

TAKING AMERICA TO WAR: WHO HAS THE POWER?

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Who has the power to take America to war? Thomas Jefferson thought that this question was firmly answered when the Constitution granted to Congress alone the power "to declare war" (Article I, Section 8). Jefferson believed that only the people, acting through their representatives in Congress, should have the power. But in another part of the Constitution, the president is designated "Commander-in-Chief of the Army and Navy of the United States" (Article II, Section 2). So although Congress has the formal power "to declare war," the president as Commander-in-Chief seemingly has the power to direct the armed forces at his will.

Throughout American history, Congress has declared war only five times. Only once, for the War of 1812, did Congress seriously debate whether or not to declare war. Yet there have been over 100 other occasions when American fighting forces were sent into combat situations. Each time the president acted on his own, using his authority as Commander-in-Chief of the military. In most of these situations, Congress accepted or endorsed the actions of the president.

The peak of presidential war-making has taken place in recent decades: the Korean War resulted in over 33,000 American combat deaths, and in Vietnam, nearly 50,000 died in combat. In neither of these cases did Congress vote to declare war, although they did approve the presidential action. Senator William Fulbright, Chairman of the Senate Foreign Relations Committee during the Vietnam War years, lamented in 1967: "The Congress has lost the power to declare war as it was written into the constitution. It has not been so much usurped as given away."

THE WAR POWERS ACT

As American war casualties escalated in Vietnam, Congress decided it was time to limit the war-making power of the president. Initiated by Senator Jacob Javitz and other members of Congress, the War Powers Act was passed by the House and the Senate on October 10, 1973.

The purpose of the War Powers Act (also known as the War Powers Resolution) was "to insure that the collective judgement" of both the president and Congress would determine when U.S. troops were to be committed to combat. To accomplish this, the law directs the president "in every possible instance" to "consult with Congress" if American soldiers are to be sent into a hostile situation. However, the law does not specify exactly who in Congress the president should consult. Neither does it specify whether Congress should voice its approval or disapproval of the president's proposed action.

In any event, after troops are actually committed to "hostilities or into situations where imminent involvement in hostilities is clearly indicated," the president is required by the law to submit a report to Congress within 48 hours. This report has to include an explanation of why the president decided to use the armed forces and an estimate of the "scope and duration" of the military action.

Finally, 60 days after the president submits a report to Congress, any troops still remaining in a hostile situation must be withdrawn unless Congress votes to continue the operation or declare war. The War Powers Act also gives Congress the authority to vote to end a military action at any time during the 60-day period.

President Nixon vetoed the War Powers Act. He claimed the bill was an unconstitutional invasion of the President's executive power as Commander-in-Chief of the armed forces, a violation of the "separation of powers" principle. Nevertheless, both houses of Congress overrode his veto by the required two-thirds vote on November 7, 1973.

Presidents since Nixon have generally agreed with him that the War Powers Act is unconstitutional and believed that the president is not bound by the law. However, since the Supreme Court has never been asked to rule on the law's constitutionality, presidents have treated it cautiously. In some instances they chose to voluntarily observe certain provisions of the War Powers Act. In other instances they ignored the law altogether.

In 1975, Gerald Ford ordered U.S. Marines to rescue an American merchant ship and crew captured by the Cambodian communists. He informed Congressional leaders before he ordered the Marines into combat, but he did not comply with the full requirements of the Act. Congress did not protest Ford's apparent disregard for the War Powers Act.

In November, 1979, Iranian student radicals took over the U.S. embassy in Tehran. After trying for five months to negotiate the release of American hostages held in the embassy, President Jimmy Carter ordered a secret military rescue mission. It failed when a helicopter accidentally collided with a transport plane. Carter did

not consult with Congress at all before the operation.

In September, 1982, the Lebanese government requested aid from foreign governments to send troops to keep the peace in its war-torn country. President Reagan joined with France and Italy and committed 1,200 Marines to take up positions at the Beirut airport, citing his "constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief." He did not consult with Congress or submit a report as spelled out in the War Powers Act because he maintained the mission did not involve combat, even though he believed the Marines had the right to return fire in self-defense. Congress took no action for almost a year, but then demanded Reagan observe the requirements of the War Powers Act. Reagan negotiated a compromise with Congress to keep the Marines in Lebanon for another 18 months, but still maintained that as Commander-in-Chief he could keep them there longer if needed. A few days after the compromise was passed, a terrorist bomber drove a truck loaded with explosives into the Marines' barracks, killing 241 of them. Public pressure increased to bring them home, and they were withdrawn within four months.

A few days after the bombing of the Marine barracks, Reagan again ordered U.S. troops into combat to invade the Caribbean island of Grenada. His stated reason was to rescue American citizens stranded there during a civil conflict. Several days of intense fighting against armed Cubans on the island resulted in 18 American military deaths. Reagan only told Congress of the invasion once it was underway, ignoring the provisions of the War Powers Act.

In January of 1991, President George Bush asked Congress for their support of military action against Iraq and its leader, Sadaam Hussein when they threatened to invade neighboring Kuwait. After vigorous debate, Congress gave its support of Operation Desert Storm. Fighting lasted less than a week with few American lives lost. President Clinton frequently used troops in peace-keeping, humanitarian missions into places like Haiti, Ethiopia, and Bosnia.

Unless the Supreme Court someday rules that the War Powers Act is constitutional, presidents are likely to continue to carry out military operations without consulting Congress in any meaningful way. As long as the use of combat troops is relatively quick and painless, Congress will probably yield to the president's judgment. However, the War Powers Act might still serve as a check on presidential war-making in those situations like Lebanon where American forces seemed to be engaged for an extended time with the potential for many casualties. After over 200 years, the power to take America to war is still not clear-cut.

ARGUMENTS FOR & AGAINST THE WAR POWERS ACT

FOR: by Jacob Javits (co-author of the War Powers Act, former U.S. Senator from New York)

AGAINST: by Barry Goldwater (former U.S. Senator from Arizona)

1. The War Powers Resolution of 1973 remains one of the firmest supports of our determination that the American people will decide their own fate.
 2. We cannot place the great questions of war or peace in the hands of a single human being, not even our president.
 3. [Nixon's] veto was overridden because of the urgent need of the people to establish some restraint on the presidency & to safeguard the constitutional responsibility vested in the Congress to declare war, a power to be exercised by the Congress alone without any presidential consent or signature.
 4. The resolution does not represent an effort to tie the president's hands or to deny him his rightful powers, as previous presidents have charged. Rather, the legislation provides the method by which the Congress and the president can render a collective judgment on the question of whether to risk war.
1. The War Powers Resolution is probably the most unconstitutional measure Congress has ever passed
 2. Congress should never attempt to impose an artificial time limit on the deployment of U.S. military units. It is the height of nonsense to tell forces who are shooting at you that no matter what they do, you will pull out by a certain date.
 3. Congress cannot be counted on to deal quickly with future problems as the need arises. Unlike the president, an assembly of 535 "secretaries of state" does not rush to decision.
 4. The entire course of practice under the Constitution from Washington to the current administration has demonstrated beyond any reasonable doubt that the existing forces of the United States in defense of U.S. citizens and the survival of our country, in reaction to foreign dangers, was and is vested with the president.