

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

March 20, 2014

Dear Senator/Representative:

We, the undersigned members of The Constitution Project’s War Powers Committee,¹ write to express our serious concerns with S. 1939, introduced by Senators Tim Kaine, John McCain, and Angus King on January 16, 2014. The bill would repeal the War Powers Resolution (WPR) and require prior executive branch consultation with a 20-person joint legislative committee before the President could order military action. We appreciate that S. 1939 is intended to spark a long-overdue congressional and national debate about the issue. However, as the bill currently stands it would undermine core constitutional principles and strengthen the President and executive power at the expense of Congress and representative government.

We agree with the predicate for S. 1939: the War Powers Resolution “has not worked as intended, and has added to the divisiveness and uncertainty that exists regarding the war powers of the President and Congress.” Our opposition reflects a range of concerns that the legislation would only make matters worse. We offer the following to explain our opposition to this bill.

Legislation cannot amend the Constitution, which in Article I, section 8, assigns the power to decide on war – at least on offensive military action – to the Congress. S. 1939, despite its claim that it is “not meant to define, circumscribe, or enhance the constitutional war powers of either the executive or legislative branch of government,” ignores the requirement of Article I, section 8, and instead circumscribes the power of Congress and enhances the power of the President.

S. 1939 is correct in saying that “[t]he American people want both the President and Congress involved in the decision-making process when United States Armed Forces are committed to significant armed conflict” However, this bill shifts that decision largely to the President and a 20-person legislative committee, undermining the constitutional role of 515 other Members of Congress and the duty they have to represent the interests of their constituents.

Recent history demonstrates the inadequacy of S. 1939 and its potential for shifting power to the President. It defines “significant armed conflict” to mean any conflict expressly authorized by Congress “or any combat operation involving members of the Armed Forces lasting more than a week or *expected by the President* to last more than a week.” (Emphasis added.) In 2011, President Obama estimated that the military operation against Libya would take a matter of days, not weeks. Thus it would have been an operation permitted by this bill without Congressional action. In fact, action in Libya lasted seven months. In August 2013, the President contemplated a “limited” military strike against Syria, also within the boundaries of this bill language. Both operations constituted offensive actions against another country. Under the Constitution, they required the support of the full Congress either by a declaration or specific authorization.

¹ The Constitution Project’s bipartisan War Powers Committee was formed to examine how the United States should exercise its constitutional authority to make decisions about the use of force abroad. Our 2005 report, [*Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*](#), recommended improvements needed to restore the proper roles of all three branches, including replacement legislation for the WPR.

Section 3 of the bill also provides that the term “significant armed conflict” does not include “[l]imited acts of reprisal against terrorists or states that sponsor terrorism.” Article I, section 8, makes no such exception. The bill’s language could – and we fear would – be interpreted to provide statutory authorization for a President to order unilateral military attacks against Syria, Iran, and a potentially large number of other targets.

Most critically, the exceptions to the category of “significant armed conflicts” set out in Section 6 are an invitation to executive manipulation in the White House’s always-present cause of husbanding presidential authority. As noted above, that is especially worrisome regarding (2) “Limited acts of reprisal against terrorists or states that sponsor terrorism” and troubling as to (5) “Covert operations.” The “secret” war in Laos, for example, might have been considered a covert operation that would fall within this exception, despite its scale and duration. Such broad and ill-defined categories add to the divisiveness and uncertainty that the bill purports to lessen.

Even if the constitutional objections were absent, the consultative procedure contemplated under Section 6 to precede “a significant armed conflict” is fraught with its own problems of definition and operation. The President has complete discretion to finesse even the “classified report setting forth the circumstances necessitating the significant armed conflict” if there is a “need for secrecy or other [undefined] emergency circumstances.” Here again, this bill would have permitted unilateral presidential military actions against Libya in 2011, Syria in 2013, and prospectively against Iran. “Consult” is also undefined (except by implication in section 6(b)(1)(A)), repeating a major error of the War Powers Resolution. Furthermore, the bill requires consultation not just for “significant armed conflict,” but apparently for all “significant matters of foreign policy and national security,” sweeping across the jurisdictions of multiple existing congressional committees with enormous potential for competition.

There are also problems with Section 7, which sets out an expedited process for Congress to act on presidential requests to commit U.S. force abroad. Article I, section 8, should be the beginning and the end of any authorizing process. Under S. 1939, a president would retain his veto over a joint resolution of disapproval and, with the support of only a minority of one-third plus one in a single chamber to sustain a veto, could initiate and continue a military operation opposed by both Houses of Congress.

Section 4 of S. 1939 would repeal the WPR but would not carry forward vital language in the statute designed to protect the constitutional authority of Congress and safeguard republican government. Section 8(a) of the WPR stipulates that appropriations and treaties may not authorize the President to order military operations unless language in an appropriations bill or treaty “specifically authorizes” such action. By repealing the WPR, the bill would also eliminate this salutary rule of statutory construction.

Finally, the bill specifies that a joint resolution of approval means a joint resolution “*the sole matter of which*” consists of narrowly prescribed approve-or-disapprove language. However, Congress has historically authorized limited wars, restricted by area and scope, as well as armed conflicts upon fulfillment of certain conditions. We do not believe that any bill can (or should) attempt to eliminate this discretion by putting Congress in a straight-jacket when considering the scope of authorizations for armed conflict, and the bill’s futile attempt will surely confuse, rather than clarify, Congress’s authority.

Unfortunately, the WPR also contains language that undermines Congressional authority and responsibility. We understand the need to clarify this area of law. But for reasons already stated, S. 1939 is not the answer. We support a constitutionally valid alternative to address the short-comings in the WPR. We would commend to you the report of The Constitution Project's War Powers Committee, [*Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*](#) – in particular recommendation 6 – as just such an alternative. For background on the principles and analysis that provided guidance for this legislative proposal, see Louis Fisher, "[The Baker-Christopher War Powers Commission](#)," 39 Pres. Stud. Q. 128 (2009).

Thank you very much for your consideration.

Sincerely yours,

Mickey Edwards (co-chair), Vice President, Aspen Institute; former member of Congress (R-OK) and chairman of the House Republican Policy Committee

David Skaggs (co-chair), Adjunct Professor of Law, University of Colorado Law School; former Member of Congress (D-CO); Member of the Appropriations Committee and Permanent Select Committee on Intelligence

Louis Fisher, Specialist in Constitutional Law, Law Library of Congress (ret.); Scholar in Residence, The Constitution Project; Visiting Professor, William and Mary Law School

Michael J. Glennon, Professor of International Law, Fletcher School of Law & Diplomacy, Tufts University; author of *Constitutional Diplomacy* and co-author of *Foreign Relations and National Security Law*; former Legal Counsel, U.S. Senate Committee on Foreign Relations

Peter Raven-Hansen, Glen Earl Weston Research Professor of Law; Co-director, National Security and U.S. Foreign Relations Law Program, George Washington University Law School

Don Wallace, Jr., Professor, Georgetown University Law Center; Chairman, International Law Institute