

Operation Inherent Resolve and the Reemergence of the Debate Over the War Powers Resolution

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Few areas of constitutional law have produced as much heated debate as the war powers area, heat produced in no small part by the passionate belief that this is a subject of incalculable consequence.¹

Introduction

Over the course of the last several months, President Obama has launched a broad military offensive against the Islamic State of Iraq and the Levant (“ISIL”).² At this point, Operation Inherent Resolve consists primarily of air-strikes conducted by United States armed forces and coalition members—it remains to be seen the extent to which United States ground forces will be needed for the operation. One particularly interesting component of this military action is the initial justifications President Obama provided with respect to his authority to order this air campaign in the first place—until recently, he relied on statutory authorization in the form of the Authorization to Use Military Force passed within a week of the September 11, 2001, terrorist attacks, as well as the 2002 Authorization to Use Military Force in Iraq.³ Additionally, President Obama has loosely

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1. William Michael Treanor, *The War Powers Outside the Courts*, 81 IND. L.J. 1333, 1333 (2006).

2. This operation has been given the title: *Operation Inherent Resolve*.

3. President Obama has since provided Congress with a draft of a new joint resolution authorizing the use of military force with respect to ISIL specifically. See Draft authorization: *Authorization for Use of military Force against the Islamic State and the Levant*, THE WHITE HOUSE (Feb. 13, 2015), https://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf.

cited his constitutional authority as commander in chief to protect American citizens and promote national security abroad.

In a letter to Congress, President Obama indicated his statutory authority, relying specifically on both the 2001 and the 2002 Authorizations to Use Military Force, to commit United States armed forces abroad without consultation, or express approval, of Congress:

I have ordered the implementation of a new comprehensive and sustained counterterrorism strategy to degrade, and ultimately defeat, ISIL. As part of this strategy, I have directed the deployment of 475 additional U.S. armed forces personnel to Iraq, and I have determined that it is necessary and appropriate to use the U.S. Armed Forces to conduct coordination with Iraqi forces and to provide training, communications support, intelligence support, and other support, to select elements of the Iraqi security forces I have also ordered the U.S. Armed Forces to conduct a systematic campaign of airstrikes and other necessary actions against these terrorists in Iraq and Syria.

. . . .

I have directed these actions . . . pursuant to my constitutional and statutory authority as Commander in Chief . . . and as Chief Executive, as well as my constitutional and statutory authority to conduct the foreign relations of the United States.⁴

In light of the War Powers Resolution (“WPR”), many have criticized President Obama’s reliance on the AUMF in Iraq as statutory authority to commit armed forces in the fight against ISIL as, at best, a legal stretch.⁵

This Note asserts that, with some modification, the WPR can serve as a meaningful mechanism by which the President is able to consult with Congress *before* making the decision to commit United States armed forces to conflicts abroad. Part I introduces the history

4. Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, THE WHITE HOUSE: OFFICE OF THE PRESS SECRETARY (Sept. 23, 2014), <https://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq>.

5. See Deb Riechman & Nedra Pickler, *Obama to Send His New War Powers Request to Capitol Hill*, THE ASSOCIATED PRESS (Feb. 10, 2015, 7:02 PM), <http://www.newsmax.com/Newsfront/obama-to-send-war/2015/02/10/id/623777/>.

and background of the WPR, including a brief overview of how the Constitution splits the war powers between the President and Congress, and provides an introduction with respect to the pertinent parts of the WPR.

In Part II, this Note provides a broad overview of the scholarly debate with respect to war powers, specifically within the context of the WPR. This debate offers, on the one hand, a pro-Congress understanding of the war powers provided by the Constitution, and on the other, a pro-Executive interpretation of the war powers provided by the Constitution. This Note advocates for the former.

Part III discusses why the WPR is problematic in practice, and Part IV provides an evaluation of the WPR as applied to Operation Inherent Resolve. Lastly, Part V provides various ways in which the WPR can be strengthened to better align the practical use of the WPR, and its ultimate goal of facilitating cooperation between the executive and the legislature without undermining the constitutional powers they enjoy.

Specifically, this Note advocates that the WPR be amended so as to (1) establish a permanent consultation group to facilitate communication between the President and Congress, (2) shorten the sixty to ninety day time limitation set-up under the congressional actions and procedures section⁶ of the WPR; and (3) amend the WPR so as to require that an expiration date be placed on all Congressional authorization to use military force.

I. History and Background of the War Powers Resolution

War powers are divided between Congress and the President under the United States Constitution. Article I, Section 8 confers on Congress the power to make declarations of war, control war funding, and raise and support the armed forces.⁷ Furthermore, Congress has the power “to make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by the Constitution in the Government of the United States”⁸ Under Article II, Section 2, the President is commander in chief of the military, “when called into the actual Service of the United States.”⁹ This division of power, however, is not always clear—one major concern is the extent of the President’s war power to deploy armed

6. See 50 U.S.C. § 1544 (2015).

7. U.S. CONST. art. I, § 8, cl. 11.

8. U.S. CONST. art. I, § 8, cl. 18.

9. U.S. CONST. art. II, § 2, cl. 1–2.

forces abroad without the express approval, via declaration of war or otherwise, of Congress.

Following the Vietnam war, the WPR was adopted in the form of a congressional joint resolution¹⁰ to not only address concerns about the extent of the President's power to commit United States forces abroad without the consent of Congress, but also to provide a set of procedures for the President and Congress to follow in situations where the introduction of United States forces abroad could lead to their involvement in armed conflict.¹¹ Conceptually, the WPR can be broken into six distinct parts:¹²

1. Purpose and policy;¹³
2. The consultation requirement;¹⁴
3. The reporting requirement;¹⁵
4. Congressional actions and procedures;¹⁶
5. Rules and definitions in interpretation of the WPR;¹⁷ and
6. The "separability provision."¹⁸

The policy behind the WPR is clear: "to fulfill the intent of the Framers of the Constitution of the United States and insure that the *collective judgment of both* Congress and the President will apply," not only with respect to the "introduction" of United States Forces into hostile situations, but also where "imminent involvement in hostilities is clearly indicated by the circumstances."¹⁹ In this regard, the President is limited in his exercise as commander in chief of the armed forces either pursuant to a declaration of war, after having been granted statutory authorization from Congress, or following a "national emergency created by attack upon the United States."²⁰

10. H.R.J. Res. 543, 93rd Cong. (1973) (enacted). Passed over President Nixon's veto in November of 1973.

11. This joint resolution is codified in the United States Code in Title 50, Chapter 33, Section(s) 1541–48.

12. War Powers Overview, LIBRARY OF CONGRESS (Feb. 16, 2015, 12:32 PM), <http://loc.gov/law/help/war-powers.php>.

13. 50 U.S.C. § 1541 (2015).

14. 50 U.S.C. § 1542 (2015).

15. 50 U.S.C. § 1543 (2015).

16. 50 U.S.C. § 1544 (2015).

17. 50 U.S.C. § 1547 (2015).

18. 50 U.S.C. § 1548 (2015).

19. 50 U.S.C. § 1541(a) (2015) (emphasis added).

20. 50 U.S.C. § 1541(c) (2015).

Under § 1542, the President is required “*in every possible instance* to consult with Congress *before* introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances[.]”²¹ Furthermore, the President is required to regularly consult with Congress “until United States armed forces are no longer engaged in hostilities.”²² To complement the consultation requirement in § 1542, absent a declaration of war, the President must comply with the reporting requirements set forth in § 1543 “in any case in which United States armed forces are introduced.”²³ The President must, within forty-eight hours of the introduction of United States armed forces, report to Congress “the circumstances necessitating the introduction,” “the constitutional and legislative authority under which such introduction took place,” and the “estimated scope and duration” of the involvement.²⁴

Congressional actions and procedures are set out in § 1544 of the law. Perhaps the most significant aspect of this section is that it requires United States armed forces to be withdrawn from hostilities “[w]ithin sixty calendar days after a report is submitted or is required to be submitted pursuant to § 1543(a)(1) of this title, whichever is earlier.”²⁵ Additionally, § 1544(c) requires the President to remove United States armed forces that are not engaged in hostilities at any time Congress so directs by a Concurrent Resolution.²⁶

Lastly, the “separability provision” states: “if any portion of this chapter of the application thereof to any person or circumstances is held invalid [by a court], the remainder of the chapter and the application of such provision to any other person or circumstance shall not be affected thereby.”²⁷

21. 50 U.S.C. § 1542 (2015) (emphasis added).

22. 50 U.S.C. § 1542 (2015).

23. 50 U.S.C. § 1543(a) (2015).

24. 50 U.S.C. § 1543(a)(3) (2015).

25. 50 U.S.C. § 1544(b) (2015).

26. 50 U.S.C. § 1544(c) (2015). This is subject to the exception that Congress has either “(1) declared war or has enacted a specific statutory authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.” *Id.* It is worth noting that the procedure set up under § 1544(c) is a “legislative veto” insofar as concurrent resolutions are not laws and are not presented to the President for signature or veto; a procedure that is questionable in light of the Court’s decision in *I.N.S v. Chada*. See *I.N.S v. Chada*, 462 U.S. 919 (1983).

27. 50 U.S.C. § 1548 (2015).

Presidents have submitted over one-hundred and thirty reports to Congress in the nearly four decades since the passage of the WPR.²⁸ Still, the WPR has been subject to numerous proposals to either modify or repeal the resolution. Furthermore, “[d]ebate continues on whether using the WPR is effective as a means of assuring congressional participation in decisions that might get the United States involved in a significant military conflict.”²⁹

II. Congressional Action Serves as a Substantive Restriction on the President’s Power to Use Military Force

One of the main challenges to the WPR rests on differing interpretations of how the Constitution allocates war powers between the President and Congress. There is no debate that the framers of the Constitution realized the necessity to check the President’s ability to wage war. However, the Constitution itself fails to establish a “comprehensive system for the conduct of foreign and military affairs”; some powers are allocated to the President, others to Congress.³⁰ In this regard, the debate arises with respect to the *allocation* of the war powers *between* Congress and the President. Legal scholars who argue that the Declare War Clause provides comprehensive war powers to Congress point not only to a strict reading of the Constitutional text, but supplement this with discussions reflecting how the framers envisioned the balance of power in the Constitution;³¹ such as this excerpt from James Madison’s Helvidius, number 4:

In no part of the [C]onstitution is more wisdom to found than in the clause which confides the question of war and peace to the legislature, and not to the executive department. Besides the objection to such mixture of heterogeneous powers: the trust and the temptation would be too great for any one man; not such as nature may offer as the prodigy of many centuries, but such as may be expected in the ordinary

28. RICHARD F. GRIMMETT, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE, (Congressional Research Service Sept. 25, 2012), <http://fas.org/sgp/crs/natsec/RL33532.pdf>.

29. *Id.*

30. Cyrus R. Vance, *Striking the Balance: Congress and the President under the War Powers Resolution*, 133 U. PA. L. REV. 79, 91, 83 (1985).

31. Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1552 (2002).

successions of magistracy It is in war, finally, that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast . . . are all in conspiracy against the desire and duty of peace.³²

Generally, those who align themselves with this pro-Congress approach to war powers call for Congressional approval for any type of military force, unless the nation is acting in self-defense. As indicated, this view is based largely on a strict reading of the Constitution's Declare War Clause,³³ but also relies on various interpretations of the drafting of the Constitution.³⁴

Legal scholars such as John C. Yoo,³⁵ who hold more expansive (i.e., pro-executive) views of presidential power, critique the pro-Congress position of the war powers insofar as the text of the Constitution only grants Congress "the power 'to declare war,' not the power 'to authorize hostilities.'"³⁶ Yoo argues that "a more comprehensive reading of the text and structure [of the Constitution] demonstrates that the Constitution does not mandate a specified, legalistic process for waging war."³⁷ What is more, Yoo criticizes, the "pro-Congress" understanding of the constitution—one in which interprets the Constitution to require that Congress provide its authorization before the United States can engage in military hostilities—because it "ignores the constitutional text and structure, errs in interpreting the ratification history of the Constitution, and cannot account for the practice of the three branches of government."³⁸ Rather, Yoo argues that the Constitution creates a "flexible system of war powers."³⁹ In this "flexible system," the President enjoys "significant initiative as commander in chief," and

32. THE PAPERS OF JAMES MADISON, VOL. 15, 24 MARCH 1793–20 APRIL 1795 106–10 (Thomas A. Mason, et al. eds., Charlottesville: Univ. Press of Virginia 1985), <http://founders.archives.gov/documents/Madison/01-15-02-0070>.

33. U.S. CONST. art. I, § 8.

34. See John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1641 (2002).

35. Professor of Law, University of California at Berkeley; former Deputy Assistant Attorney General, Office of Legal Counsel, United State Department of Justice (2001–2003).

36. Ramsey, *supra* note 31, at 1552 (discussing the need to determine how the Constitution initially made the basic allocation of war powers before coming to a consensus of how to apply them to "complicated modern events").

37. Yoo, *supra* note 34, at 1639.

38. *Id.*

39. *Id.* at 1640.

Congress is reserved the authority to “check executive policy through its power of the purse.”⁴⁰

Despite this scholarly debate, one thing is clear: neither the President or Congress enjoy complete allocation of war powers; rather the text of the Constitution divides the war powers between the President and Congress and “produces complex layers of checks and balances in war powers, rather than entrusting war wholly to a single branch.”⁴¹ Even supporters of the pro-Congress view of the Constitution recognize that there are in fact some situations where Congressional approval is not necessary—for example, “when the nation is under attack or to rescue a US citizen abroad.”⁴² Yet the fundamental issue remains: how do we determine when the President can act unilaterally and what are the limits to this power?⁴³

This is arguably where the WPR comes into play—as a mechanism by which the President is given some leeway in his acts as commander in chief, while at the same time facilitating some sort of cooperation between Congress and the President when it comes time to make the decision to commit United States armed forces abroad. In this regard, the WPR in no way seeks to “define or modify the constitutional powers of the President.”⁴⁴ Rather, as Cyrus Vance⁴⁵ deftly points out, the WPR “establishes a *procedure* by which Congress can express its institutional judgment” and question the degree of Presidential war powers.⁴⁶ What remains unclear is just how expansive the Presidential power as commander in chief is, as well as to what degree, and when, might congressional consultation be needed *before* committing United States armed forces abroad.

In Justice Jackson’s concurring opinion in the *Steel Seizure Case*, Jackson articulated that “the art of governing under our Constitution does not and cannot conform to judicial definitions of the power and any of its branches based on isolated clauses or even single Articles from context[;]” the Constitution “diffuses power . . . to secure liberty, it also contemplates that *practice* will integrate the dispersed

40. *Id.*

41. Ramsey, *supra* note 31, at 1638.

42. Treanor, *supra* note 1, at 1335.

43. *See id.*

44. Vance, *supra* note 30, at 85.

45. Former United States Secretary of the Army (Kennedy); United States Deputy Secretary of Defense (Johnson); and United States Secretary of State (Carter).

46. Vance, *supra* note 30, at 85 (emphasis added).

powers into a workable government.”⁴⁷ What is more, Justice Jackson identified that “[p]residential powers are not fixed, but fluctuate upon their disjunction or conjunction with those of Congress.”⁴⁸ To highlight this interpretation of presidential power in relation to congressional power, Justice Jackson identified *three zones of presidential power*:⁴⁹

1. “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said . . . to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. the consultation requirement.”
2. “When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in when he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite measure on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”
3. “When the President takes measure incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers over the matter . . . [p]residential claim to a power at once so conclusive

47. *Youngstown Sheet & Tube Co. v. Sawyer*, (*Steel Seizure*) 342 U.S. 579, 635 (1952) (Jackson, J., concurring) (emphasis added).

48. *Id.* at 635.

49. Comment, *Congressional Control of Presidential War-Making Under the War Powers Act: The Status of a Legislative Veto After Chada*, 132 U. PA. L. REV. 1217, 1235 (1984) (emphasis added).

and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”⁵⁰

In this regard, “the constitutionality of presidential action must be judged by the scope of the President’s independent authority . . . and by the restraints that may legitimately be placed upon presidential exercise of that power by the other branches.”⁵¹ Relying on this view, the WPR is not a delegation of congressional war powers to the President; rather, the act recognizes “that these powers are shared by Congress and the President, with the President’s powers falling into [Justice] Jackson’s ‘zone of twilight.’”⁵²

These are just some of the questions that must be considered against the backdrop of the realities of modern times—Congress has not formally declared war since World War II, instead we have “witnesses frequent hostilities initiated by the President with little or no congressional authorization[,]”⁵³ and yet, there seems to be “no political constituency clamoring for a different practice under which a declaration of war would be necessary.”⁵⁴

III. Why the War Powers Resolution is Problematic, Generally

As Richard Grimmett⁵⁵ points out, one major issue involving the WPR is the consultation requirement—not only is it open to interpretation as to *when* consultation is required, but also the meaning of the term “consultation” is up for debate.⁵⁶ A noticeable trend is that the executive branch may feel that it has fulfilled the requirement, while Congress does not.⁵⁷ The House report on the WPR indicates that “consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice opinions and, in appropriate circumstances, their approval of action contemplated.”⁵⁸ Yet another concern is *who* should represent Congress for

50. *Steel Seizure*, 343 U.S. at 635–38.

51. Comment, *supra* note 49, at 1236.

52. *Id.*

53. See Ramsey, *supra* note 31, at 1548.

54. See Treanor, *supra* note 1, at 1334.

55. Richard Grimmett is a specialist in international security with the Congressional Research Service of the Library of Congress.

56. GRIMMETT, *supra* note 28, at 26.

57. See *id.* at 23.

58. *Id.* at 26.

consultation purposes—while critics of the existing statute have “introduced proposals to specify a consultation group[,] . . . Congress has yet to act on such a proposal.”⁵⁹ Many scholars have pointed out that while the WPR clearly calls for Congressional consultation *before* introducing United States armed forces abroad, this goal is not being realized in practice—the President often fails to initiate any meaningful discussions with Congress before introducing United States armed forces abroad.⁶⁰

Furthermore, Grimmatt points out that Congress not only faces “immediate issues . . . when the President introduces troops into situations of potential hostilities,” but also the “longer-term issue [of] whether the WPR is working or should be amended.”⁶¹ In light of the former, Congress generally has the following choices:⁶²

1. Apply the WPR to terminate presidential action that Congress does not agree with,⁶³
2. Apply the WPR to “either legitimize the action and strengthen it by making clear congressional support for the measure or to establish the precedent does apply in such situation[.]”⁶⁴
3. Refrain from applying the WPR out of fear that invoking the Resolution will otherwise damper the President’s otherwise “flexible” war powers,⁶⁵ or
4. Refrain from applying the WPR because “some may not wish to have a formal vote on either the issue of applying the Resolution or the merits of utilizing Armed Forces in that case.”⁶⁶

Most would agree that since its enactment, the WPR has had at least somewhat of an influence on our government’s policy-making process— “[w]eary of the time limit on the commitment of troops unauthorized by Congress and of the congressional veto provision . . .

59. *Id.* at 23. (Note that the House report on the WPR “specifically called for consultation between the President and the leadership and appropriate committees[,] . . . [however,] this was changed to less specific wording in final House-Senate conference committee version, to provide some flexibility.)

60. Vance, *supra* note 30, at 88–90.

61. GRIMMATT, *supra* note 28, at 26.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

a President contemplating armed action must weigh in advance the likely political reaction.”⁶⁷ This, however, has not achieved the ultimate goal of the WPR: *collective judgment*.

The policy behind the WPR makes clear that its purpose is to provide a mechanism by which Congress and the President can exercise their respective war powers. The WPR, however, has arguably failed to achieve the goal of cooperation between the two branches. While the WPR is a sound concept, it is in need of improvement; “with minor modification, it could more effectively achieve its goal of requiring consultation between the President and Congress.”⁶⁸

IV. Operation Inherent Resolve and the War Powers Resolution

The application of the WPR in light of the current campaign against the Islamic State of Iraq and the Levant (“ISIL”) illustrates both the impact of the WPR in relation to presidential war powers nearly forty years after the WPR was enacted, as well as its flaws as a mechanism by which the President at least consult with Congress before engaging United States armed forces abroad. The opening stages against ISIL consisted of a barrage of air strikes in an effort that restricted largely to not only humanitarian missions, but also to protect American personnel and facilities. During this timeframe, President Obama relied heavily on his constitutional authority to protect the American people. Within a few months, President Obama announced a broader campaign to “degrade and ultimately defeat”⁶⁹ ISIL. It was not until mid-September of 2014, that the President officially notified Congress of his intention to rely on the 2001 and 2002 Authorizations to Use Military Force as statutory justification for the air campaign against ISIL.⁷⁰ In a September 2014, letter to Congress, President Obama specifically indicated that he, in light of the “national security and foreign policy interest of the United States” and “pursuant to [his] constitutional and statutory authority as Commander in Chief (including the authority to carry out Public Law 107-40⁷¹ and Public Law 107-243⁷²)” had the authority

67. Vance, *supra* note 30, at 90.

68. *Id.* at 91.

69. *Supra* note 3.

70. Prior to the White House invoking the Authorization to Use Military Force Against Iraq as a statutory justification to conduct air strikes against ISIL, at least in some cases, the Obama administration had called for repeal of the law.

71. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

to commit United States armed forces abroad in the fight against ISIL without a new express authorization from Congress.⁷³

October 7, 2014 marked sixty days since the beginning of the bombing air campaign against ISIL strongholds in Iraq.⁷⁴ Bernadette Meehan⁷⁵ identified that “[b]ecause the 2001 and 2002 AUMFs constitute specific authorization with the meaning of the [WPR], the [WPR]’s [sixty] day limitations on operations does not apply here.”⁷⁶ Moreover, Meehan indicated that the President had filed War Power reports over the summer months of 2014, notifying both Congress and the American people of the operation going on in the Middle East. However, reliance on the nearly fifteen-year-old authorization unsurprisingly caught the attention of legal scholars across the country. Mary O’Connell, an international law professor at the University of Notre Dame, said that President Obama was “in clear violation” of the WPR,⁷⁷ while other critics have said that the President’s reliance on the old AUMF(s) is a “legal stretch at best.”⁷⁸ Perhaps one of the major critiques of the President’s reliance on the old AUMF is that many would say the militant group ISIS “is no longer part of the al-Qaeda ‘associates’ envisioned by the military authorization passed after the September 11, 2001 attacks.”⁷⁹

The Authorization to Use Military Force was passed, unsurprisingly, within a week of the September 11, 2001, terrorist attacks on the World Trade Center and the Pentagon. This AUMF is divided into three parts: five perambulatory clauses, one section delineating the granted authority, and one section placing the

72. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243.

73. *Supra* note 3.

74. Spencer Ackerman, *White House Says Expired War Powers Irrelevant to ISIS Campaign*, THE GUARDIAN (Oct. 16, 2014, 3:53 PM), <http://www.theguardian.com/us-news/2014/oct/15/white-house-war-powers-resolution-iraq>.

75. Spokeswoman, National Security Council.

76. Ackerman, *supra* note 74.

77. *Id.*

78. Deb Riechman & Nedra Pickler, *Obama to Send His New War Powers Request to Capitol Hill*, THE ASSOCIATED PRESS (Feb. 10, 2015, 12:17 PM), <http://www.newsmax.com/Newsfront/obama-to-send-war/2015/02/10/id/623777/>.

79. Greg Miller & Karen Young, *In Syria, Obama Stretches Legal and Policy Constraints He Created for Counterterrorism*, WASH. POST (Oct. 18, 2015, 12:23 PM), http://www.washingtonpost.com/world/national-security/in-syria-obama-stretches-legal-and-policy-constraints-he-created-for-counterterrorism/2014/09/23/79fdaf44-4339-11e4-9a15-137aa0153527_story.html.

authorization within the rubric of the War Powers.⁸⁰ It allows the President to:

[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁸¹

While this AUMF authorized the use of “necessary and proper force” against those responsible for the September 11, 2001 attacks, Congress was not authorizing the President to use “military action against terrorists *generally*.”⁸²

President Obama did not formally request authorization for the use of military force against ISIL until February of 2015:

I have directed a comprehensive and sustained strategy to degrade and defeat ISIL Although existing statutes, [i.e. Public Law 107-40 and Public Law 107-243], provide me with the authority I need to take these actions, I have repeatedly expressed my commitment to working with the Congress to pass a bipartisan authorization for the use of military force (AUMF) against ISIL. Consistent with this commitment, I am submitting a draft AUMF⁸³] that would continue use of military force to degrade and defeat ISIL.⁸⁴

Under the draft authorization, titled “The Authorization for Use of Military Force against the Islamic State of Iraq and the Levant,” the President is authorized to use United States armed forces “as the

80. Beau Marnes, *Reauthorizing the “War on Terror”: The Legal and Policy Implications of the AUMF’s Coming Obsolescence*, 211 MIL. L. REV. 57, 68 (2012).

81. § 2, 115 Stat. at 224.

82. Beau, *supra* note 80, at 69 (citing GRIMMETT, *supra* note 28) (emphasis added).

83. *Supra* note 3.

84. Letter from President Obama for the Speaker of the House of Representatives and the President Pro Tempore of the Senate, THE WHITE HOUSE: OFFICE OF THE PRESS SECRETARY (Feb. 11, 2015), <https://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection>.

President determines to be necessary and appropriate against ISIL or associated persons or forces . . . consistent with the War Powers Resolution.”⁸⁵ Furthermore, this authorization “*does not* authorize the use of the United States Armed Forces in enduring offensive ground combat operations . . . [and this authorization] shall terminate *three years after the date of enactment of this joint resolution*, unless reauthorized.”⁸⁶ Additionally, the proposed authorization calls for repeal of Iraq AUMF.⁸⁷ This draft proposal came several months after United States armed forces began engaging in air-strikes in an effort to weaken ISIL. Still, President Obama has continuously indicated that the proposed resolution is “important not only for the [United States] strategy against [ISIL], but also to the cohesion of an international coalition.”⁸⁸

Unsurprisingly, President Obama faced a wave of criticism from Democrats and Republicans alike after submitting his draft proposal to Congress: “[t]he initial reaction by lawmakers suggested a rare case in which Republicans wanted to provide [President] Obama more leeway than did members of his own party.”⁸⁹

The President has indicated that his draft proposal “provides the military flexibility to conduct ground combat operations in limited circumstances, such as rescue operations and special operations against [ISIL] . . . with the core objective to destroy ISIL.”⁹⁰ However, the draft proposal includes no geographic limitations “on a possible extension of the war beyond those two countries in pursuit of the Islamic State and ‘associated persons or forces.’”⁹¹

Still, the Speaker of the House, John Boehner, has indicated that President Obama’s request is “‘the beginning of the legislative process’ of hearings, committee votes and amendments.”⁹² Furthermore, Republicans have indicated that “the onus [is] on

85. *Supra* note 3.

86. *Id.*

87. *Id.*

88. Carol Lee & Michael Crittenden, *Debate Opens on New War Powers: Obama Asks Congress to Back Islamic State Fight*, THE WALL ST. J. (Feb. 11, 2015, 3:47PM), <http://www.wsj.com/articles/obama-asks-congress-to-authorize-military-action-against-islamic-state-1423666095>.

89. *Id.*

90. *Id.*

91. Karen De Young, *Obama Makes Formal Request for War Authorization Against Islamic State*, THE WASH. POST (FEB. 11, 2015), http://www.washingtonpost.com/world/national-security/obama-makes-formal-request-for-war-authorization-against-islamic-state/2015/02/11/881cc0b0-b1f7-11e4-886b-c22184f27c35_story.html.

92. Lee & Crittenden, *supra* note 88.

[President] Obama to make the case for the authorization, both with Congress and the broader country.”⁹³ In this regard, it seems that the draft proposal is far from what will be required for enough congressional support to see the floor. The main concern for Democrats seems to be that the draft proposal does not go far enough to limit United States operations to fighting ISIL.⁹⁴ In this regard, some Democrats are calling for more specific limitations with respect to the use of ground forces.⁹⁵

The current push and pull between Democrats and Republicans in response to the draft proposal sent to Congress by President Obama illustrates the difficulty of achieving bi-partisan support of a congressional authorization to commit United States armed force abroad. This ongoing debate is exactly what the WPR is intended to facilitate. Insofar as the President and Congress enjoy overlap in their war powers as conferred by the Constitution, the WPR is in place to not limit their respective war powers, but to make sure that both the President and Congress live up to their responsibility of not acting entirely independent of the other branch. What is most problematic about the current debate is that there seems to be little justification for the President relying on the 2001 and 2002 Authorizations to Use Military Force in the first place—not only is ISIL narrowly linked to al-Qaeda,⁹⁶ but those Authorizations to Use Military Force were passed with the express purpose to combat the terrorist groups who conducted the September 11, 2001 attacks, not ISIL.

V. Strengthening the War Powers Resolution

The current debate regarding President Obama’s handling of ISIL in the context of the WPR highlights that perhaps the biggest hurdle to improving the WPR is that congressional leaders and the

93. *Id.*

94. *Id.*

95. For example, ranking Democrat on the House Intelligence Committee, Adam Schiff, indicated that “a new authorization should place more specific limits on the use of ground troops to ensure we do not authorize another major ground war without the President coming to Congress to make the case for one.” Carol Lee & Michael Crittenden, *Debate Opens on New War Powers: Obama Asks Congress to Back Islamic State Fight*, THE WALL STREET JOURNAL (Feb. 11, 2015), <http://www.wsj.com/articles/obama-asks-congress-to-authorize-military-action-against-islamic-state-1423666095>.

96. Al-Qaeda has all but separated themselves from the aggressive actions taken by ISIL in recent months. See Swati Sharma, *Islamic State Was Dumped by al-Qaeda a Year Ago. Look Where it is Now*, THE WASH. POST (Feb. 3, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/02/03/the-islamic-state-was-dumped-by-al-qaeda-a-year-ago-look-where-it-is-now/>.

executive branch have been unable to come to an agreement with respect to enacting mutually acceptable changes to the WPR.⁹⁷ This stems not only from tension between differing ideology in the area of foreign policy and war powers, but also a differing interpretation of what war powers the Constitution provides to Congress and the President respectively.⁹⁸ Still, it is important to highlight that the WPR “reinforces presidential self-restraint and serves as a constant reminder that policies involving the use of force overseas must garner support beyond the short-term.”⁹⁹

Perhaps the most important aim of the WPR is requiring the President to consult with Congress in “every possible instance.”¹⁰⁰ As Vance points out, this goal “is a contemporary reaffirmation of the Framers’ conviction that, while sometimes awkward and inconvenient, a system of political principles including especially ‘separation of powers’ and effective ‘checks and balances’ is a necessary precaution against the abuse of unfettered power in the hands of any one individual.”¹⁰¹ In this regard, Vance envisions the *consultation requirement*¹⁰² to mean:

1. Giving congressional leadership “*all information* about a placed action that is material to a judgment about its advisability;”
2. Providing congressional leadership information “sufficiently in advance of the planned action to permit a reasonable opportunity to absorb the information, consider its implication, and for a

97. This is not for a lack of trying—take, for example, the 104th Congress; Grimmitt points out that “President Clinton, in Presidential Decision Directive 25 signed May 3, 1994, supported legislation to amend the Resolution . . . to establish a consultative mechanism and also eliminate the [sixty] day withdrawal provisions. Although many agreed on the consultation group, supporters of the legislation contended the time limit had been the main flaw in the War Powers Resolution, whereas opponents contended the time limit provided the teeth of the Resolution. The difficulty of reaching consensus in Congress on what action to take is reflected in the fact that in the 104th Congress, only one measure, S. 5, introduced January 4, 1995, by then Majority Leader Dole was the subject of a hearing. S. 5, if enacted, would have repealed most of the existing War Powers Resolution. An effort to repeal most of the War Powers Resolution in the House on June 7, 1995, through an amendment to the Foreign Assistance and State Department Authorization Act for FY1996-97 (H.R. 1561) by Representative Hyde, failed (201-217).” See GRIMMETT, *supra* note 28, at 24.

98. See *supra* Part III.

99. Vance, *supra* note 30, at 90.

100. 50 U.S.C. § 1542 (emphasis added).

101. Vance, *supra* note 30, at 90.

102. 50 U.S.C. § 1543.

- judgment before irrevocable decisions are made by the President;” and
3. Providing congressional leadership the “opportunity to communicate its views to the President or at least to his closest advisors.”¹⁰³

While various recommendations have been made with respect to redefining the *consultation requirement*, none have been enacted.¹⁰⁴ With this in mind, it might prove beneficial to establish a consultation group to meet with the president when military action is being considered.¹⁰⁵ Implementing a more formal procedure by which the President is to go about consulting with Congress will provide a meaningful liaison between the President and Congress that will not only be more efficient but also provide for more meaningful dialogue. In addition, it might prove beneficial to improve consultation between the President and Congress by broadening the areas where consultation is necessary under the WPR.¹⁰⁶ This is particularly important in consideration of the modern makeup of *hostilities* abroad, such as the case with ISIL.

A second improvement would be to shorten or eliminate the time limitation under the congressional actions and procedures section of the WPR.¹⁰⁷ Under the WPR, United States armed forces are to be withdrawn within sixty days after a report is submitted to Congress by the President, assuming express approval is not granted by Congress.¹⁰⁸ Furthermore, the President is given an additional thirty days after the expiration of the sixty day period to withdraw armed forces from conflict.¹⁰⁹ Grimmatt points out that some

103. Vance, *supra* note 30, at 91.

104. *See id.*; *see also* GRIMMETT, *supra* note 28.

105. *See e.g.*, S.J. Res. 323, 100th Cong. (1988) (Proposed that the President regularly meet with a group of 6—comprised of the majority and minority leaders of the House and Senate, Speaker of the House, and Senate President pro tempore. Following a Presidential request from this group of 6, the President would the consult with a permanent consultative group of 18 members—consisting of the leadership as well as the ranking majority and minority members of the Committees on Foreign Relations, Armed Services, and Intelligence); *see also* H.R. 3405, 103rd Cong. (1993) (Proposed the establishment of a Standing Consultative Group within the Congress to facilitate improved interaction between the executive branch and the Congress with respect to the use of U.S. military force abroad).

106. *See* GRIMMETT, *supra* note 28.

107. 50 U.S.C. § 1544.

108. *Id.*

109. *Id.*

opponents of the WPR argue that this time frame is too long.¹¹⁰ The concern is that once United States armed forces have been committed to armed conflict for such a long period, it become strategically and politically more difficult for Congress to use the WPR in an effort to end Presidential commitments of United States armed forces abroad.¹¹¹ As an alternative, a shorter time period in which the President must comply would facilitate further consultation between the President and Congress, and ultimately give Congress better ability to curtail otherwise unilateral action taken by the President.¹¹²

An even more extreme alternative with respect to shortening or eliminating the sixty to ninety day time limitation¹¹³ would be to return to the original language of the WPR passed by the Senate before the WPR became law.¹¹⁴ This would require “*prior authorization*” for the introduction of forces into conflict abroad without a declaration of war except to respond or forestall an attack against the United States or its forces to protect U.S. citizens while evacuating them.¹¹⁵ In effect, this would eliminate the problematic sixty to ninety-day withdrawal requirement.¹¹⁶ Opponents of this view feel that such a strong limitation on Presidential action might not allow the needed speed or action and provide adequate flexibility in other circumstances.¹¹⁷ On the other hand, it is possible that the President could still take advantage of the *forestalling an attack* against the United States requirement.¹¹⁸

If nothing else, the WPR should be amended to include both a geographic as well as a temporal limit on all Authorizations to Use Military Force granted by Congress. In the context of the ISIL debate, one of the major concerns is that President Obama relied on the Authorizations to Use Military Force that were passed nearly fifteen years ago.¹¹⁹ Insofar as the WPR is in place to facilitate the President consulting with Congress before it commits United States armed forces abroad, it is counterintuitive to allow the President to

110. See GRIMMETT, *supra* note 28.

111. *Id.*

112. *Id.*

113. See 50 U.S.C. § 1544.

114. See GRIMMETT, *supra* note 28 (Senator Thomas Eagleton made this proposal in 1977; this proposal has been made several times since).

115. *Id.* (emphasis added).

116. *Id.*

117. *Id.*

118. *Id.*

119. 115 Stat. 224 (2001).

rely on outdated, and seemingly inapplicable, constitutional authorizations to start yet another conflict abroad.¹²⁰ Rather, the president should be required, under the WPR, to indicate some sort of time limitation in relation to the congressional authorization to use military force abroad—similar to the three year time limitation set up by President Obama in his draft proposal for AUMF against ISIL.¹²¹ By providing such a limitation, an amended WPR would further facilitate the consultation requirement that the WPR policy calls for.¹²²

Conclusion

While the United States Constitution divides war powers between the President under Article II, Section 2,¹²³ and to Congress under Article I, Section 8,¹²⁴ it is not always clear where the presidential war powers end and congressional war powers begin. In the wake of the Vietnam War, Congress passed the War Powers Resolution with the primary goal of facilitating a more cohesive effort between the President and Congress with respect to their war powers.¹²⁵ Specifically, the WPR set up a procedural mechanism calling for the President to consult with Congress before committing United States armed forces to long-term conflicts abroad. While a novel concept, the WPR has not proven to be as beneficial as its drafters envisioned—the recent conflict against ISIL highlights the WPR's short-comings. Realizing that any changes to the WPR are difficult, and inevitably political, this Note proposes various ways to strengthen the WPR.

First, the Note proposes that the consultation requirement of the WPR is redefined so as to require a team to serve as a liaison between the President and Congress. Second, this Note proposes that the withdrawal period be shortened from the current sixty to ninety day timeframe; in the alternative, the withdrawal period should be removed altogether—in this case the WPR should be amended so as to reflect the language provided by the initial Senate version of the WPR. Finally, this Note proposes that both a geographic limit as well

120. See *supra* Part V.

121. Draft authorization: *Authorization for Use of military Force against the Islamic State and the Levant*, THE WHITE HOUSE (Feb. 13, 2015), https://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf.

122. See 50 U.S.C § 1541.

123. See U.S. CONST. art. II, § 2.

124. See U.S. CONST. art. I, § 8.

125. See *supra* Part III.

as temporal limit be implemented so as to curtail the improper and long-standing use of “authorized” war powers—such as Obama’s reliance on the 2001 and 2002 Authorizations to Use Military Force as justification for his military action against ISIL.

These changes would significantly increase the viability of the WPR in the modern world. Moreover, these changes will better align the practice of using the WPR as a meaningful mechanism by which the President and Congress work together to make decisions regarding committing United States armed forces abroad.