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The War Powers Resolution-- A Dim and Fading Legacy

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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—
A DIM AND FADING LEGACY

John R. Crook

THE WAR POWERS RESOLUTION—A DIM AND FADING LEGACY

*John R. Crook**

The 1973 War Powers Resolution, adopted over the veto of a weakened President Nixon after the Vietnam War, has not fulfilled its supporters' hope of a stronger Congressional role in decisions involving U.S. uses of force. No administration has accepted its key provisions' constitutionality, and Congress has been unwilling or unable to perform the role it set for itself of approving or terminating the introduction of U.S. forces into hostilities. Hence, the Resolution has had only modest impact. Despite occasional debates regarding compliance, it has not materially affected successive presidents' decisions to use force. It seems likely to have less impact in the future, given Congress's broad authorization for the use of force following the 9/11 attacks and the changing nature of warfare, including the growing role of non-military actors, cyber warfare and other new forms of conflict, secret operations, and remotely piloted weapons.

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I. INTRODUCTION

I begin with a disclaimer. I am not a scholar of constitutional or national security law. For thirty years, I was employed in various legal capacities by the U.S. Department of State. Since then, I have edited the *American Journal of International Law's* section on Contemporary U.S. Practice Related to International Law for many

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years. I was also a military police lieutenant in the early 1970s, in a U.S. Army badly scarred by its long and painful experience in Vietnam.¹ Thus, I am familiar with debates about the War Powers Resolution.² All this has left me with a generally “pro-executive” bias in the recurring debates about the proper roles of Congress and the executive in national security matters.

I will not try to add to the discussion on the constitutional propriety of the War Powers Resolution, nor will I do much lawyerly parsing of the text. Instead, I will briefly describe how the Resolution has had only a modest impact over the last forty years and then suggest why I think it is likely to have even less significance going forward.

The War Powers Resolution was the offspring of an increasingly unpopular war and an increasingly unpopular presidency.³ As Professor Stephen L. Carter observed, it was “forced on a weakened President Nixon by a Congress brimming with confidence in the wake of the Watergate scandals.”⁴ Consider the timeline:

March 1971—The approval rating for U.S. Vietnam policy dropped to 41%, and approximately half of all Americans polled thought the war was “morally wrong.”⁵ First Lieutenant William Calley was convicted of murdering twenty-two civilians at My Lai by a court martial.

June 1972—The Watergate burglary.

January 23, 1973—Paris Peace Accords signed.

January 27, 1973—Secretary of Defense Melvin Laird announced the end of the draft.

Spring 1973—The Watergate hearings began.

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1. See MARVIN KALB & DEBORAH KALB, *HAUNTING LEGACY: VIETNAM AND THE AMERICAN PRESIDENCY FROM FORD TO OBAMA* 88–91 (2011).
 2. Pub. L. No. 93–148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§1541–48).
 3. See Michael J. Glennon, *Too Far Apart: Repeal the War Powers Resolution*, 50 U. MIAMI L. REV. 17, 18 (1996).
 4. Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 102 (1984).
 5. See Joseph Carroll, *The Iraq-Vietnam Comparison*, GALLUP (June 15, 2004), <http://www.gallup.com/poll/11998/iraqvietnam-comparison.aspx>; Anne Gearan, *AP-GfK Poll: Afghan War Support Drops to New Low*, THE GUARDIAN (UK), May 9, 2012, <http://www.guardian.co.uk/world/feedarticle/10234460>.

June 1973—Congress approves the Case-Church Amendment by wide margins, barring further military involvement in Vietnam, Laos, and Cambodia.

October 1973—Vice President Spiro Agnew resigned and pleaded guilty to criminal charges.

November 7, 1973—The War Powers Resolution was passed over President Nixon's veto.

May 1974—Congress began impeachment proceedings.

August 9, 1974—President Nixon resigned.

The War Powers Resolution is the product of a time when Congress was riding particularly high and the presidency was particularly weak.⁶ That unusual array of circumstances has not been repeated. In the ensuing years, no administration has accepted the constitutionality of the Resolution's key provisions.⁷ At the other end of Pennsylvania Avenue, Congress has not mustered the collective will to insist on full and timely compliance with the Resolution in a wide range of cases.⁸ From time to time, the Resolution has offered both Republican and Democratic presidents' political opponents an avenue to attack their compliance with particular policies or actions. Nevertheless, Congress has not shown itself willing or able to perform the role it set out for itself in Section 5 of the Resolution.⁹

6. See PETER W. RODMAN, *PRESIDENTIAL COMMAND: POWER, LEADERSHIP, AND THE MAKING OF FOREIGN POLICY FROM RICHARD NIXON TO GEORGE W. BUSH* 113–14 (2009).

7. During the Carter Administration, the Office of the Legal Counsel suggested in a paragraph that the Resolution's 60-day time limit passed constitutional muster. This view has not been repeated. See *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 196 (1980).

8. See John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1380–83 (1988); Eileen Burgin, *Congress, the War Powers Resolution & the Invasion of Panama*, 25 POLITY 217, 217 (1992).

9. Section 5(b) provides that, on receiving a presidential report that U.S. forces are being introduced into a situation involving actual or imminent involvement in hostilities, those forces must be withdrawn unless within sixty days, Congress declares war, specifically authorizes their use, extends the sixty-day period, or cannot meet because of an armed attack on the United States.

Section 5(c) provides that if U.S. armed forces are engaged in hostilities outside the United States without a declaration of war or specific congressional authorization, they shall be removed if Congress so directs by concurrent resolution (*i.e.*, a resolution not requiring approval by the

II. THE RESOLUTION IN PRACTICE

For the details of the often intricate interplay between Congress and various presidents under the Resolution, the best starting point is the detailed studies of past practice prepared by the Congressional Research Service of the Library of Congress.¹⁰ In the forty years since the Resolution was adopted over President Nixon's veto, there have been at least 136 reports filed "consistent with" the Resolution.¹¹ Only one, President Ford's report on the deployment of U.S. forces to recover the SS *Mayaguez* twelve days after the fall of Saigon in 1975, specifically stated that forces had been introduced into hostilities or imminent hostilities.¹²

While debates regarding compliance (or non-compliance) with the Resolution have arisen from time to time, the Resolution has not materially affected successive presidents' use-of-force decisions. I know of no case where a president, Republican or Democratic, refrained from utilizing U.S. military force solely because of the Resolution. In the forty years since its enactment, presidents of both parties have utilized U.S. forces in response to a wide array of challenges. I believe that, at most, the Resolution has affected these actions at the margins.

Successive presidents' uses of military force have been too numerous to detail here. There were few incidents involving use of U.S. forces on President Carter's watch, except for the failed raid to free hostages from Iran in 1980.¹³ President Reagan sent U.S. forces to Lebanon in 1982,¹⁴ contending that the circumstances did not constitute hostilities while also insisting that the Resolution was unconstitutional.¹⁵ As Professor Turner describes, this deployment of U.S. forces was unpopular in Congress and led to a rare instance of congressional action under Article 5 of the Resolution.¹⁶

President). See H.R.J. Res. 542, Pub. L. 93-148, § 5(b)-(c), 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548).

10. See, e.g., RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R41199, THE WAR POWERS RESOLUTION AFTER THIRTY-SIX YEARS (2010); RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE (2012) [hereinafter GRIMMETT, PRESIDENTIAL COMPLIANCE].
11. GRIMMETT, PRESIDENTIAL COMPLIANCE, *supra* note 10, summary.
12. See *id.* On the *Mayaguez*, see KALB & KALB, *supra* note 1, 29-40.
13. See KALB & KALB, *supra* note 1, 70-74.
14. *Id.* at 95; Ely, *supra* note 8, at 1381.
15. Carter, *supra* note 4, at 105.
16. See *Exercising Congress's Constitutional Power to End a War (Without in Process Breaking the Law): Hearing Exercising Congress's Constitutional Power to End a War Before the S. Comm. on the*

Faced with strong congressional resistance, the Reagan Administration and Congress struck a deal: the president did not concede the Resolution's constitutionality, but did sign a joint resolution authorizing U.S. Marines to remain for eighteen months for limited purposes and subject to reporting requirements.¹⁷ The deal was an uneasy one; Reagan's signing statement records his disagreement with Congress's determination that the War Powers Resolution had been triggered, arguing that "the initiation of isolated or infrequent acts of violence against United States Armed Forces does not necessarily constitute actual or imminent involvement in hostilities, even if casualties to those forces result."¹⁸

President Reagan withdrew U.S. forces from Lebanon before the end of the eighteen-month deployment after 241 Marines were killed in the October 23, 1983 bombing of their Beirut barracks.¹⁹ Although the United States had clear intelligence identifying the perpetrators of the bombing, the president did not order military action against them.²⁰ During Reagan's second term, the deployment of U.S. naval forces in the Persian Gulf (which included direct conflicts with Iranian forces) led more than 100 members of Congress to sue in pursuit of compliance with the Resolution; their action was dismissed on equitable and political question grounds.²¹ This was one of several unsuccessful actions brought by members of Congress during the

Judiciary 110th Cong. 249–50 (2007) (prepared statement of Prof. Robert F. Turner).

17. Multinational Force in Lebanon Resolution, Pub. L. No 98–119, 97 Stat. 805. Section 2(b) of the resolution recites a congressional determination that the presidential reporting requirement of section 4(a)(1) was operative: that is, that U.S. forces had been introduced into a situation of hostilities or imminent hostilities. The resolution then describes the authorization for continued presence of U.S. forces as "[c]onsistent with section 5(b) of the War Powers Resolution." On the deployment of U.S. forces to Lebanon, see Carter, *supra* note 4, at 105; KALB & KALB, *supra* note 1, at 103; RODMAN, *supra* note 6, 170–73.
18. Statement on Signing Multinational Force in Lebanon Resolution Into Law, S.J. Res. 159, Oct. 12, 1983, 22 I.L.M. 1391.
19. See RODMAN, *supra* note 6, at 170–73. The author was at risk of becoming another casualty on the night of the Beirut bombing, when he and a new, nervous, and fast drawing Marine Security Guard corporal had an unexpected encounter in the basement of the U.S. Embassy in The Hague.
20. See KALB & KALB, *supra* note 1, at 92–96, 104–11.
21. *Lowry v. Reagan*, 676 F. Supp. 333, 334 (D.D.C. 1987); see also Monroe Leigh, *Judicial Decisions*, 82 AM. J. INT'L L. 580, 596 (1988) (summarizing *Lowry v. Reagan*).

Reagan years invoking the War Powers Resolution. All of these cases were dismissed on preliminary grounds,²² as have other cases since.

The October 1983 U.S. invasion of Grenada²³ occurred at almost the same time as the Beirut bombing. The invasion offers an interesting illustration of how the Resolution can suddenly become less relevant when a president takes military action with broad public support. While most U.S. troops had left the island by the sixty-day deadline, a few remained, but there was little congressional inclination to make an issue of it.²⁴

President George H.W. Bush's December 1989 invasion of Panama and the removal of General Noriega from power also seem to have been popular with the U.S. public and with members of Congress²⁵—sufficiently popular to muffle any congressional concerns involving the War Powers Resolution. Although the invasion involved a large-scale deployment of U.S. forces into a situation involving firefights and U.S. casualties and was effected with little or no prior congressional consultation, Congress essentially remained silent. “[T]he administration's failure to abide by the law was almost never addressed publicly following the Panama invasion. Members introduced neither reactive legislation about Panama and the [War Powers Resolution] nor prospective proposals about the act.”²⁶

President Bush sent U.S. troops into Somalia at the end of 1992 for what was to have been a short-duration humanitarian mission, but it dragged on into the Clinton years, leading to the bloody October 1993 raid on General Aidid's headquarters, later memorialized in the book and film *Black Hawk Down*.²⁷ Thereafter, Congress enacted closely circumscribed authorizations for U.S. troops to remain for five months for limited force protection purposes.²⁸ Following its unhappy experiences in Somalia, the Clinton Administration was, for a time at

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22. See Lori Fisler Damrosch, *The Clinton Administration and War Powers*, 63 LAW & CONTEMP. PROBS. 125, 130 n.32 (2000).
 23. See KALB & KALB, *supra* note 1, at 92–94.
 24. See Carter, *supra* note 4, at 106–07.
 25. See Jane Kellett Cramer, “Just Cause” or Just Politics?: U.S. Panama Invasion and Standardizing Qualitative Tests for Diversionary War, 32 ARMED FORCES & SOC'Y 178, 194–95 (2006) (stating that “[a]fter the invasion, there was clear bipartisan support for President Bush's use of force” and “80 percent U.S. approval”).
 26. Burgin, *supra* note 8, at 233.
 27. See Michael Wines, *Mission to Somalia; Bush Declares Goal in Somalia to 'Save Thousands'*, N.Y. TIMES, Dec. 5, 1992, at 1.
 28. Department of Defense Appropriations Act, 1994, Pub. L. No. 103–139, § 8151, 107 Stat. 1418; National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103–160, § 1512, 107 Stat. 1547. See also KALB & KALB, *supra* note 1, at 169–71.

least, very cautious about uses of force. Informed observers attribute the U.S. failure to respond to the Rwandan genocide in April and May of 1994 to the legacy of the unsuccessful U.S. military efforts in Somalia.²⁹ Other uses of force during the Clinton Administration in Iraq, Haiti, Sudan, and elsewhere, and the administration's approach to the War Powers Resolution (which broadly tracked that of earlier administrations), have been well summarized elsewhere, notably by Professor Lori Damrosch.³⁰ Only one warrants further mention here: President Clinton's substantial use of American air power as part of the NATO bombing campaign intended to end the ethnic cleansing of Kosovars by Serbian force in the spring of 1999—an air campaign that continued well past the Resolution's sixty-day deadline.³¹ Congress was unable to agree either to approve or disapprove the bombing campaign.³² As Clinton's frustrated spokesman put it, "The House today voted no on going forward, no on going back and they tied on standing still."³³

President George W. Bush engaged in extensive use of military force, including large-scale ground wars in Iraq and Afghanistan, both of which were blessed by Congress.³⁴ The legislation involved is discussed below.

The Resolution became the focus of debate again in the spring and early summer of 2011, as President Obama committed U.S. air and naval forces as part of the successful multilateral military effort that accompanied the fall from power of Libyan dictator Muammar Qaddafi.³⁵ The administration contended that the use of American military power in these circumstances did not trigger Article 4 of the Resolution,³⁶ requiring a report from the president whenever U.S.

29. See KALB & KALB, *supra* note 1, at 172.

30. See generally Damrosch, *supra* note 22.

31. See JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 157–59 (2005).

32. Damrosch, *supra* note 22, at 137–38.

33. Charles Babington & Juliet Eilperin, *House Votes to Require Assent for Ground Troops*, WASH. POST, Apr. 29, 1999, at A1.

34. See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 1107–243, 116 Stat. 1498; Authorization for Use of Military Force 2001, Pub. L. No. 107–40, 115 Stat. 224.

35. Jessica Rettig, *Obama, Congress Not Likely to Engage on Libya Yet*, U.S. NEWS AND WORLD REP., May 18, 2011, <http://www.usnews.com/news/articles/2011/05/18/obama-congress-not-likely-to-engage-on-libya-yet> (discussing President Obama's use of military action "in line with the War Powers Resolution" in Libya).

36. See JOSEPH E. MACMANUS, DEP'T OF DEF. & ELIZABETH L. KING, DEP'T OF STATE, *UNITED STATES ACTIVITIES IN LIBYA 25* (2011), available at <http://www.washingtonpost.com/wp-srv/politics/documents/united-states-activities-libya.html> (asserting that the President did have the

armed forces are introduced “into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”³⁷ In June 2011 testimony before the Senate Foreign Relations Committee, State Department Legal Adviser Harold Koh identified four factors said to indicate that the Libyan operation did not constitute “hostilities” for purposes of Section 4. Koh emphasized the limited scope of the mission, the limited exposure of U.S. armed forces, the limited risk of escalation, and the limited military means involved.³⁸

Some analysts and commentators excoriated the administration’s legal rationale;³⁹ others found it sufficient.⁴⁰ As has often occurred in cases involving the Resolution, Congress could not decide on a course of action. In June 2011, the House of Representatives rejected a resolution authorizing the limited use of the U.S. Armed Forces in support of the NATO operation in Libya by a vote of 123 yeas to 295 nays.⁴¹ However, it also rejected a second resolution limiting the use of appropriated funds to support the NATO operation by a vote of 180 yeas to 238 nays.⁴² Following the success of the Libyan insurrection, the death of Qaddafi, and the end of the NATO air campaign, congressional interest in the Resolution’s application to Libya appears to have dropped off sharply.

constitutional authority to direct “limited military operations abroad,” as U.S. military forces “are playing a constrained and supporting role in a legitimated multinational coalition” and “do not involve sustained fighting or active exchanges of fire with hostile forces” with no “significant chance of escalation into a conflict . . .”).

37. H.R.J. Res. 542, Pub. L. 93-148, § 2(a), 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1548).
38. *See Libya and War Powers: Hearing Before the S. Comm. On Foreign Rel.*, 112th Cong. 14–16 (2011) (testimony of Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State) (noting, among other things, that there had been no U.S. casualties, and U.S. forces were not involved in “active exchanges of fire with hostile forces” and that “the bulk of U.S. contributions to the NATO effort has been providing intelligence capabilities and refueling assets”).
39. *See, e.g., Libya and War Powers: Hearing Before the S. Comm. on Foreign Rel.*, 112th Cong. 42 (2011) (statement of Louis Fisher, Scholar in Residence, The Constitution Project).
40. *See, e.g., Libya and War Powers: Hearing Before the S. Comm. on Foreign Rel.*, 112th Cong. 1 (2011) (statement of Peter J. Spiro, Professor of Law, Temple Univ., Beasley School of Law) (“The [Obama] Administration’s interpretation of ‘hostilities’ under the War Powers Resolution is a plausible one, although not free from doubt.”).
41. 157 CONG. REC. H4534 (daily ed. June 24, 2011).
42. GRIMMETT, PRESIDENTIAL COMPLIANCE, *supra* note 10, at 14.

Although successive presidents have not sought express congressional authorization for smaller-scale military operations, Presidents George H.W. Bush and George W. Bush sought and obtained congressional authorization for the three largest U.S. wars since Vietnam. The public record does not indicate that the War Powers Resolution was a factor in these decisions. Rather, they seem to have been impelled by political judgments, likely informed by the Vietnam experience and by a sense of constitutional necessity, that both political branches have a necessary role in decisions to committing the nation to large-scale hostilities.

President George H.W. Bush's extensive commitment of U.S. forces in the First Gulf War received congressional sanction, but it came five months after the massive buildup of U.S. forces in the Gulf began. While President Bush later remarked that he did not need "permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait,"⁴³ he nevertheless sought congressional approval. In January 1991 Congress approved the Authorization for Use of Military Force Against Iraq Resolution of 1991⁴⁴ authorizing U.S. combat operations against Iraqi forces. The resolution, which stated that it constituted specific statutory authorization within the meaning of the War Powers Resolution, passed the House by a vote of 250–183.⁴⁵ Passage was a closer run thing in the Senate, where the vote was 52–47.⁴⁶

The second President Bush also sought and received congressional approval for the U.S. invasion of Iraq. Again, it does not seem that the War Powers Resolution figured in the decision to go to Congress.⁴⁷ In October 2002, Congress approved the Authorization for Use of Military Force Against Iraq, authorizing the president to use force as he determines necessary to "defend the national security of

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43. Remarks of President George Bush, 28 WKLY COMP. PRES. DOC. 1120–21 (1992).
44. H.R.J. Res. 77, 102d Cong. (1991). In a signing statement, President Bush indicated that he did not concede the War Powers Resolution's constitutionality. *See also* L. Gordon Crovitz, *How Bush Outflanked Iraq and Liberated the Constitution*, WALL ST. J., Mar. 6, 1991, at A9.
45. KALB & KALB, *supra* note 1, at 147.
46. *Id.*
47. *See* BOB WOODWARD, PLAN OF ATTACK 168–70, 200–04 (2004). Woodward contends that President Bush would likely have used U.S. forces regardless of Congressional authorization, but that Vice President Richard Cheney proposed that "the president . . . demand a quick passage of a resolution so voters would know before the election where every congressman and senator stood on Saddam Hussein and his dangerous regime." *Id.* at 168–69.

the United States against the continuing threat posed by Iraq” and to enforce relevant U.N. Security Council Resolutions.⁴⁸

Congress also gave legislative sanction for the war in Afghanistan and many other uses of military force in combatting terrorism. In September 2001, a week after the September 11, 2001 attacks on the World Trade Center and the Pentagon, Congress hurriedly passed the ultimate of all authorizations for the use of force. The Authorization for Use of Military Force Resolution⁴⁹ (AUMF) has provided statutory underpinning for uses of American forces in many conflicts in many places for the last eleven years. The AUMF’s authorization for the use of U.S. forces is very broad:

(2)(a) IN GENERAL—That the President is authorized to use 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.⁵⁰

The AUMF’s drafters made clear that they intended for the legislation to satisfy the Resolution’s requirement of congressional approval for deploying U.S. forces. Section 2(b)(1) provides: “Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.”⁵¹

Thus, in the forty years since the War Powers Resolution was adopted, it has rarely had significant effect on national security policy and the use of U.S. forces. Congress has rarely turned its mind to the Resolution. When it has, the debate often has veered to issues of technical compliance with the Resolution, not to the wisdom of particular policies involving actual or potential uses of force. Indeed, it often has worked out that whichever political party does not hold the presidency has invoked the Resolution as an avenue to attack actions taken by a president of the other party.

48. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

49. Pub. L. No. 107-40, 115 Stat. 224 [hereinafter AUMF]. The AUMF was adopted by a vote of 420-1 in the House of Representatives and 98-0 in the Senate. See generally Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

50. AUMF, *supra* note 49, § 2.

51. *Id.* § 2(b)(1)

In the meantime, successive administrations have adopted the practice of submitting periodic reports “consistent with the War Powers Resolution” briefly describing deployments of U.S. forces “equipped for combat” at many locations throughout the world. The unclassified versions of these reports are a useful contribution to transparency. The classified versions may provide additional information of value to lawmakers. However, the reports seem a modest legacy.

III. WHAT OF THE FUTURE?

Yogi Berra is credited with observing that it is difficult to predict the future because you don’t know what’s going to happen. On this, as with many things, Yogi was correct. We do not know what may occur in Syria, the South China Sea, Iran, or any of the world’s other potential flashpoints for military confrontations. Nevertheless, I believe it is reasonably safe to predict that the War Powers Resolution will have less relevance in coming years than it has in the past. Several factors point this way.

A. *The Continued Role of the AUMF*

The first factor is Congress’s approval in 2001 of the AUMF, which remains in force and seems likely to remain with us for the foreseeable future. It will be a bold president or congressman who announces that the “War on Terror” has been won and the AUMF should be repealed. The act’s broad terms played a central role in the U.S. Supreme Court’s affirmation of the president’s power to detain enemy combatants,⁵² and have provided statutory cover—for both political branches—with respect to a wide range of deployments of U.S. military forces in many places as part of the ongoing, violent, and often shadowy U.S. efforts against terrorists. The AUMF contains no limitations as to the forces that may be employed, potential targets, or geographical extent, and describes the enemy in expansive terms.⁵³

A commentator recently observed that “[t]he president who won the Nobel Peace Prize less than nine months after his inauguration has turned out to be one of the most militarily aggressive American leaders in decades.”⁵⁴ Whether one accepts this characterization or not, it is clear that U.S. personnel and assets are being widely and lethally applied in many parts of the globe for the purposes indicated in the AUMF. The most recent consolidated War Powers report sent

52. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004). See also Bradley & Goldsmith, *supra* note 49, at 2052–53.

53. See Bradley & Goldsmith, *supra* note 49, at 2080–82.

54. Peter L. Bergen, *Warrior in Chief*, N.Y. TIMES, Apr. 28, 2012, at SR1.

by President Obama to congressional leaders on June 20, 2012 describes a wide range of military deployments and activities, including public confirmation of previously unconfirmed U.S. military operations against groups affiliated with al-Qaeda in Somalia and Yemen.⁵⁵ Most of the listed activities seem to have been undertaken under the AUMF umbrella. The unclassified report states:

Since October 7, 2001, the United States has conducted combat operations in Afghanistan against al-Qa'ida terrorists, their Taliban supporters, and associated forces. In support of these and other overseas operations, the United States has deployed combat equipped forces to a number of locations in the U.S. Central, Pacific, European, Southern, and Africa Command areas of operation. Previously such operations and deployments have been reported, consistent with Public Law 107-40 [the AUMF] and the War Powers Resolution, and operations and deployments remain ongoing.⁵⁶

The report goes on to briefly describe military activities involving combat-equipped U.S. forces in Afghanistan, Central African Republic, Cuba (Guantánamo Bay), Democratic Republic of the Congo, Egypt, Iraq, Kosovo, Somalia, South Sudan, Uganda, and Yemen. The report also refers to additional activities described in its classified annex.

B. *The Changing Nature of Warfare*

The second factor weighing against the Resolution's relevance is the changing nature of warfare. The United States' means and methods of warfare, and its potential opponents, are quite different from those Congress had in mind in 1973.

It is said that generals prepare for the last war. The War Powers Resolution suggests that legislators do the same. The Resolution's draftsmen had their eyes on the U.S. Vietnam experience of 1965–1972, when large conventional forces built on a steady supply of draftees were caught in a massive, long-running, and increasingly unpopular war fought most visibly on the ground. Thus, the Resolution's trigger is the introduction of “United States Armed Forces”⁵⁷ into “hostilities, or into situations where imminent

55. Peter Baker, *Obama Acknowledges U.S. Is Fighting Groups Tied to Al Qaeda in Somalia and Yemen*, N.Y. TIMES, June 16, 2012, at A9.

56. Press Release, President Barack Obama, Presidential Leader—2012 War Powers Resolution 6-Month Report (June 15, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/06/15/presidential-letter-2012-war-powers-resolution-6-month-report>.

57. 10 U.S.C. § 101(a)(4) defines the term “armed forces” to mean “the Army, Navy, Air Force, Marine Corps, and Coast Guard.”

involvement in hostilities is clearly indicated by the circumstances.”⁵⁸ The Resolution’s focus and wording don’t match many contemporary realities.

Analysis of the profound changes in the ways in which the United States utilizes force is far beyond the scope of this article. However, brief mention of a few of the changes is illustrative:

- *Non-military actors:* The United States is greatly increasing use of non-military actors—including the Central Intelligence Agency and civilian contractors⁵⁹—in conducting operations involving the use of force and in collecting intelligence in potentially dangerous locations. It is widely reported that the extensive attacks on suspected Taliban locations in remote regions of Pakistan and elsewhere involve remotely piloted aircraft controlled by the CIA, not by “U.S. Armed Forces.”⁶⁰ The U.S. military is also reportedly using civilian contractors to gather intelligence in support of low-visibility U.S. military operations in Africa.⁶¹ Such activities by civilians do not fall under terms of the War Powers Resolution. Some operations reportedly involve combinations of CIA and military resources.⁶²
- *New styles of conflict:* New types of conflict are emerging that again do not mesh with the Resolution’s structure and concepts. According to multiple reports, U.S. agencies and personnel played significant roles in developing and deploying computer malware that successfully disabled nearly 1000 centrifuges in Iran’s nuclear enrichment facilities.⁶³ The response in Congress has not been concern that it was not informed of the U.S. attack, or that the United States might be implicated in actions potentially constituting an armed attack on Iran. Instead,

58. H.R.J. Res. 542, Pub. L. 93-148, § 2(a), 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1548).

59. See LAURA A. DICKINSON, *OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS* 4 (2011).

60. See, e.g., Declan Walsh & Eric Schmitt, *Al Qaeda’s No. 2 Said to Be Killed in a Drone Strike*, N.Y. TIMES, June 6, 2012, at A1.

61. See Craig Whitlock, *Contractors Run U.S. Spying Missions in Africa*, WASH. POST, June 14, 2012, at A1.

62. See Greg Miller, *Under Obama, a Drone Network*, WASH. POST, Dec. 28, 2011, at A1.

63. See David Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES, June 1, 2012, at A1; Ellen Nakashima & Joby Warrick, *Officials Say U.S., Israel Were Behind Cyberattack on Iran*, WASH. POST, June 2, 2012, at A2.

Congressional reaction has focused on the possible leak of classified information, with Republican members of Congress charging that sensitive material was leaked for partisan advantage.⁶⁴

- *Secret operations:* As the foregoing illustrates, the United States' contemporary uses of force are often shrouded in secrecy, largely insulating them from informed public discussion and congressional consideration, save perhaps for a few members of a few key congressional committees. Thus, for example, the United States is reported to have created a ring of classified bases from which Joint Special Operations Command personnel operate remotely piloted aircraft in the Horn of Africa and the Arabian Peninsula.⁶⁵

It is striking in this regard that press reports of President Obama's personal involvement in decisions to target suspected terrorists⁶⁶ have not led to congressional consideration whether it is appropriate for this president—or any president—to play such a role in targeting individuals.⁶⁷ Rather, the focus in Congress has again been that details were leaked for allegedly partisan purposes.

- *Remotely piloted weaponry:* U.S. armed forces today make extensive and increasing use of weapons systems that do not expose U.S. personnel to danger from enemy action, most notably remotely piloted aircraft and cruise missiles that can strike distant targets after being launched at sea or from distant aircraft. Targets in Afghanistan are regularly tracked and attacked by remotely piloted aircraft flown by Air Force controllers sitting at air bases in the continental United States. Indeed, remote piloting has become an

64. See *Senators to Open Inquiry Into 'Kill List' and Iran Security Leaks*, N.Y. TIMES, June 6, 2012, at A12; Greg Miller, *Intelligence Panels Seek New Laws on Classified Data*, WASH. POST, June 7, 2012, at A3; Scott Shane, *Renewing a Debate Over Secrecy, and Its Costs*, N.Y. TIMES, June 7, 2012, at A1.

65. See Mark Mazzetti & Eric Schmitt, *U.S. Expands Its Drone War into Somalia*, N.Y. TIMES, July 2, 2011, at A1; Karen DeYoung, *U.S. Air Attacks in Yemen Intensify*, WASH. POST, Sept. 17, 2011, at A6; Craig Whitlock & Greg Miller, *U.S. Creating A Ring of Secret Drone Bases*, WASH. POST, Sept. 21, 2011, at A1.

66. Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1.

67. See Editorial, *Too Much Power for a President*, N.Y. TIMES, May 31, 2012, at A28.

established career in the U.S. Air Force, with regular training and a designated career field.⁶⁸

Increasing use and reliance on such weapons, remotely piloted by U.S. military personnel physically located at safe locations in the United States—and not involving “boots on the ground”—do not mesh comfortably with the statutory notions of “introducing United States Armed Forces into hostilities.” In this regard, the fact that U.S. personnel involved in the NATO operation against Libya were physically well removed from the battles on the ground was a significant thread in the Obama Administration’s argument that those forces were not involved in hostilities for purposes of the Resolution.

IV. CONCLUSION

The War Powers Resolution has, at most, only influenced decisions involving the use of U.S. armed forces at the margins. It seems likely to have less impact going forward.

So as Lenin famously asked, “what is to be done?” I don’t know the answer. Today’s political climate is harshly partisan. The political branches cannot come to reasonable accommodations on matters of far more immediate importance than revising the War Powers Resolution.⁶⁹ Even in less partisan times, it is difficult to envision mechanisms for effective congressional-executive interaction in use-of-force decisions that are both constitutionally appropriate and likely to stand up in the face of actual events. Past proposals for revision and reform have not made it past the starting line.⁷⁰

Our current inability to have a sensible conversation about the appropriate interplay between Congress and the president in matters involving the use of force is troubling. As noted here, there has been a blurring of many of the traditional boundaries that determine how the United States identifies its enemies and uses force against them. At the same time, there has been a profound shift in the makeup of the U.S. armed forces. The Vietnam-era draft made that war a central fact in the lives of millions of young men and their families, giving issues of war or peace immediacy that they do not have today. The United States now relies upon highly professional armed forces. While bumper stickers on civilians’ cars urge us to “support the troops,” those “troops” make up a tiny percentage of the population, living

68. See Tech. Sgt. Amaani Lyle, *Air Force Officials Announce Remotely Piloted Aircraft Pilot Training Pipeline*, AIR FORCE PRINT NEWS TODAY (June 9, 2010), <http://www.af.mil/news/story.asp?storyID=123208561>.

69. See, e.g., Steven Mufson & Lori Montgomery, *Over the ‘Fiscal Cliff’ and into Recession?*, WASH. POST, Aug. 23, 2012, at A1.

70. See, e.g., Ely, *supra* note 8; Michael J. Glennon, *The War Powers Resolution, Once Again*, 103 AM. J. INT’L L. 75 (2009).

and performing their duties in a world separate and apart from most of us.⁷¹

Together, these things may make it easier—perhaps too easy—for any president to decide to use force in doubtful circumstances. There is a need for an effective mechanism to better assure that such decisions are wise and will enjoy the support of the American people. Unfortunately, the War Powers Resolution is not that mechanism.

71. *By the Numbers: Today's Military*, NPR, Mar. 31, 2010, <http://www.npr.org/2011/07/03/137536111/by-the-numbers-todays-military> (noting that less than 1% of the total U.S. population serves in the military today).