Modern American History (2023), **6**, 270–273
doi:10.1017/mah.2023.26

CAMBRIDGE UNIVERSITY PRESS

TAKE THREE: THE 1973 WAR POWERS RESOLUTION

The Unhappy Legal History of the War Powers Resolution

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In 1973, two years after President Richard Nixon expanded the U.S. war in Vietnam, sending ground troops to Cambodia and provoking massive antiwar demonstrations, the U.S. Congress passed the War Powers Resolution (WPR) over Nixon's veto. Congress sought to roundly reject the idea that the president has primary power over committing the nation to war. Lauded by critics of unilateral presidential war power, the WPR was a political success at the time, but it has been a legal failure. In spite of its enactment, presidential war power has expanded ever since. Presidents value congressional authorization for war as a political message of national unity, but behind the scenes their lawyers have circumscribed the degree to which congressional action is required.[1]

The path to conflicts over the war powers was laid when the U.S. Constitution was drafted. In the Constitution's text, war powers are divided. Congress has the constitutional power to declare war, and the president is commander in chief. The division of authority led constitutional scholar Edward Corwin to argue that the Constitution is "an invitation to struggle" over the foreign affairs power. Before World War II, presidents often sent troops to engage in conflicts without a war declaration, but these were more limited deployments until President Harry S. Truman ignored Congress's role at the outset of the Korean War, setting a precedent that tremendous destruction could be authorized by the president alone. Congress authorized the war in Vietnam with the Gulf of Tonkin Resolution (GTR), which granted President Lyndon B. Johnson war power so broad the president compared it to "grandma's nightshirt. It covered everything." Johnson and his successor Richard M. Nixon relied on that resolution to prosecute a brutal but unsuccessful war in Vietnam, and to expand U.S. military action into Cambodia and Laos.[2]

With the GTR, Congress handed both presidents broad and amorphous authority for war, but mounting U.S. casualties, news of U.S. atrocities, and growing antiwar protest generated pressure and political momentum to rebalance the war power. The WPR requires that unless there is an attack on the United States or U.S. territory, the president's commander-in-chief power to send U.S. forces into harm's way can be exercised only pursuant to a war declaration

[1]John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton, NJ, 1995), 48–9; Carolyn Woods Eisenberg, *Fire and Rain: Nixon, Kissinger, and the Wars in Southeast Asia* (New York, 2023), 156–74; Matthew C. Weed, "The War Powers Resolution: Concepts and Practice," Congressional Research Service, Mar. 8, 2019, 7–10, https://sgp.fas.org/crs/natsec/R42699.pdf (accessed Mar. 30, 2023).

[2]U.S. Const. art. I, § 8, cl. 11; U.S. Const. art. II, § 2, cl. 1; Edward S. Corwin, *The President, Office and Powers, 1787–1984*, 5th rev. ed. (New York, 1984), 201; Mary L. Dudziak, "The Gloss of War," *Michigan Law Review* (forthcoming 2023) (prepublication copy available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4049263); Fredrik Logevall, *Choosing War: The Lost Chance for Peace and the Escalation of the War in Vietnam* (Berkeley, CA, 1999), 205.

or specific statutory authorization. It also requires the president to notify and consult with Congress when force is deployed.[3]

Soon after its enactment, the question of what, exactly, the WPR prohibited presidents from doing came up as the U.S. was withdrawing from Vietnam. President Gerald Ford wanted to send U.S. troops back to Saigon to help evacuate American civilians and others who were at risk due to their association with the U.S. Was that legal? On April 12, 1975, U.S. Assistant Attorney General Antonin Scalia (who would later become a Justice of the United States Supreme Court) wrote an Office of Legal Counsel (OLC) opinion addressing, in part, whether the WPR posed a barrier. Section 2 (c) of the resolution "clearly prevented" Ford's proposed action, Scalia wrote, but then he opined that this provision merely stated Congress's interpretation of the Constitution. Meanwhile Section 8 provided that "nothing in this joint resolution … is intended to alter the constitutional authority of the Congress or of the President." The president *had* Constitutional authority to evacuate American civilians, Scalia wrote. Because the WPR's facial limitation differed from the administration's interpretation of the president's constitutional power, according to Scalia it had no force. His argument rested, in part, on the principle that a statute cannot revise the scope of constitutional power. Legal scholar Oona Hathaway suggests that "there's a good case to be made that this memo marks the beginning of the end of the War Powers Resolution." In spite of its importance, the memo has only recently been made public through settlement of a Freedom of Information Act lawsuit. Because of executive branch secrecy, Congress was unaware of this opinion and others, and therefore unable to respond with corrective legislation.[4]

Although Executive Branch curtailment of the War Powers Resolution would continue, Congress is not without significant war powers, particularly the appropriations power and the power to authorize a military draft, which enable Congress to co-produce war authority, or to cut back on what a president can accomplish. Congress also has power to investigate and hold hearings. The Senate Foreign Relations Committee's Fulbright Hearings in 1971, for example, exposed brutal U.S. actions in Vietnam, and featured proposals from members of Congress to limit presidential unilateralism. This helped legitimize dissent and led eventually to the WPR itself. These congressional powers matter, but the most effective time to limit presidential war power is before military action has begun and troops are under fire. After that point, at least early in a war, Congress and the country usually rally behind the president and seek to support members of the military in harm's way. OLC opinions upholding the

[3]War Powers Resolution, Pub. L. 93-148, 87 Stat. 555 (1973). The WPR also requires the executive branch to terminate the use of armed forces within sixty days of notification if Congress has not authorized their continued engagement, or ninety days in certain circumstances. It provides that Congress can vote to require withdrawal of American troops by concurrent resolution, which would not allow for a presidential veto, but a concurrent resolution was found to be unconstitutional under a subsequent, unrelated Supreme Court ruling. *INS v. Chadha*, 462 U.S. 919 (1983).

[4]Office of Legal Counsel, "Memorandum Re: Use of Troops in Vietnam and Cambodia" (Apr. 12, 1975), Knight-FOIA-OLC Opinions on War Powers, https://www.documentcloud.org/documents/22277202-knight-foia-olc-opinions-on-war-powers#document/p64 (accessed Apr. 30, 2023). This OLC memo was declassified pursuant to the 2022 settlement in *Francis v. Department of Justice*, brought by the Knight First Amendment Institute at Columbia University. I was a plaintiff along with a small group of other scholars. "Newly Released Office of Legal Counsel Memos Shed Light on Government's View of War Powers, 1945–1993," Knight First Amendment Institute, Columbia University, Sept. 16, 2022, https://knightcolumbia.org/content/newly-released-office-of-legal-counsel-memos-shed-light-on-governments-view-of-war-powers-1945-1993 (accessed April 30, 2023); Charlie Savage, "U.S. Discloses Decades of Justice Dept. Memos on Presidential War Powers," *New York Times*, Sept. 16, 2022, https://www.nytimes.com/2022/09/16/us/politics/war-powers-justice-dept-president.html. In 1984, the Office of Legal Counsel reinforced this interpretation. Assistant Attorney General Theodore B. Olson wrote that "The Executive Branch has taken the position from the very beginning that § 2(c) of the WPR does not constitute a legally binding definition of Presidential authority to deploy our armed forces. The Department of State's position set forth in a letter of November 30, 1973 was that § 2(c) was a 'declaratory statement of policy.'" Office of Legal Counsel, 8 Op. O.L.C. 271 (1984).

https://doi.org/10.1017/mah.2023.26 Published online by Cambridge University Press

ability of presidents to unilaterally initiate armed conflict undermine Congress's role at the point it can have the greatest impact: before military action has begun.[5]

After the war in Vietnam, the Office of Legal Counsel continued its surgery on the WPR. In a major 1980 review of presidential power to use force without congressional authorization, the OLC argued that constitutional interpretation should be informed by the way presidents have exercised their powers. Substantive limitations on the president's broad power were "a function of historical practice and the political relationship between the President and Congress," wrote Assistant Attorney General John M. Harmon. "Our history is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval." Notwithstanding persistent criticism of presidential overreach, the OLC viewed the history of executive power grabs as evidence of the constitutional scope of the commander-in-chief power.[6]

In this important opinion, the OLC relied on the interpretive method referred to as "historical practice" or "the gloss of history." This approach is based on the idea that interpretation of the separation of powers should be informed by the way the presidents and Congress have historically exercised their powers. The methodology became a key feature of executive branch legal opinions well before it received serious scholarly attention. OLC reliance on the gloss of history meant that the fact that a president had done something became evidence of the next president's power to do the same thing. For example, Truman's action in the Korean War is not treated as an outlier, but as legal precedent for unilateral presidential war power, at least for conflicts not exceeding the scope of that massive and destructive war. Because gloss of history analysis is a form of *constitutional* interpretation, it trumped acts of Congress like the War Powers Resolution, undermining Congress's ability to pull back on the broadening range of executive power.[7]

If the War Powers Resolution was ineffective in placing limits on presidents' ability to unilaterally initiate the use of force, what could it do? The WPR has consultation and reporting requirements. Section 3 states:

> The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

Because the consultation is required *before* armed forces are deployed, and consultation was thought to require more than mere notification, members of Congress were surprised in April 1986 when told by Ronald Reagan's White House that "planes are in the air" to bomb

[5]Mariah Ziesberg, *War Powers: The Politics of Constitutional Authority* (Princeton, NJ, 2013); John Robert David, *Congress and the Cold War* (New York, 2006), 105–43; Marc J. Hetherington and Michael Nelson, "Anatomy of a Rally Effect: George W. Bush and the War on Terror," *PS: Political Science and Politics* 36, no. 1 (Jan. 2003): 37.

[6]Office of Legal Counsel, "Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization," 4A Op. O.L.C. 185 (1980).

[7]Although important works have been published on "gloss of history" analysis, the most important scholar of this methodology has himself noted the relative paucity of critical attention. Curtis A. Bradley, "Doing Gloss," *University of Chicago Law Review* 84, no. 1 (2017): 59, 66. The first significant scholarly examination of this method was Curtis A. Bradley and Trevor W. Morrison, "Historical Gloss and the Separation of Powers," *Harvard Law Review* 126, no. 2 (2012): 411. Works criticizing historical gloss include Alison L. LaCroix, "Historical Gloss: A Primer," *Harvard Law Review Forum*, 126 (2013): 75. Bradley's book-length examination of historical gloss is forthcoming. Curtis A. Bradley, *Historical Gloss and Foreign Affairs: How Governmental Practices Shape Constitutional Authority* (forthcoming, Harvard University Press). On the Korean War as historical gloss, see Dudziak, "The Gloss of War," 55–63; April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1 (2018).

https://doi.org/10.1017/mah.2023.26 Published online by Cambridge University Press

Libya. In response to criticism, State Department Legal Adviser Abraham Sofaer argued that the form of consultation was up to the president.[8]

The Reagan Office of Legal Counsel pushed its interpretation of presidential war and foreign affairs power to the outer limits. In a memo defending President Reagan's secrecy in communications and arms shipment to Iran, Assistant Attorney General Charles J. Cooper argued that the President's foreign affairs power was "presumptively exclusive." Presidential power was "virtually as broad as the national interest and as indefinable as the exigencies of unpredictable events," he argued. Because of this, "almost any congressional attempt to curtail his discretion raises questions of constitutional dimension." Statutes should be interpreted narrowly to protect "the President's constitutional independence." Statutes infringing on the president's conduct of foreign policy "would be constitutionally void."[9]

The Reagan Administration's arguments shocked lawyers at the time. Harvard legal icon Archibald Cox was "aghast" at the evisceration of the War Powers Resolution. The country seemed to have veered far from Corwin's idea of the Constitution as an invitation to struggle. Because Office of Legal Counsel opinions serve as precedent within the executive branch and are rarely withdrawn, each administration builds upon previous ones, with Democratic as well as Republican presidents favoring broad power. Resetting this imbalance requires more effort than Congress and the American people have thus far been willing to muster. As a consequence, the evisceration of the War Powers Resolution set the stage for twenty-first-century bipartisan presidential overreach. Instead of setting a boundary on unilateral presidential war power, law became a staging ground for ongoing, unrestrained war.[10]

[8]War Powers Resolution, 50 U.S.C. 33, Sec. 3; Arthur H. Garrison, "The History of Executive Branch Legal Opinions on the Power of the President as Commander-in-Chief from Washington to Obama," *Cumberland Law Review* 43, no. 3 (2013): 439–40.

[9]Office of Legal Counsel, "The President's Compliance with the 'Timely Notification' Requirement of Section 501(b) of the National Security Act," 10 Op. O.L.C. 159, 162, 170 (1986).

[10]Michael J. Glennon, "Mr. Sofaer's War Powers 'Partnership,'" *The American Journal of International Law* 80, no. 3 (July 1986): 584, 585; Charlie Savage, *Power Wars: The Relentless Rise of Presidential Authority and Secrecy*, rev. ed. (New York, 2017); Kelly A. McHugh, "At War with Congress: War Powers Disputes during the Trump Administration," *Democracy and Security* 18, no. 3 (Dec. 2022): 228. On the role of lawyers, see Oona Hathaway, "National Security Lawyering in the Post-War Era: Can Law Constrain Power?" *UCLA Law Review* 68, no. 1 (2020): 2-102. For different perspectives on the contemporary state of war powers and forms of constraint, see Tess Bridgeman and Stephen Pomper, "Policy Roundtable: The War Powers Resolution," *Texas National Security Review*, Nov. 14, 2019, https://tnsr.org/roundtable/policy-roundtable-the-war-powers-resolution/#_ftn11 (accessed Apr. 30, 2023).

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