7 years thereby conjuring vast presidential war powers that Congress clearly never intended to grant. The president insisted that the AUMF not only authorized the invasion of Afghanistan, but also: the substitution of military commissions for courts to try prisoners in Guantánamo; the detention without any hearing of prisoners captured anywhere in the world and deemed enemy combatants; the warrantless wiretapping in the United States by the NSA; the preventive detention of US citizens and resident aliens captured not on any battlefield abroad but within the United States; and the rendition and torture of alleged suspected terrorists. The president also claimed that he had independent war powers that could not be curtailed by Congress and would allow him to, for example, torture prisoners even where Congress enacts legislation prohibiting such treatment.

Iraq War

In the summer of 2002, the Bush administration began publicly denouncing Iraq for its supposed possession of weapons of mass destruction, and suggesting that Iraq was allied with Al Qaeda’s terrorist network. The campaign was unmatched in recent history for its cynicism: in the absence of Central Intelligence Agency and Defense Intelligence Agency intelligence supporting such allegations, the White House manufactured its own evidence, as was later revealed by both news media and Defense Department reports.

The Bush administration also clearly ignored the United Nations Charter prohibiting wars that are not sanctioned by the UN Security Council or carried out in self-defense. And, when justifying the war, then Secretary of State Colin Powell made a patently false presentation to the Security Council about Saddam Hussein’s possession of weapons of mass destruction. Other administration officials presented a similarly false picture; for example, as the invasion began, Secretary of Defense Donald Rumsfeld claimed that US officials not only knew that Iraq had weapons of mass destruction, but also that “[w]e know where they are.”

The administration also lied to Congress. In October 2002, a few days before the Senate was to vote on the *Joint Resolution to Authorize the Use of Armed Forces Against Iraq*, about 75 Senators were told in closed session that Saddam Hussein had definitive means to attack the eastern seaboard of the US with biological

or chemical weapons. Based on such misrepresentations, Congress voted to approve the initiation of war with Iraq.

The Constitution's requirement that only Congress has the power to initiate war is designed to ensure an open, honest and public debate about whether to go to war. While Bush went to Congress to get authorization, the spirit of the Constitution was not complied with, because the executive did not inform Congress of the true facts, and Congress abdicated its responsibility to seriously attempt to determine what those true facts were.

Moreover, Bush again refused to concede any war power to Congress. While President Bush noted he had sought a "resolution of support" from Congress to use force against Iraq, and that he appreciated receiving that support, he also stated that: "my request for it did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the president's constitutional authority to use force to deter, prevent, or respond to aggression or other threats to US interests or on the constitutionality of the War Powers Resolution."

The long and tragic history that followed leaves little room for doubt that the nation would have been better served by frank and open debate before the resolution authorizing the illegal attack on Iraq in violation of the UN Charter was approved by Congress. The war and occupation have cost not only billions of dollars, but cost hundreds of thousands of Iraqi, American, and allied lives, created violence in the region and spurred internal conflict in Iraq.

The responsibility of the Bush administration for this devastating military adventure is clear. Congress too bears responsibility for its own failures over the years, from the continuance of funding for the Iraq war in the face of military failure, gross human rights abuses and spiraling costs. But, the structural inadequacy of the existing War Powers Resolution as a brake on dangerous executive war-making is more evident than ever. In the Obama Administration, this must be corrected to protect America – and the world – against similar future disasters.

Summary and Policy Proposals

Congressional power to declare war has been usurped by the executive's assertion of its exclusive decision-making power to engage in unchecked "military actions" of various magnitudes. The constitutional vision of the commander in chief – someone responsible for taking short, quick, defensive actions in emergency situations – has been superseded by the vision of presidents, most recently or egregiously George W. Bush, who claim sole authority to conduct protracted, offensive wars and large-scale military actions. Executive authority has been so distorted that an unconstitutional vision of war power as presidential prerogative has

taken over. The wars launched illegally by the Bush administration must be brought to a close. And, the constitutional vision of Congress holding war powers must be realized through effective legislation, as an important democratic brake on executive adventurism.

Reform the War Powers Resolution

The War Powers Resolution has failed. Every president since the enactment of the Act has considered it to be unconstitutional. Presidents have generally not filed a report that would start the 60-day clock running, despite repeated executive introduction of armed forces into places like Indochina, Iran, Lebanon, Central America, Grenada, Libya, Bosnia, Haiti, Kosovo and Somalia, among others. Congress has usually not challenged this non-compliance. And, the judiciary has persistently refused to adjudicate claims challenging executive action as violating the War Powers Resolution, holding that members of Congress have no standing to seek relief, or that the claim presents non-justifiable political questions.

The War Powers Resolution, as written, was flawed in several key respects. The first flaw was that the Resolution imposed no operative, substantive limitations on the executive's power to initiate warfare, but rather created a time limit of 60 days on the president's use of troops in hostile situations without explicit congressional authorization. This approach was a mistake, because as a practical matter it recognized that the President could engage in unilateral war-making for up to 60 days, or 90 days with an extension. But the Constitution requires that Congress provide authorization prior to initiating non-defensive war, not within a period of months after warfare is initiated. As history has demonstrated time and again, it is difficult to terminate warfare once hostilities have begun. The key time for Congress to weigh in is before hostilities are commenced, not 60 or 90 days afterward.

Secondly, the War Powers Resolution correctly recognized that even congressional silence, inaction or even implicit approval does not allow the president to engage in warfare – but it failed to provide an adequate enforcement mechanism if the president did so. Under the resolution, wars launched by the executive were supposed to be automatically terminated after 60 or 90 days if not affirmatively authorized by Congress – but this provision proved unenforceable. Presidents simply ignored it, Congress had an insufficient interest in enforcing it and the courts responded by effectually saying: if Congress did nothing, why should we?

Reforming the War Powers Resolution is a project that will require leadership from the President and the political will of Congress, working together in the service and preservation of the Constitution. In light of the abuses that have taken place under the Bush administration, it is the responsibility of a new administration to insist on transparency in the drafting of new legislation.

There is a long history of attempts to revise the War Powers Resolution. As new legislation is drafted,

though, it will be important to focus on the central constitutional issues. Much time has been spent in debating how to address contingencies. It will be impossible to write into law any comprehensive formula for every conceivable situation, though; much more important will be establishing the fundamental principles of reform:

The War Powers Resolution should explicitly prohibit executive acts of war without previous Congressional authorization. The only exception should be the executive's power in an emergency to use short-term force to repel sudden attacks on US territories, troops or citizens.

It is true that many potential conflict situations will be murky, complicated or divisive, and that quick congressional action may not always be forthcoming. Yet, history shows the folly of launching wars that are not supported by the American people. The United States should not use military force until a substantial consensus develops in Congress and the public that military force is necessary, appropriate and wise.

Today, as in 1787, the reality is that the interests of the people of the United States are best served if the Congress retains the power to declare war, and the President's unilateral power to use American forces in combat should be reserved to repelling attacks on American troops or territories and evacuating citizens under actual attack. Repelling does not equate retaliation for an attack on an American city that occurred in the past, be it several days, weeks or months prior; it also does not mean launching a surprise invasion of a nation that has not attacked us. Repelling similarly does not permit the inflation of supposed threats against US citizens as justification to invade another country, as was the case in the Dominican Republic in 1965 and Grenada in 1983. The president can respond defensively to attacks that have been launched or are in the process of being launched, but not to rumors, reports, intuitions, or warnings of attacks. Preventive war, disguised as preemptive war, has no place in constitutional or international law.

To ensure that this principle is enforced, new legislation should prohibit the use of appropriated funds for any executive use of force that is unauthorized under the statute. Furthermore, the reformed War Powers Resolution must allow room for judicial oversight in the case of conflicts. A president who initiates hostilities in disregard of the statute would undoubtedly use appropriated funds to do so, forcing Congress to make the difficult decision of whether to authorize funds for troops engaged in combat. The statute should therefore state that a presidential violation of the act would create an impasse with Congress, and that separation of powers principles require the Court to decide the merits of any challenge brought against an alleged violation. And, a presidential violation of this principle should be explicitly made an impeachable offense.

End Abuses of Authorizations of Military Force

The past 8 years saw a period of lawless executive action in the area of war-making, marked by disregard for the Constitution, Congress, and the courts. The consequences for the democratic process and American security have been grave. President Obama must make plain his intention to conduct national security policy in full compliance with the law, and must demonstrate that America's policies will not be carried out by deception.

The post 9/11 Authorization for the Use of Military Force was used by the Bush administration as justification for any and all acts the executive chose to engage in without the approval of, or in many cases, the knowledge of, Congress. White House lawyers claimed this AUMF allowed the President to engage in warrantless wiretapping, arbitrary detention, extraordinary rendition and numerous other illegal acts. The noxious principle of the all powerful "unitary executive" has no place in the Constitution.

President Obama must reject language in any Authorization of Military Force that gives over-broad powers to the executive, and must pro-actively inform Congress about the extent of any executive actions under an AUMF.

When a President receives an authorization from Congress for the use of military force, it cannot be taken as a blanket authorization of unchecked executive authority.

The United Nations Charter begins with a commitment "to save future generations from the scourge of war." This cannot be accomplished in violation of the fundamental principles of international law. Hence, the amended War Powers Resolution must make strict compliance with international law an essential ingredient of US policy.

Conclusion

The last 8 years saw an expansion of executive power unprecedented in American history. The consequences for constitutional rights and our system of government are grave. But in no area have the consequences been more devastating than in the area of war-making. The cost in lives, human rights and long-term strategic interests is staggering. President Obama must not only work to heal the damage wrought by the Bush administration, but restore the constitutional principles of separation of powers and ensure that future conflicts will not be launched without checks and balances.

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