

Executive-Legislative Conflict over the War Powers Resolution

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Executive-Legislative Conflict over the War Powers Resolution in Iraq and Libya: A Bureaucratic Perspective

At the end of the 20th Century, presidential power in foreign policy had expanded substantially. After a decade of conflict in Vietnam and the changing nature of warfare in the late Cold War era, Congress recognised the need to curb the growing presidential monopoly on war powers and reassert its constitutional authority. It had become marginalised in foreign policy decision-making by the use of proxy wars and military 'advisors' avoiding congressional approval, growing intelligence apparatus, and the rise of the national security state. This stand necessitated consideration of the need for urgent responses to unforeseen hostilities balanced against the maintenance of an effective power of congressional oversight. As such, the War Powers Resolution of 1973 (WPR) was the subject of intense debate over several sessions of Congress before both houses could agree on its intent, flexibility, and constitutionality (Spong 1975, 826-8), and has become a symbol of congressional resurgence against an imperial presidency.

This essay will outline the principles of the WPR and the intra-governmental conflict it has caused. Using the bureaucratic model of foreign policy analysis, it will examine the power politics in executive-legislative relations and seek to establish the extent to which the resolution is an effective oversight mechanism for Congress. Allison and Zelikow (1999, 4) describe this method as establishing "which results of what kinds of bargaining among which players yielded the critical decisions and actions." The Iraq War (2003) and the Libyan Revolution (2011) provide contrasting examples of congressional action against the use of force in conflicts which fit a similar presidential grand strategy. It will examine the consistencies in the two conflicts and the differing reactions by Congress, analysing how the WPR affects decision-making and intra-governmental bargaining, and whether it enables legislators to promote their policy images successfully. It will then draw conclusions on the role and relevance of the WPR consistent with these findings.

Principles of the Resolution

The resolution has three basic requirements: that entrance into hostilities or foreign territory anticipating combat is reported to Congress within 48 hours; that a joint resolution of Congress is issued within a 60-day period; and if this was not achieved, assets are withdrawn within 30-days (WPR 1973, §§1543-4). The resolution sought to create a line of demarcation in executive-legislative relations setting out precisely the extent of presidential authority to conduct military operations without a declaration of war, and the circumstances by which it would be regulated. This would combat the rise of what Schlesinger (1973) described as the 'imperial presidency': the usurpation of constitutional authority by the presidency from Congress, a very real threat in a globalised nuclear world where the changing nature of war requires more immediate and strategic responses. It is a debate which has dominated the interpretation of foreign policy powers for decades since.

Nixon's veto of the resolution explained that it would give Congress the ability to "handcuff every future president" and prevent effective responses to imminent crises, "jeopardis[ing] America's] role as a force for peace" (Nixon,

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1973). In practice presidents have continued to engage in controversial and costly military conflicts with no more than passive resistance from Congress. Between the implementation of the resolution and February 2012 some 132 reports were submitted by the president to Congress of which the majority were under Bill Clinton (66) and George W. Bush (39) (Grimmett 2012, 14). This demonstrates the progressive growth in presidential imperialism, the decline of congressional power and its entrenchment in the political system.

The conflict which has evolved in foreign policy-making as a result can be extensive. While evidence points to the inefficiency of the WPR in practical terms Congress can place powerful limitations on presidential actions. With the power of the purse and treaty ratification the purview of Congress, the president can be subject to a host of domestic pressures. However, the rise of the doctrinaire foreign-policy president has given that office much greater responsibility for grand strategy than it theoretically holds. The imperial appropriation of powers from Congress both explains why the WPR exists and why it can be highly ineffective.

It is possible to understand this conflict between institutions using the bureaucratic model of foreign policy analysis. This framework holds that institutional powers are not divided but shared (Neustadt 1960, 33). The methods by which actors are able to manipulate this power determine their success in achieving desired foreign policy outcomes. It predicts that as a result of this vying for power a political process of consensus-building, persuasion, negotiating and bargaining takes place within government in a manner similar to the relationships between states in the international arena (Schilling 1962, 22; Allison and Zelikow 1999). This approach seeks to explain foreign policy by placing emphasis on the domestic influences of institutions on policy decisions above foreign actors.

Huntington (1961, 135) highlights the need to analyse the role of Congress in decision-making due to the broader range of interests it represents, despite its reluctance to veto presidential actions. When many analytical models place undue influence on president, this approach is especially useful to analysing the WPR and congressional influence on foreign policy. By understanding the policy preferences of actors as related to their respective institutions, policy decisions as the result of negotiations and consensus-building and the importance of the persuasive power of interested policy actors (Art 1973, 472-4; Allison and Zelikow 1999, 256-7), it is possible to offer a broad multifactorial analysis of the domestic interplay in executive-legislative relations in foreign policy.

The two case studies which follow display contrasting approaches to the WPR and the role of Congress in decision-making. The first demonstrates the weakness of Congress in effectively scrutinising policy decisions by offering too broad support for presidential actions, while the second shows that when legislators actively oppose an intervention they are realistically powerless to prevent it. Both case studies display a fundamentally different attitude toward a broadly consistent set of policy aims by the president, giving the opportunity to analyse the role and relevance of the WPR and whether it acts as an effective oversight mechanism to presidential overstretch.

Liberation in Iraq, 2003

After 9/11 the US found itself fighting a war with an intangible enemy. As such, it sought to create links between the terrorists and 'rogue' states, first in Afghanistan with the Taliban regime and later in Iraq. The Bush administration accused Saddam Hussein of harbouring Al Qaeda fugitives and aiding them to achieve mutual interests (Bush 2002). The administration argued this created an imminent threat to US security justifying the pre-emptive use of force. However, in a 2002 speech President Bush described the fundamental issue as the type of regime in Iraq; this needed to be corrected to preserve US security and regional stability in the Middle East (Bush 2002).

Consistent with a grand strategy of liberal peace, the administration sought to quell anti-American Islamic extremism through democratisation. It was recognised that some states propped up by the US, such as Iraq, Liberal peace recognises that the culture of freedom and democracy tends to enhance cooperation between states and therefore security (Doyle 1983, 213). However, it is precisely this culture which can lead to hostilities with non-democratic states. Liberal theory suggests that states should be free from interventions, but in practice liberal states often pursue a strategy of democratisation to protect and enhance their security (Doyle 1983b, 325-6). During this period the Bush administration promoted the idea of US primacy, a concept based on the belief that liberalism can be applied effectively abroad and is in the interests of both the US and the international community (Dueck 2004, 516). Primacy

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adds the necessary aggression and interventionist policy preferences to the liberal peace strategy which drove the administration to war with Iraq (Dueck 2004, 531).

While Congress held reservations about the intervention, there was broad public support for action. An extensive public opinion campaign made effective opposition difficult (Ackerman and Hathaway 2011, 460-2). Congress swiftly permitted the president to use force for the protection of US interests as long as Iraq remained a threat. It also mandated the implementation of all relevant United Nations Security Council (UNSC) resolutions, envisaging a broader role for the international community. This demonstrates a strategic decision by Congress to encourage the president to cooperate with the United Nations (UN), creating an additional method of oversight and potentially restraining presidential action. Here the WPR was not directly invoked as Congress made no challenge to presidential authority and the administration complied fully with the resolution. The president had a clear grasp on power in the decision-making process, so Congress sought to extract concessions through the international community rather than voicing direct opposition to a popular war.

After the regime fell and no WMDs were found questions were raised over the legality of the invasion altogether given no immediate threat existed and the UN had not mandated the intervention. As a result the reputation of the administration suffered and the international community lost faith. However, the passage of UNSC Resolution 1483 mandated the continuation of the coalition provisional authority to complete the process of democratisation in Iraq (Ackerman and Hathaway 2011, 464-5), allowing continued engagement consistent with the authorisation given to complete the president's mission (Grimmett 2012, 25) and offering it international credibility. Ackerman and Hathaway (2011) debate extensively the constitutionality of the arrangement and the extent of the 2002 resolution for authorising future engagements in Iraq.

As such, opposition arose in Congress in 2007 when the Bush administration entered into a bilateral executive agreement to maintain US forces in Iraq, circumventing the WPR. The *Congressional Oversight of Iraq Agreements Act of 2007* sought to prevent funding of the agreement and declare the Senate's opposition to any military arrangement with the government of Iraq. Whereas Congress had failed to have a significant influence on the initial authorisation of war, the drop in popularity enabled oversight to take place. The legislature's reluctance to extend opposition to the initial operation had reduced its ability to scrutinise effectively, but there was still opportunity to put pressure on the administration and project more constrained policy images which enhance the power of Congress. However, with the 2008 presidential election looming this opposition was quietly dropped and has not been subject to scrutiny under the Obama administration, perhaps predicting the president's future conflicts with Congress over war powers. Policy preferences are consistent with an actor's institutional position, explaining why key figures in the Obama administration who had taken part in this opposition to the war in Iraq later promoted the importance of the president as Commander-in-Chief and the key foreign policy actor (Allison and Zelikow 1999, 256).

Defining 'Hostilities': Intervention in Libya, 2011

After the damage the Bush administration caused to the legitimacy of US leadership as a result of alleged breaches of international law in the invasion of Iraq, Obama became preoccupied with the notion of international legitimacy. While successfully achieving UN Resolution 1973 to support the revolution in Libya by enforcing the No-Fly Zone through a joint NATO operation and meeting regularly with the Arab League, the president failed to address the constitutional considerations at home (Ackerman and Hathaway 2011b). This use of international institutions reinforced Obama's authority in waging a potentially illegal war by bringing the international community into the picture in an attempt to force the hands of legislators in Washington. This notion of legitimacy enhanced the president's executive power in foreign policy-making by aligning with institutions which shared his policy objectives and would therefore enable effective implementation.

After deploying assets, Obama gave notice to Congress of the intervention. However, when the Office of Legal Counsel (OLC) informed the president of the need to comply with the WPR if Congress requested withdrawal, he sought alternative opinions to exempt the intervention from congressional authorisation (Ackerman 2011). In a legislative power play the president publicly attempted to appropriate full war powers and marginalise Congress in order to achieve his policy preference unimpeded. During his testimony to the Senate Committee on Foreign

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Relations, State Department legal advisor Harold Koh argued that the limited scope and aims of the intervention neither met the definition of hostilities nor of war thereby offering the president full authority over the intervention (Koh 2011).

Despite this, precedent set as early as *Bas v. Tinny (1800)* asserted that 'imperfect' or 'limited' wars which did not commit the full resources of the US still required congressional approval, a position consistently supported in jurisprudence thereafter (Ackerman and Hathaway 2011, 453-7). As such the WPR mandated the president to consult with Congress on the engagement and adhere to its request if withdrawal was ordered. In rejecting the advice of the OLC, whose reputation as an independent legal advisor lends it substantial legitimacy, the president acted against established norms creating a political furor (Morrison 2011, 64). Despite latent support for the intervention from many senior Republicans (such as Sen. John McCain), they determined to hold the president to account (Savage and Steinhauer 2011). This attempted display of power by Congress is symptomatic both of its general relationship with the president after the election of the Republican majority in the House of Representatives in 2010 and of the clear presidential imperialism taking place.

A bipartisan resolution supporting the war passed the Senate in June 2011, limiting military action to prevent 'boots on the ground', but was rejected by the House citing concern over the constitutionality of the engagement and the president's attempts to bypass the WPR. In the same instance it also rejected proposals to cut funds from the operation despite its cost reaching almost \$1bn (Steinhauer 2011). Failing to exercise this key power of budgetary appropriation demonstrated the politicking taking place in Congress and the complexity of the decision-making process. Although Congress was trying to assert its authority and prevent the presidential usurpation of power, it found itself rife with indecision when a joint resolution could not be passed.

The intervention was governed by a similar approach to grand strategy to the Bush administration. While the concept of primacy may have been scrapped resulting in a more passive approach to international relations, the liberal peace strategy fuelled policy decisions on Libya. In order to enhance security and promote both political and economic interests abroad, democratisation was a key feature of the intervention. However, the decision-making process was quite different. With divided opinion between the executive and legislature leading to no clear policy outcome, the process of bargaining and negotiation had failed. In this instance the bureaucratic model offers a corollary to its core position: as chief diplomatic representative the president ultimately wields the most power when decisions cannot be reached (Halperin and Kanter 1973, 6-7; Art 1973, 475).

It is worth consideration that the initial war in Iraq may have caused a ripple effect which ultimately resulted in the wave of democratisation in the Arab world during 2011-2. The liberalisation of regimes experienced during the Arab Spring is comparable to Huntington's idea of democratic waves (Huntington 1991, 15-6). While there is still time for a reverse effect to occur (as in Latin America during the 1960s (Huntington 1991, 19)), this explains the intervention in Libya as a direct consequence of the invasion of Iraq. Justifying the decision to invade, Bush said that "a liberated Iraq can show the power of freedom to transform that vital region" (quoted in Dueck 2004, 531), demonstrating the liberal peace strategy and his intent to enhance US security through the democratisation of the Middle East. By this measure the intervention in Libya – while a marked departure from the head-first approach of the Bush administration in Iraq – was consistent with a grand strategy which can be seen practiced as early as the 1970s (Huntington 1991, 93-5). The congressional opposition suggests inconsistencies in responses to war and puts the relevance of the WPR into question. As Congress ultimately mandated the use of force in both theatres, the WPR stagnates as a key component of the congressional arsenal against a powerful president.

The Decline of Congress

The contradictions in congressional challenges to the president's authority under the WPR show definite decline in power evidenced which enables the president to enact policy decisions without effective oversight from the legislature. While presidential grand strategy remains broadly similar through both case studies, Congress appear unable to maintain a consistent approach to foreign policy. Instead it is constrained by a combination of partisan politicking and other domestic pressures beyond the executive-legislative bargaining which the resolution seeks to encourage. Whether through campaign financing, authoring legislation, or bargaining over strike action, politicians

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can become embroiled in complex relationships with lobbyists and special interests undermining the effectiveness of the legislative agenda of Congress. Especially in election years, intra-governmental conflict can become heated. The relationship between the president and the opposition party in Congress created the inflammation surrounding the legality of the Libyan intervention and could have led to the end of US engagement if sufficient pressure were applied.

Epistemic communities of 'experts' and practitioners seek to influence policy-makers in both branches of government to take certain courses of action identified with their particular professional interests and capabilities (Jacob and Page 2005, 108), often including officials in government agencies at both domestic and international level. Clear examples can be found during the preparations for the invasion of Iraq where CIA intelligence had a definitive influence on the administration's decision to go to war (Pillar 2006). The notion of 'iron triangles' expresses this relationship between legislators, special interests and bureaucrats working to influence the policy process for mutually beneficial arrangements (Jordan 1981, 99-100); they are common across policy subsystems but their entrenchment in foreign policy especially facilitates the growth of presidential power and its development as a norm.

The bargaining and negotiating described by the bureaucratic model is influenced to a great extent by domestic pressures on both Congress and the president, resulting in conflict and indecision as demonstrated clearly in the Libya case study, leading to a need for presidential leadership in decision-making. The WPR is intended to prevent such a situation and afford Congress a mechanism by which it can reign in the president and ensure that its position at the negotiating table is maintained. However, the relevance of the resolution is called into question when it fails to be implemented effectively. As the cases discussed show, executive-legislative conflict in foreign policy decision-making remains a power struggle, but the outcome is increasingly a foregone conclusion.

Conclusion

The deference toward presidential opinion which Congress exhibits in foreign affairs imposes a severe limitation on its ability to engage in effective oversight of executive actions. The ambiguity in the constitutional division of powers between the two branches inevitably leads to appropriation by one from the other, creating the imperial presidency. In foreign affairs there is now little scope for congressional intervention where decisions are made informally with foreign leaders, ambassadors are increasingly reduced to little more than cultural representatives, and the political pressure to pass defence budgets becomes insurmountable. It is no longer realistic to use traditional budgetary and approval mechanisms to constrain a charismatic and popular president in times of war.

The policy process should be an arena of conflict between the executive and legislature with each branch attempting to gain power and influence over the decision-making process and project their preferred policy images. However, both case studies show that the leadership of the president in times of crisis has become an irreversible norm, a feature which the bureaucratic model also predicts when indecision occurs in foreign policy issues further marginalising the role of Congress. While conflict does exist when Congress attempts to save face and stand up to the imperial appropriation of powers by the Commander-in-Chief by invoking the WPR, this has become ineffective. The WPR does not provide the necessary mechanism for oversight, especially when presidents attempt to circumvent compliance. In the post-9/11 era Congress has failed to arrest the growth of the imperial presidency in foreign policy, rendering the WPR little more than a symbolic declaration of lost power.

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