Prof. Moore’s National Security Law

War Powers Resolution and Executive Privilege

Prof. Robert F. Turner, SJD

Center for National Security Law - Separation of Powers Project
Reconciling the War Powers of Congress and the President

May Congress Direct the Conduct of Military Operations?
C.J. Chase in *Ex parte Milligan* (1866)

“But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. . . . Congress cannot direct the conduct of campaigns . . . .”

[Deciding to bring up reinforcements from the rear [the “surge”] is at the core of command decisions in the conduct of campaigns.]
But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President . . . .

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[Deciding to bring up reinforcements from the rear “surge” is at the core of command decisions in the conduct of campaigns . . . .]

This passage was quoted with favor by Justice Stevens for the Supreme Court majority in the 2006 *Hamdan* case.
This Exclusive (but Conditional) Presidential Power Includes Far More than “Day-to-Day Munitia”

The Commander in Chief has no force to Command unless provided by Congress, and no money to spend without appropriations.

But all strategic and tactical decisions about the conduct of war are vested in the Executive. Congress may not tell him what to negotiate or how to fight the war.
THE 1973 WAR POWERS RESOLUTION
War Powers Resolution (1973) Overview

- § 1 - name of act ("War Powers Resolution")
- § 2 - purpose & policy ("fulfill intent of framers")
- § 3 - consultation ("in every possible instance")
- § 4 - reporting
  - (a)(1) - "into hostilities/imminent involvement in" etc.
  - (a)(2) - "equipped for combat"
  - (a)(3) - "substantially enlarge" existing force deployment
- § 5 - Congressional action
  - (b) must withdraw in 62-92 days if no Cong. action.
  - (c) Cong. may order withdrawal by concurrent resolution
- § § 6&7 - congressional procedures (reports and votes expected)
- § 8 - interpretation: no war by treaty, doesn’t change const. powers.
“[Watergate] had a tremendous impact on the pending War Powers Act. Congressional anger over the Cox firing was still apparent when the vote to override…was taken on November 7. One Senator reported such comments as these form his colleagues: ‘This is not the time to support Nixon;’ ‘We simply have to slap Nixon down, and this is the vote to do it on;’ and ‘I love the Constitution, but I hate Nixon more.’ As a result of this high degree of animosity…the House voted 284 to 135 in favor of the Act. Thus, by the slim margin of four votes the House overrode the President’s veto.”

War Powers Resolution: The Proper Constitutional Standard?

“[applies to] the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”

versus

“Congress shall have the power…to declare War”
Question to Ponder

Would the War Powers Resolution have prevented the Vietnam conflict if it had been enacted prior to the August 1964 Tonkin Gulf incident?
War Powers Resolution
Section 2(c)

“The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) **specific statutory authorization**, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”
QUESTION:
Does This Permit the President to Rescue American Civilians Abroad From Terrorists?

“The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”
Footnote

*In December 1984 I was on a panel with Senator Jacob Javits at the annual meeting of the American Section of the International Law Association in New York. To my surprise, when I asserted that Section 2(c) of the WPR unconstitutionally limited the President’s independent constitutional power to rescue endangered civilians abroad, the Senator agreed with me.
“Within sixty days after a report is submitted or is required to be submitted pursuant to section 4(a)(1) [Report due in 48 hours], whichever is earlier, the President shall terminate any use of United States Armed Forces . . . unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty day period, (3) is physically unable to meet as a result of an armed attack upon the United States . . . “

[President may extend another 30 days to protect troops while withdrawing.]
The Chadha Problem
War Powers Resolution § 5(c)

“Notwithstanding subsection (b), at any time that the United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.”
Justice WHITE, dissenting.

“Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a "legislative veto." For this reason, the Court's decision is of surpassing importance. And it is for this reason that the Court would have been well-advised to decide the case, if possible, on the narrower grounds of separation of powers, leaving for full consideration the constitutionality of other congressional review statutes operating on such varied matters as war powers and agency rulemaking, some of which concern the independent regulatory agencies.”
“Although portrayed as an effort “to fulfill”—not to alter, amend or adjust—“the intent of the framers of the U.S. Constitution,” the War Powers Resolution actually expands Congress’ authority beyond the power to declare war to the power to limit troop deployment in situations short of war….

By enabling Congress to require—by its own inaction—the withdrawal of troops from a situation of hostilities, the resolution unduly restricts the authority granted by the Constitution to the President as Commander in Chief.
The War Powers resolution does not work, because it oversteps the constitutional bounds on Congress’ power to control the Armed Forces in situations short of war and because it potentially undermines our ability to effectively defend our national interests.

The War Powers Resolution therefore threatens not only the delicate balance of power established by the Constitution. It potentially undermines America’s ability to effectively defend our national security.”

In July 2008 the bipartisan National War Powers Commission unanimously concluded the War Powers Resolution is UNCONSTITUTIONAL and should be REPEALED.
National Security Law Institute

The War Powers Resolution in Practice: Case Studies

Prof. Robert F. Turner

Center for National Security Law - Separation of Powers Project
Implementation of the War Powers Resolution

- Has been motivated more by political expediency than by constitutional principle
- Has undermined deterrence by promoting divisive domestic debate during periods of crisis
- Has jeopardized peace and endangered the lives of American fighting men and women.
The War Powers Resolution and the April 1975 Evacuations from Indochina

- Da Nang
- Phnom Penh
- Saigon
1975 Da Nang Evacuation: Pres. Ford’s Effort to “Consult”

“Not a single leader of either party remained in the capital [during Easter recess]. Three of them were in Greece, two in the PRC, two in Mexico, one in Europe, and another in the Middle East. The rest were in twelve widely scattered locations in the United States.”

—Ford, *A Time to Heal* 245
“And now I ask the Congress to clarify immediately its restrictions on the use of U.S. military forces in Southeast Asia for the limited purposes of protecting American lives by insuring their evacuation, if this should be necessary. …

I hope that this authority will never have to be used, but if it is needed, there will be little time for congressional debate. Because of the gravity of the situation, I ask the Congress to complete action…not later than April 19.”

—Pres. Ford to Joint Session of Congress, April 10, 1975
“Speed and Dispatch” and the Congressional Response to President Ford’s Request

April 10—President Ford requests statute
April 12—Administration Submits Draft Bill
April 19—Deadline Passes
April 23—Senate approves one bill
April 24—House approves a different bill
April 25—Conference reports a compromise bill
   (House adjourns for weekend)
April 30—Last people evacuated, Saigon falls
May 1—House rejects compromise bill 246-162…
“Speed and Dispatch” and the Congressional Response to President Ford’s Request

As one of the Americans in South Vietnam in late April 1975, I am personally grateful that President Ford decided to act on his own without waiting for Congress to enact new legislation. This was an excellent illustration of why Congress is not institutionally suited to be entrusted with business that requires “speed and dispatch.”
S.S. Mayaguez Rescue
(May 1975)

- "Consultation" involved notifying congressional leaders after operation underway
- No authority recognized in War Powers Resolution to rescue endangered civilians
- Cooper-Church Amendment barred funds for combat operations on the ground, in the air, or off the shores of Cambodia (all were done)
- Operation perceived by public as a success
- Foreign Relations Committee passed unanimous resolution praising rescue as fulfilling the "spirit" of the War Powers Resolution
Iran Rescue Attempt
(April 1980)

- No “Cooper-Church”-type prohibition on using force in region
- Greater need for secrecy than during Mayaguez
- Rescue failed (8 Americans died)
- Senate Foreign Relations Committee held press conference denouncing President Carter for violating War Powers Resolution
BERUIT 1982-1983

A PARTISAN CONGRESS PLACES A BOUNTY ON AMERICAN LIVES
Beirut Deployment - 1 (1982-83)

- U.S. was part of multinational peace keeping force
- Initial consultation called “excellent” by SFRC Counsel Fred Tipson
- Reagan reported deployment under “equipped for combat” language rather than “imminent involvement in hostilities” provision
  - This led to Hill criticism, but
  - consider what would have happened in region if president said U.S. was “going to war”
- Mission was non-combat “presence” designed to reassure parties they could negotiate in safety
- Every government and major military force in region originally welcomed MNF.

Continued on next slide . . .
Beirut Deployment - 2

- Virtually no congressional criticism on merits; but widespread criticism for not complying with the War Powers Resolution
  - HFAC Chmn. Zablocki said Reagan threatened “constitutional crisis”
  - Sen. Cranston said Hill would approve if President told them “exactly how and when we propose to extricate them.” Sen. Byrd demanded to be told “specifically how long the Marines will be there.”
  - For what the Washington Post said appeared to be politically partisan reasons, Hill Democrats insisted on a vote on a resolution of approval
  - SFRC Report included “Minority Views of All Democratic Committee Members”

Continued on next slide . . .
Beirut Deployment - 3

- USMC Comandant Gen. P.X. Kelley warned SFRC partisan debate was endangering lives of Marines
- Senate voted 54-46 to (2 Democrats supported President Reagan) to continue mission [a shift in 4 votes could have defeated]
- Even SFRC Chairman Percy said publicly that if there were further casualties Congress could “reconsider” the vote at any time.
- Syrian Foreign Minister said “The United States is short of breath”
- Radical Moslem forces told to “kill 15 Marines” to force U.S. to go home
- 23 October truck bomb killed 241 Marines and sailors (more than in Gulf War)
- Congress demanded that P.X. Kelley produce the head of the Marine who was responsible for the tragic loss.
Congress Ignores Caution on Lebanon

“The White House yesterday suggested that congressional Democrats’ efforts to put some time limit on the deployment of U.S. Marines in Lebanon may be endangering the troops there.

‘To suggest…that congressional insistence that the law be lived up to is somehow giving aid and comfort to the enemy is totally unacceptable,’ said Sen. Thomas F. Eagleton (D-Mo.).

…

‘The administration has thrown out a red herring,’ Eagleton said, with ‘an attempt to intimidate the Congress and frighten the American people with this kind of ludicrous argument.’ …

When the anonymous White House comment implying danger for the Marines was reported on Capitol Hill, Democratic leaders were infuriated and, if anything, hardened their position.”

Congress Signals Weakness

“Congressional hesitation, reservations, and fears are such, however, that should American troops suffer casualties in Beirut, many senators and congressmen would immediately reconsider their support.”

Terrorists Told To Kill Marines

“[U.S. intelligence intercepted]…a radio message between two Moslem militia units: ‘If we kill 15 Marines, the rest will leave.’”


Why did they think this?
Congress Had (Unintentionally) Placed a **Bounty** on Our Forces

At dawn on Oct. 23, 1983, a terrorist truck bomb loaded with explosives killed 241 sleeping Marines at the BLT headquarters in Beirut, Lebanon.
Congress Had (Unintentionally)
Placed a Bounty on Our Forces

At dawn on Oct. 23, 1983, a terrorist truck bomb loaded with explosive killed 241 sleeping Marines in Beirut.
At dawn on Oct. 23, 1983, a terrorist truck bomb loaded with explosives killed 241 sleeping Marines at the BLT headquarters in Beirut, Lebanon. Soon thereafter, the remaining Marines were withdrawn.
Osama bin Laden drew lessons from Beruit about U.S. “will” and courage that helped bring us 9/11.

In 1998 Osama bin Laden told ABC News that America’s retreat following the Beirut bombing proved we were “paper tigers.”
Osama bin Laden drew lessons from Beruit about U.S. “will” and courage that helped bring us 9/11

A 2003 Knight Ridder account observed: “The retreat of U.S. forces inspired Osama bin Laden and sent an unintended message to the Arab world that enough body bags would prompt Western withdrawal, not retaliation.”
Operations in Libya (2011)
UNSC Res. 1973
(17 March 2011)

“4. Authorizes Member States . . . acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory . . . .”
Dear Mr. Speaker:  (Dear Mr. President:)

I am providing this supplemental consolidated report, prepared by my Administration and consistent with the War Powers Resolution (Public Law 93 148), as part of my efforts to keep the Congress informed about deployments of U.S. Armed Forces equipped for combat. . . .
Dear Mr. Speaker:  (Dear Mr. President:)

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This is the language used by six prior presidents who contended the War Powers Resolution is UNCONSTITUTIONAL. (Rather than reporting “pursuant to” the WPR.)
The U.S. Role

“MILITARY OPERATIONS IN LIBYA

. . . . (3) since April 23, [U.S. forces have engaged in] precision strikes by unmanned aerial vehicles against a limited set of clearly defined targets in support of the NATO led coalition's efforts. . . . With the exception of operations to rescue the crew of a U.S. aircraft on March 21, 2011, the United States has deployed no ground forces to Libya.”
MILITARY OPERATIONS IN LIBYA

Since April 4, U.S. participation has consisted of:

(3) since April 23, precision strikes by unmanned aerial vehicles against a limited set of clearly defined targets in support of the NATO-led coalition's efforts.

With the exception of operations to rescue the crew of a U.S. aircraft on March 21, 2011, the United States has deployed no ground forces to Libya.

Is this legal under the War Powers Resolution?
Questions

Does anyone doubt that sending Predator drones over Libyan territory to fire Hellfire missiles at members of that country’s armed forces falls under the definition of taking part in “hostilities”? 
Meaning of “Hostilities”

“[I]t might be possible to come up with language that keyed in on whether U.S. forces have been authorized to use lethal force other than on a self-defense basis.”

Prof. Robert Chesney
Lawfare Blog
The Obama Administration’s Position

Pentagon General Council Jeh Johnson said we were involved in “hostilities” and needed congressional approval.
The Obama Administration’s Position

Acting Asst. Att’y Gen. (OLC) Carolyn Krass reportedly said we were involved in “hostilities” and needed congressional approval.
The Obama Administration’s Position

Att’y Gen. Eric Holder reportedly said we were involved in “hostilities” and needed congressional approval.
The Obama Administration’s Position

State Department Legal Adviser Harold Koh said we were **NOT** involved in “hostilities” and needed NO congressional approval.
The Obama Administration’s Position

Harold Koh, State Department Legal Adviser, said we were NOT involved in “hostilities” and needed congressional approval.

Some might call this “forum shopping.”
I call it **ironic**.
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Harold Koh and I have debated War Powers and other issues dating back more than 25 years.
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Here he is in Oct. **1990** challenging my argument that we could intentionally target Saddam Hussein during Operation Desert Storm.
Harold said targeting individuals was "assassination" and illegal under U.S. and international law.
Harold Koh said we were NOT involved in "hostilities" and needed congressional approval. Some might call this "forum shopping." I call it ironic.

Harold Koh and I have debated War Powers and other issues dating back more than 20 years. Here he is in Oct. 1990 challenging my argument that we could intentionally target Saddam Hussein during Operation Desert Storm. Targeting individuals was "assassination" and illegal under U.S. and international law. In March 2010, Harold defended targeting individuals by Predator drones as lawful in an address to the American Society of International Law.
Harold Koh’s Defense of Libya Operation

Quoting Ford and Reagan lawyers, he claimed “I continue nearly four decades of dialogue between Congress and Legal Advisers … regarding the Executive Branch’s legal position on war powers.”
Harold Koh’s Defense of Libya Operation

Noting past presidents had largely ignored the WPR, Koh warned about “narrow parsing of dictionary definitions” so as “to avoid unduly hampering future presidents ....”
“[T]he military operations that the President anticipated … were not sufficiently extensive … to constitute a ‘war’ requiring prior specific approval under the Declaration of War Clause.”
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Obviously, he is right—but that is not the standard of the WPR!
Harold Koh’s Defense of Libya Operation

“Scholars will certainly go on debating this issue. But that should not distract those of us in government from the most urgent question now facing us which is not one of law but of policy.”
In other words, if it’s good **policy**, let’s not worry about whether we are breaking the **law**?
Scholars will certainly go on debating this issue. But that should not distract those of us in government from the most urgent question now facing us which is not one of law but of policy. In other words, if it’s good policy, let’s not worry about whether we are breaking the law? Is that the function of the Legal Adviser?
Harvard’s Prof. Jack Goldsmith noted “for a quarter century . . . Koh was the leading and most vocal academic critic of presidential unilateralism in war.”
There is an old Washington adage: “Where you stand often depends upon where you sit.”
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Perhaps you can tell I was having fun watching Harold Koh paraphrase arguments I’d been making since 1974.
There is an old Washington adage: “Where you stand often depends upon where you sit.”

Perhaps you can tell I’m having fun watching Harold Koh paraphrase arguments I’ve been making since 1974. But that doesn’t mean I don’t think he is right in his bottom line conclusion.
“[T]he anticipated operations here [Libya] served a ‘limited mission’ and did not ‘aim at the conquest or occupation of territory.’”
“[T]he anticipated operations there served a ‘limited mission’ and did not ‘aim at the conquest or occupation of territory.’”

When I first read this I thought perhaps it was an APRIL FOOLS’ joke!
[T]he anticipated operations here served a 'limited mission' and did not 'aim at the conquest or occupation of territory.'

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The War Power Resolution was a response to the Vietnam War.

I often think of that experiment when it was an APRIL FOOLS joke!
We didn’t “aim at the conquest or occupation of territory” in Vietnam, either!
Does President Obama have a defense to violating the War Powers Resolution?
Does the Constitution trump an inconsistent statute?
Does anyone doubt that sending Predator drones over Libyan territory to fire Hellfire missiles at forces loyal to that country’s government falls under the definition of taking part in “hostilities”?

Have U.S. armed forces “into the territory, airspace or waters of a foreign nation, while equipped for combat . . .”?

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Does the Constitution trump an inconsistent statute?

Did the Libya Operation even arguably conflict with the power of Congress “to declare War”?
Does anyone doubt that sending Predator drones over Libyan territory to fire Hellfire missiles at forces loyal to that country’s government falls under the definition of taking part in “hostilities”? Have U.S. armed forces been sent “into the territory, airspace or waters of a foreign nation, while equipped for combat . . . ?”

Yet, to date, the Obama administration is the only presidential administration since it was enacted over Nixon’s veto that has not asserted the War Powers Resolution is UNCONSTITUTIONAL.
Does the President Need a New AUMF for ISIS?

My short answer is ‘no.’
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ISIS is not a sovereign State, and formal Declarations of War (the power given to Congress) were never viewed as appropriate unless States on both sides. Indeed, a formal "Declaration of War" might play into ISIS’ hands by implying they are the sovereign "Islamic State" they claim to be.
The 2001 AUMF Seems Clearly to Cover ISIS

“[T]he 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.”
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Was al Qaeda of Iraq once part of al Qaeda?
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The UNSC has repeatedly declared that ISIS is a "splinter group" of al Qaeda.

UNSC Resolution 2170 (2014)

"Reiterating its condemnation of ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida for ongoing and multiple criminal terrorist acts aimed at causing the deaths of civilians and other victims, destruction of property and of cultural and religious sites, and greatly undermining ….

18. Observes that ISIL is a splinter group of Al-Qaida, . . . .

By what logic does AQI immunize itself by becoming more violent and changing its name?
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So, while I think there could be great political benefits by having Congress announce it was standing united behind the President:
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1. I don’t think that is even arguably constitutionally necessary;
So, while I think there could be great political benefits by having Congress announce it was standing united behind the President:

1. I don’t think that is even arguably constitutionally necessary;
2. Sadly, I don’t think it is likely to happen politically.
Now, back to the

**War Powers Resolution . . . .**

Constitution to the President as Commander in Chief.
"Although portrayed as an effort “to fulfill”—not to alter, amend or adjust—“the intent of the framers of the U.S. Constitution,” the War Powers Resolution actually expands Congress’ authority beyond the power to declare war to the power to limit troop deployment in situations short of war.…. By enabling Congress to require—by its own inaction—the withdrawal of troops from a situation of hostilities, the resolution unduly restricts the authority granted by the Constitution to the President as Commander in Chief."
...[T]he War Powers resolution does not work, because it oversteps the constitutional bounds on Congress’ power to control the Armed Forces in situations short of war and because it potentially undermines our ability to effectively defend our national interests.

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In July 2008 the bipartisan National War Powers Commission unanimously concluded the War Powers Resolution is UNCONSTITUTIONAL and should be REPEALED.
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But unless and until the Administration acknowledges the War Powers Resolution is unconstitutional and thus void, they clearly violated that “law.”
Senator Arthur Vandenberg
Feb. 10, 1949

“It will be a sad hour for the Republic if we ever desert the fundamental concept that politics shall stop at the water’s edge. It will be a triumphant day for those who would divide and conquer us if we abandon the quest for a united voice when America demands peace with honor in the world. In my view nothing has happened to absolve either Democrats or Republicans from continuing to put their country first. Those who don’t will serve neither their party nor themselves.”
Nearly 40 years ago . . .

The day after Jimmy Carter won the 1976 election, I wrote a memo to my boss, Asst. Senate Minority Leader Robert P. Griffin (R. Mich) — the original of which is on the wall in my office.
“The voters have selected Jimmy Carter. He was neither your choice nor mine, but he is all we are going to have for the next four years. . . . .

So long as Carter’s policies are reasonable -- even though they might not conform to our own views on how best to get the job done -- I think you should try hard to restore the Vandenberg tradition. (The fact that the Democrats didn’t is no excuse for our not trying.)

If you want to try to restore bipartisan cooperation, would you like for me to draft some remarks along those lines for possible delivery early in the new session?”
MEMORANDUM FOR: SENATOR
FROM: Bob Turner
DATE: 3 Nov 76
SUBJECT: Possible "Vandenberg" Speech for Next Year

The voters have selected Jimmy Carter. He was neither your choice nor mine, but he is all we are going to have for the next four years.

You have often praised Senator Arthur Vandenberg for his spirit of bipartisan cooperation in foreign policy. As Vandenberg once noted, "in the final analysis the Congressional 'opposition' decides whether there shall be cooperation."

Since you are the probable choice for Minority Leader (and a member of the Foreign Relations Committee), you are obviously going to have a lot to say about the Republican Party's policy vis à vis Carter's foreign relations.

So long as Carter's policies are reasonable -- even though they might not conform to our own views on how best to get the job done -- I think you should try hard to restore the Vandenberg tradition. (The fact that the Democrats didn't is no excuse for our not trying.)

If you want to try to restore bipartisan cooperation, would you like for me to draft some remarks along those lines for possible delivery early in the new session?

Yes.

Not now.

Discuss with [ ]
Conclusions

• Sen. George Mitchell was correct in 1988 when he observed that the War Powers Resolution “unduly restricts the authority granted by the Constitution to the President as Commander in Chief.”

• Sadly — in the guise of asserting that the President must “obey the law” — the WPR has usurped presidential constitutional power.

• It has also been used as a political tool by both parties to mislead the public, undermine our security, and place our forces at unnecessary risk.
Conclusions

• It probably contributed at least indirectly to the 9/11 attacks by persuading bin Laden we would fold our tents if hit hard.
Conclusions

- Neither Korea nor Vietnam were “presidential wars” initiated against the will of Congress.
- The WPR would not have stopped Vietnam, which was specifically authorized by statute as permitted by § 2(c)(3).
- For nearly 25 years, Dr. Lou Fisher and I debated whether the War Powers Resolution should be repealed.
- Writing in Political Science Quarterly in 1998, Dr. Fisher finally came out for the repeal of the War Powers Resolution.
Conclusions

That would in my view be a great step in the right direction.
Is there a National Security “Executive Privilege”?

May the President constitutionally deny Congress access to sensitive national security information?
“He thought it clear that the House must have a right, in all cases, to ask for information which might assist their deliberations on the subjects submitted to them by the Constitution…He was as ready to admit that the Executive had a right, under a due responsibility, also to withhold information when of a nature that did not permit a disclosure of it at the time. And if the refusal of the President had been founded simply on a representation, that the state of the business within his department, and the contents of the papers asked for, required it, although he might have regretted the refusal, he should have been little disposed to criticise it. …It belonged, he said, to each department to judge for itself. If the Executive conceived that, in relation to his own department, appears could not be safely communicated, he might, on that ground, refuse them, because he was the competent thought a responsible judge within his own department.
The President is required by the Constitution from time to time to give to Congress information on the state of the Union, and to recommend for its consideration such measures as he shall judge necessary and expedient, but this does not enable Congress or either House of Congress to elicit from him confidential information which he has acquired for the purpose of enabling him to discharge his constitutional duties, if he does not deem the disclosure of such information prudent or in the public interest.

—William Howard Taft, Our Chief Magistrate and His Powers 129
“The constitutional obligation that the President “shall from time to time give to the Congress information on the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient,” has, upon occasion, given rise to controversy between Congress and the president as to the right of the former to compel the furnishing to it of information as to specific matters. As a result of these contests it is practically established that the President may exercise a full discretion as to what information he will furnish, and what he will withhold.”

“So far as practice and weight of opinion can settle the meaning of the Constitution it is today established that the President . . . is final judge of what information he shall entrust to the Senate as to our relations with other governments.”

"[The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. …

“The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution directs the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information “if not incompatible with the public interest.” A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.”
Judicial Experience with the privilege which protects military and state secrets has been limited in this country...

...In each case, the showing of necessity [of disclosure] which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.
Does this mean there is an absolute “executive privilege” to protect “military secrets” from judicial inquiry? If so, does it also apply to Congress? What about diplomatic secrets?
Judicial Experience with the privilege which protects military and state secrets has been limited in this country. In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.

Remember C.J. John Marshall’s comment in Marbury that “The acts of such an officer [the Secretary of Foreign Affairs/State], as an officer, can never be examinable by the courts.”
“Congress…cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the executive.”

Supreme Court on Executive Privilege


“He [Nixon] does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.”
Supreme Court on Executive Privilege


In *C. & S Air Lines v. Waterman S.S. Corp.* ..., dealing with Presidential authority involving foreign policy considerations, the Court said:

The President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. *It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.*"
State Secrets Privilege

It is from this reasoning the courts have upheld the right of the President to withhold sensitive national security information from courts and parties to civil litigation.
Does it really make sense to allow private litigants—perhaps enemy nationals—to use our courts as a means of compelling the President to expose sensitive national security secrets?
The “Power of the Purse”

Does Legislative Control Over Appropriations Give Congress Constitutional Authority to Direct the Execution of Commander-in-Chief Powers?
Are there no limits on the Power of the Purse?"

"It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations - a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."

*Curtiss-Wright*
Congress May Not Lawfully Use Its Powers to Usurp the Constitutional Powers of Another Branch

- *United States v. Klein*
- *United States v. Lovett*
"[T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court has adjudged them to have….The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive….It is the intention of the Constitution that each of the great coordinate departments of the government—the legislative, the executive, and the judicial—shall be, in its sphere, independent of the others. To the Executive alone is intrusted the power of pardon; and it is granted without limit. …Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration."
United States v. Lovett
328 U.S. 303, 313, 315, (1946)

“We…cannot conclude, as [Counsel for Congress] urges, that [the section] is a mere appropriation measure, and that, since Congress under the Constitution has complete control over appropriations, a challenge to the measure’s constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress had final say….We hold that [the section] falls precisely within the category of congressional actions which the Constitution barred by providing that ‘No Bill of Attainder or ex post facto Law shall be passed’ ”
Jefferson on Senate Abuse of Power (April 1790)

"It may be objected that the Senate may by continual negatives on the person, do what amounts to a negative on the grade [of an appointee], and so, indirectly, defeat [the] right of the President [to determine the grade]. But this would be a breach of trust; an abuse of power confided to the Senate, of which that body cannot be supposed capable.
Jefferson on Senate Abuse of Power (April 1790)

“So the President has a power to convoke the Legislature, and the Senate might defeat that power by refusing to come. This equally amounts to a negative on the power of convoking. Yet nobody will say they possess such a negative, or would be capable of usurping it by such oblique means. If the Constitution had meant to give the Senate a negative on the grade or destination, as well as the person, it would have said so in direct terms, and not left it to be effected by a sideward. It could never mean to give them the use of one power through the abuse of another.”

—Thomas Jefferson: Opinion on Executive Appointments
Thomas Jefferson
Memorandum to President Washington
(April 1790)

It may be objected that the Senate may, by continual negatives on the powers, do what amounts to a negative on the grade; V. to indirectly defeat this right of the President. But this would be a breach of trust, an abuse of the power confided to the Senate, of which that body cannot be supposed capable, so the President has a power to concur the legislature; if the Senate might defeat that power by refusing to come, it equally amounts to a negative on the power of concuring; yet nobody will say they partake such a negative, or would be capable of escaping it by such oblique means. If the constitution had meant to give the Senate a negative on the grade or destruction, as well as the person, it would have said so in direct terms. And not left it to be effected by a side wind. It could never mean to give them the use of one power to the abuse of another.

New York, April 20, 1790.
The modern practice of using “conditions” on appropriations bills to exercise control of powers vested elsewhere in the Constitution is a threat to the core doctrine of Separation of Powers. If Congress can seize the Commander-in-Chief power, it can destroy the Judicial power too . . . .
Be it hereby enacted, that...

No funds appropriated by this or any other act shall be available to finance the operations of the Supreme Court, other than to pay the salaries of the Justices, if the Court holds any statute or part of a statute enacted by Congress to be unconstitutional.
Supreme Court Neutralization Act of 2008
(not yet introduced)

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No funds appropriated by this or any other act shall be available to finance the operations of the Supreme Court, other than to pay the salaries of the Justices, if the Court holds any statute or part of a statute enacted by Congress to be unconstitutional.

Or “. . . if the Supreme Court [overturns/fails to overturn] Roe v. Wade; Justices, if the Court holds any statute or part of a statute enacted by Congress to be unconstitutional.
Supreme Court Neutralization Act of 2008
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No funds appropriated by this or any other act shall be available to finance the operations of the Supreme Court, other than to pay the salaries of the Justices, if the Court holds any statute or part of a statute enacted by Congress to be unconstitutional.

Or “. . . unless the justices appears before the Senate Judiciary Committee weekly while in session to receive binding instructions on how to decide pending cases.
The Stakes Here Are Important

If Congress may use its “power of the purse” to by conditional appropriation seize control of powers vested elsewhere by the Constitution, the doctrine of “separation of powers” will come to an end.
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If Congress may use its "power of the purse" to by conditional appropriation seize control of powers vested elsewhere by the Constitution, the doctrine of "separation of powers" will come to an end.

Avoiding this was of great concern to the Founding Fathers.
“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”
Could the Power of Judicial Review Survive Such a Statute?

(Unlike the Commander-in-Chief Power, Judicial Review is an implied power not mentioned in the Constitution.)
Are there any questions?