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A stylized world map in shades of blue and white, overlaid on a grid of latitude and longitude lines. The map is centered on the Atlantic Ocean.

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THE WAR POWERS RESOLUTION AND PUBLIC OPINION

Gregory Noone

THE WAR POWERS RESOLUTION AND PUBLIC OPINION

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This essay focuses on the 1973 War Powers Resolution (WPR) and the impact of public opinion. Over the last forty years it might best be described as “political cover” for Congress. It allows Congress to abdicate its role in making decisions that might ultimately prove unpopular with voters. Congress may seek adherence to the WPR when there is disagreement among the elite. But more often than not there are few calls for a WPR. There are electoral disincentives for confronting the president over foreign policy. However, research indicates that the WPR appears to have impacted the behavior of presidents because presidents have rarely used force for more than sixty days without congressional authorization.

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I. INTRODUCTION

The 1973 War Powers Resolution (often alternatively referred to as the War Powers Act—its title in the Senate version of the law) has been described as constitutionally unnecessary as well as a “fraud” and “feckless.”¹ But over the last forty years it might best be described as “political cover” for Congress.

Jack Goldsmith describes the phenomenon of policy approval in Washington D.C. in the political context. Such as when President George W. Bush did “soft things” like releasing detainees from Guantanamo Bay and trying suspected terrorists in civilian courts in the United States. The Democrats liked the policy and the Republicans liked the president. Whereas, when President Barack Obama does “hard things” such as using unmanned aerial vehicles (also known as “drones”) for targeted killings in Yemen and Pakistan, the Republicans like the policy and the Democrats like the president. Both of these concepts are rooted in partisanship for at least one side in each scenario. With that said, playing against type has a long history in American politics. Only a hardline anti-Communist such as President Richard M. Nixon could go to China. President William J. Clinton succeeded in welfare reform, and President George W. Bush reshaped education at the local level with No Child Left Behind.

But partisanship does not necessarily hold true when the president uses force that would clearly fall under the rubric of the War Powers Resolution (WPR). The partisanship angle of this issue requires an examination of congressional support for presidential use of force. In other words, does congressional support simply follow partisan lines? Through an examination of polling data, the results indicated that congressional behavior was not based on partisanship but more on tracking the public opinion of the American people. With a few outliers on each end of the spectrum, such as Congressman Dennis Kucinich (D-Ohio) and Congressman Ron Paul (R-Texas), most of Congress will support the president’s use of force regardless of party so long as the polling data indicates strong public support.

Therefore, Congress’ action is more closely linked to public opinion than party affiliation. This is not a surprise to anyone who follows politics, *but* use of force decisions involve sending men and women into harm’s way. One would hope such decisions are made because of principled positions of leaders as opposed to followers with their fingers in the air.

1. H.R.J. Res. 542, Pub. L. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1548). For a comprehensive history of the War Powers Resolution see the accompanying articles in this publication by Professor Robert Turner, Professor Michael Newton, and former Department of State lawyer John Crook.

Congress *may* seek adherence to the WPR when there is disagreement among the elite (*i.e.*, the president, politicians, media, intellectuals, experts). But more often than not there are few calls for a WPR, and the leadership and members in both parties are happy to let the president go on his own. However, when public opinion, as demonstrated through national polls (and arguably through constituent contact, which is very difficult to measure and of which very little data is available), is opposed to the use of military force abroad the likelihood of calls for a WPR increase. This is a bit of a “chicken or an egg” issue because some researchers argue that a consensus of elite opinion forms and guides public opinion and not the other way around.² Unfortunately there isn’t any solid evidence, but it is doubtful that the vast majority of politicians in Congress have a desire to be out of step with their constituents—especially Representatives.

In general, the more complex the issue and the more unified elites are about the appropriate policy response, the less likely public opinion will oppose and constrain the policy-making elite. But when the facts of the issue are relatively easy to grasp and elite opinion is divided, then public opinion may wield significant influence and operate as an important constraint on policy making.³

For example, the elites and the public both supported humanitarian relief in Somalia in the summer of 1992. However, elite-level disagreement arose over the next year as the mission there evolved from easy to understand humanitarian relief to complex offensive operations against warlords. Public support for the mission eroded by October 1993 and fell by another ten points after eighteen Army Rangers were killed in Mogadishu.

Frankly, Congress is happy to let the president take singular responsibility (*i.e.*, pay any potential electoral price) for the use of force. However, time *always* diminishes U.S. public support for military action overseas. No matter how popular an exercise of American power may be at the beginning, support will erode. The only question is how quickly.

2. See James Burk, *Public Support for Peacekeeping in Lebanon and Somalia: Assessing the Casualties Hypothesis*, 114 POL. SCI. Q. 53, 60 (1999) (explaining that public opinion is shaped by the “views of elites whose judgments and opinions are broadcast electronically and reported in print”). See also Adam J. Berinsky, *Assuming the Costs of War: Events, Elites, and American Public Support for Military Conflict*, 69 J. POL. 975, 975 (2007) (arguing that political elites determine if the public will rally to war).

3. Burk, *supra* note 2, at 60.

The duration of the conflict and the number of casualties directly impacts the level of support. For example, support at the start of the Korean War in June 1950 was at 78% and a majority of Americans supported it after two months.⁴ However, by January 1951, as casualties mounted, 49% of the American public thought the war was a mistake.⁵

More recently, United States action with NATO in Libya garnered a 47% approval versus 37% disapproval on March 21, 2011.⁶ However, by June 22, 2011, the numbers had flipped with only 39% of the American people approving and 46% expressing disapproval. This immediate drop in support was especially quick since there was not a single U.S. combat casualty or any boots on the ground.⁷

When there is contentious debate and public opinion is split prior to the commencement of hostilities, it quickly coalesces once the shooting starts. For example, prior to the 1991 Gulf War only 55% of the American public supported going to war, but as soon as the campaign kicked-off the support number rose sharply to 79% at the beginning of the air war and reached 84% shortly thereafter.⁸ The same happened prior to the Iraq War in 2003 as support hovered around 57% but quickly rose to 76% once the war commenced.⁹

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4. Steve Crabtree, *The Gallup Brain: Americans and the Korean War*, GALLUP (Feb. 4, 2003), <http://www.gallup.com/poll/7741/gallup-brain-americans-korean-war.aspx>.
 5. *Id.*
 6. Jeffrey M. Jones, *Americans Approve of Military Action Against Libya, 47% to 37%*, GALLUP (Mar. 22, 2011), <http://www.gallup.com/poll/146738/americans-approve-military-action-against-libya.aspx>.
 7. Foreign wars aren't the only thing that loses support over time. In a Gallup poll conducted September 7–10, 2001 less than 1% of Americans viewed terrorism as the country's most important problem. After September 11, 2001, that number spiked to 46%, receded to 11% on the fifth anniversary, and by the nine year mark was back below 1%. Frank Newport, *Nine Years After 9/11, Few See Terrorism as Top U.S. Problem*, GALLUP (Sept. 10, 2010), <http://www.gallup.com/poll/142961/nine-years-few-terrorism-top-problem.aspx>.
 8. Frank Newport, David W. Moore & Jeffrey M. Jones, *Special Release: American Opinion on the War*, GALLUP (Mar. 21, 2003), <http://www.gallup.com/poll/8068/special-release-american-opinion-war.aspx>. In examining all interstate military conflicts from 1945 to 2001 researchers discovered that UN Security Council support significantly increased support among the American public for the president's proposed use of force. See Terrence L. Chapman & Dan Reiter, *The United Nations Security Council and the Rally 'Round the Flag Effect*, 48 J. CONFLICT RESOL. 886, 893 (2004).
 9. Newport, Moore & Jones, *supra* note 8.

Dramatic, sharply focused events which involve Americans placed in harms way [sic] on foreign soil are part of a class of occurrences known as rally events, so named because they typically cause the American public to “rally around the flag” and usually result in increased job approval ratings for the sitting president.¹⁰

Support dissipates over time as the percentage of those supporting the conflict invariably decreases and the conversation turns to asking Americans if the war was a mistake. At the beginning of the Iraq War only 27% thought it a mistake, but by July 2005, 53% of Americans felt it was a mistake sending troops to Iraq.¹¹ By March 2006, 60% of Americans stated that the Iraq War was not worth it, and that number held steady in 2009 at 58%.¹²

For most of its duration a majority of Americans believed the Korean War was not a mistake. Whereas from August 1968 onwards a majority of Americans consistently stated the Vietnam War was a mistake.¹³ By May 1971, that number rose to two-to-one in opposition.¹⁴ With that said, most Americans believed Iraq was a mistake within fifteen months of its start whereas it took more than three years for a majority of Americans to feel Vietnam was a mistake. In contrast, less than 10% of Americans felt that the

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10. Frank Newport, *Clinton Receives Record High Job Approval Rating After Impeachment Vote and Iraq Air Strikes*, GALLUP (Dec. 24, 1998), <http://www.gallup.com/poll/4111/clinton-receives-record-high-job-approval-rating-after-impeachment-vot.aspx>.
 11. Frank Newport & Joseph Carroll, *Iraq Versus Vietnam: A Comparison of Public Opinion*, GALLUP (Aug. 24, 2005), <http://www.gallup.com/poll/18097/iraq-versus-vietnam-comparison-public-opinion.aspx>; Jeffrey M. Jones, *Special Analysis: Americans Divide into Four Grounds on Iraq War*, GALLUP (July 5, 2005), <http://www.gallup.com/poll/17164/special-analysis-americans-divide-into-four-groups-iraq-war.aspx>.
 12. *Iraq*, GALLUP, <http://www.gallup.com/poll/1633/iraq.aspx>; Frank Newport, *Americans Upbeat on Progress in Iraq, Afghanistan*, GALLUP (July 16, 2009), <http://www.gallup.com/poll/121727/Americans-Upbeat-Progress-Iraq-Afghanistan.aspx>. The portion of the public who supported the war the longest were overwhelmingly Republicans, white, Protestant, and frequent churchgoers. Frank Newport, *Protestants and Frequent Churchgoers Most Supportive of Iraq War*, GALLUP (Mar. 16, 2006), <http://www.gallup.com/poll/21937/protestants-frequent-churchgoers-most-supportive-iraq-war.aspx>.
 13. Crabtree, *supra* note 3; Newport & Carroll, *supra* note 11. January 30, 1968 was the launch of the Tet Offensive. Tet was a military failure for the Viet Cong but it impacted Americans' view as to the progress of the war.
 14. Jeffrey M. Jones, *Opposition to Iraq War Reaches New High*, GALLUP (Apr. 24, 2008), <http://www.gallup.com/poll/106783/opposition-iraq-war-reaches-new-high.aspx>.

Afghanistan War was a mistake at the outset but that number has steadily risen and by April 2011 reached 42%.¹⁵

II. THE VIETNAM EFFECT

A direct result of the unpopular Vietnam War was the passage of the War Powers Resolution. It states in part:

The President, in every possible instance, shall 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, 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.¹⁶

The WPR is one of the most significant legacies of the Vietnam War. However, the Vietnam experience offered many lessons for political and military leaders and chief among them “was that the military could not deploy effectively or for very long without public support.”¹⁷ In fact, part of the often-quoted Weinberger doctrine requires “some reasonable assurance” of public support before committing armed forces abroad for combat.¹⁸ The WPR is the result of Congress’ desire to reassert its constitutional authority, but the concept of keeping an eye on public opinion during a foreign war has not been lost on politicians.

III. CONGRESS IS A DISTANT THIRD

Another reason Congress allows the president to lead when it comes to military action overseas is that Congress is a distant third behind the office of the presidency and the military in the public’s eye. In April 2011, President Obama’s highest approval rating was for his handling of foreign affairs and he has averaged 50% during his

15. Frank Newport, *Americans Divided on How Things Are Going in Afghanistan*, GALLUP (Apr. 8, 2011), <http://www.gallup.com/poll/147011/americans-divided-things-going-afghanistan.aspx>.

16. H.R.J. Res. 542, Pub. L. 93-148, § 3, 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1542).

17. Burk, *supra* note 2, at 53.

18. CASPAR W. WEINBERGER, *FIGHTING FOR PEACE* (1990). This concept is sometimes referred to as the Weinberger-Powell doctrine or the Powell doctrine.

first term.¹⁹ This is middle of the pack for presidents since the poll began. Obama's rating is higher than Reagan's and George W. Bush's, however it is narrowly behind Clinton's, but ultimately behind the elder Bush's 63% average.²⁰ In fact, since 2000, the American public has trusted the U.S. government, particularly the president, more with international problems than domestic.

In June 2011, a poll taken to assess the public's confidence in institutions the U.S. military received the highest rating at 78% (11% above its historic average of 67%).²¹ The presidency received a confidence rating of 35% (10% below its historic average), and Congress received a confidence rating of 12% (14% below its historic average).²² This poll has been conducted thirty-five times since 1973 and indicates that the military has been number one since 1989 (with the exception of 1997 when small business was added to the survey). An analysis of this annual survey indicates that the public's confidence level in the military is higher when it is engaged in military operations. In fact, the public overwhelmingly supports the military especially during conflict. Given Congress' low ratings it is clear why members of Congress do not want to appear to be anything other than supportive of the military.

"Opposing the use of force is no less risky domestically than it was before the [WPR's] passage."²³ There are "electoral disincentives for confronting the president over foreign policy."²⁴ There is a particular price to pay if members of congress attempt to constrain the executive by cutting off funding. Allegations of being unpatriotic or abandoning U.S. forces in the field will hurt re-election bids.²⁵ congressional votes for funding the use of force are usually overwhelming and decisive.

However, when public support declines, Congress is more likely to assert itself by maintaining that the president is violating the law (if the WPR is applicable) rather than reducing or eliminating funding.

19. Jeffrey M. Jones, *Obama Still Fares Better on Foreign Than Domestic Issues*, GALLUP (Apr. 1, 2011), <http://www.gallup.com/poll/146930/obama-fares-better-foreign-domestic-issues.aspx>.

20. *Id.*

21. Jeffrey M. Jones, *Americans Most Confident in Military, Least in Congress*, GALLUP (June 23, 2011), <http://www.gallup.com/poll/148163/americans-confident-military-least-congress.aspx>.

22. *Id.*

23. David P. Auswald & Peter F. Cowhey, *Ballotbox Diplomacy: The War Powers Resolution and the Use of Force*, 41 INT'L STUD. Q. 505, 506 (1997).

24. *Id.*

25. *See id.* at 511.

Congress uses the law as a shield against charges of being “unpatriotic.”²⁶

There is some good news for Congress. As much as the members are trying to follow the public, the public often has difficulty following them. In February 2007, when the national conversation was about a potential troop surge and timetables in Iraq, 70% of Americans stated that their Representative’s position on the war was in Iraq will be a factor in deciding their vote in the next congressional election.²⁷ However, 64% of those polled were unsure as to *exactly* what their Representative’s position on the war and more specifically President Bush’s plan to increase the number of troops in Iraq.²⁸ This lack of awareness proves useful because by 60% to 38% Americans opposed the troop surge, 57% to 40% believed Congress should limit the number of troops in Iraq, and 63% to 35% favored Congress setting a timetable for withdrawal.²⁹ Therefore, despite public opposition to a troop surge, President Bush went ahead, and Congress didn’t try to stop him because they were free to do as they please due to the public’s unawareness.

IV. THE PUBLIC WANTS CONGRESS TO APPROVE

“Do you think the president should or should not be required to get the approval of Congress before sending United States armed forces into action outside the United States?”³⁰ In November 1973 the response favoring congressional approval was 80% and in May 2008 it was an equally stark 79%.³¹ In fact, for the past thirty-five years there has been little change in this basic sentiment as an overwhelming majority of Americans believe that the president needs congressional approval *before* committing troops overseas. The American people want Congress to execute its constitutional duties, or in other words, do its job.

In February 1999, for example, 54% approved of a peacekeeping mission in Kosovo (40% disapproved), whereas 43% Americans

26. *See id.* at 515.

27. Frank Newport, *Majority Wants Congress to Set Limits on U.S. Troop Presence in Iraq*, in ALEC M. GALLUP & FRANK NEWPORT, *THE GALLUP POLL: PUBLIC OPINION 2007*, at 63–64 (2007).

28. *Id.*

29. *Id.*

30. Frank Newport, *Public Wants Congress to Approve Military Action, Bombings*, GALLUP (July 7, 2008), <http://www.gallup.com/poll/10865/8/public-wants-congress-approve-military-action-bombings.aspx>.

31. *Id.*

supported airstrikes and 45% opposed.³² However, 78% of Americans wanted President Clinton to seek approval from Congress.³³ In September 2002, 69% said congressional approval was necessary for an invasion of Iraq and 51% said Congress should not give unlimited authority to use military action against Iraq.³⁴ A CBS poll from that same month found 44% believed Congress was not asking enough questions, yet 22% believed Congress was asking too many questions, 16% about right, and 18% don't know.³⁵

Beyond the basic question of obtaining congressional approval, other specific scenarios polled in May 2008 indicate the desire for congressional approval remains strong with few exceptions.

Poll Question	Yes—the president needs congressional approval	No—the president shouldn't need congressional approval	No opinion
Do you think the president should or should not be required to get the approval of Congress before sending U.S. armed forces into action outside the United States? ³⁶	Nov. 1973: 79% May 2008: 70%	Nov. 1973: 18% May 2008: 28%	Nov. 1973: 3% May 2008: 2%

32. Mark Gillespie, *New Poll Shows Support for Peacekeeping Role in Kosovo*, GALLUP (Feb. 22, 1999), <http://www.gallup.com/poll/4060/new-poll-shows-support-peacekeeping-role-kosovo.aspx>.

33. *Id.*

34. Frank Newport & Lydia Saad, *Americans' View: U.S. Should Not Go It Alone in Iraq*, GALLUP (Sept. 24, 2002), <http://www.gallup.com/poll/6874/americans-view-us-should-alone-iraq.aspx>.

35. Jaime Holguin, *War with Iraq: Americans in No Hurry*, CBS (Feb. 11, 2009, 8:59 PM), <http://www.cbsnews.com/stories/2002/10/06/opinion/polls/main524496.shtml>.

36. FRANK NEWPORT ET AL., *WINNING THE WHITE HOUSE 2008*, at 429 (2009).

Do you think the president should or should not be required to get the approval of Congress before sending U.S. armed forces into action under each of the following circumstances? ³⁷			
If U.S. were attacked:	46%	53%	1%
If American citizens were in danger or in need of rescue abroad:	40%	58%	2%
To conduct a humanitarian mission in response to a natural disaster:	49%	50%	1%
If president did not expect a long combat operation:	76%	22%	2%
If president wanted to use Air Force or Navy planes to bomb suspected terrorists:	70%	28%	2%

V. THE PRACTICAL EFFECT OF THE WPR

There has not been a president since the WPR's passage that has accepted the constitutionality of the WPR. Although, President Obama has not stated that the WPR is unconstitutional as his predecessors have, he maintains that his administration's actions have been "consistent with" the WPR. When confronted with the situation in Libya and the use of U.S. military force, the Obama Administration instead took the position that WPR does not apply to Libya for a host of reasons.³⁸

37. *Id.* at 430.

38. Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 16, 2011, at A16 ("We are not saying the War Powers Resolution is unconstitutional or should be scrapped or that we can refuse to consult Congress. We are saying the limited nature of this particular mission is not the kind of 'hostilities' envisioned by the War Powers Resolution.").

However, research indicates that the WPR appears to have impacted the behavior of presidents because presidents have rarely used force for more than sixty days without congressional authorization. David Auerswald and Peter Cowhey examined conflicts with greater than 500 troops during “three periods of similar duration.”³⁹ During 1900–1925, the United States undertook five major conflicts without prior congressional approval whereby “fighting and subsequent occupation lasted from two years to nineteen years.”⁴⁰ During 1947–1972, there were eight major conflicts without prior congressional approval whereby fighting and subsequent occupation lasted from two and a half months to seven years. During both time periods the presidents’ use of force was not challenged.

After the passage of the WPR, as well as the American experience in Vietnam, there were fourteen conflicts without prior congressional authorization from 1973–1995. Ten were less than sixty days in duration and the remaining four resulted in congressional action. They were: 1983 Lebanon, 1992 Somalia, 1987 Persian Gulf reflagging, and 1990 Desert Shield. Auerswald and Cowhey state, “Our findings demonstrate that presidents respond to the War Powers Resolution by limiting the duration of international conflicts to avoid domestically costly battles with Congress as well as the international ramifications of domestic debate.”⁴¹

VI. CONCLUSION

Presidents rarely consult Congress before using force. However, it appears that presidents have adhered to the WPR timelines. If a president’s use of force is “swift or small scale” Congress acquiesces.⁴² Brief, focused military operations involving few casualties will result in favorable support for presidents. Longer conflicts are met with “either congressional threats or legislative action,” but only if the polling changes and it becomes an unpopular use of force.⁴³ It is unlikely that any calls for repealing the WPR will be answered. Simply put, the WPR allows the U.S. Congress political cover and the option to abdicate their role in making any decisions that might ultimately prove unpopular with voters during their next election.

39. Auerswald & Cowhey, *supra* note 23, at 518–19.

40. *Id.* at 518

41. *Id.* at 507.

42. *Id.* at 523.

43. *Id.*