

The Presidency

Presidential War Powers

Directions.—In this assignment, you will read through three different situations that involve the use of military force, and give your opinion (and justification) as to what a president may, or may not, do. But first, read the selections below that deal with the war-making powers of our government, and answer the questions that follow.

READING SELECTIONS.

from the United States Constitution

Article I, Section 8:

Clause 1: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .”

Clause 10: “To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . .”

Clause 11: “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . .”

Clause 12: “To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years . . .”

Clause 13: “To provide and maintain a Navy . . .”

Clause 15: “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . .”

Clause 16: “To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States . . .”

Clause 18: “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers”

Article I, Section 9:

Clause 2: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”

Article I, Section 10:

Clause 3: “No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”

Article II, Section 2:

Clause 1: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .”

Clause 2: “He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”

Article VI:

Clause 2: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

from the War Powers Act (a law passed by Congress in 1973 over President Nixon's veto)

SEC. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

SEC. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced--

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; the president shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth--

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

SEC. 5. (a) [describes the report the President is to submit to Congress].

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), 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, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), at any time that 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.

SEC. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) . . .

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

QUESTIONS FOR READING SELECTIONS.

1. Who has the power to declare war?_____
2. May states have their own armies and navies?_____
3. What may states have for their defense?_____
4. Who is Commander-in-Chief of the armed forces of the United States?_____
5. When may a state engage in war without consent of Congress?_____
6. According to the War Powers Act, for how long may a president use U.S. forces without congressional approval?

7. At the end of that time, what are the three reasons why the president may continue to use U.S. forces in battle?
(1) _____
(2) _____
(3) _____
8. Is there any way the president can get an extension to the original time limit? How?_____
9. What happens at the end of the time limit if the president continues to use U.S. forces in battle?_____
10. Do you think the War Powers Act is constitutional? Why or why not?_____

SITUATIONS.

- A. North Korean special forces storm a U.S. merchant ship, the S.S. *Savannah*, in international waters sailing between Japan and China. The ship has been towed to a North Korean port, and the crew taken to a North Korean prison camp. The President orders the Secretary of Defense and the Joint Chiefs (chiefs of the different branches of the military) to draw up plans to retake the ship and rescue the crew. The plans are given the name OPERATION VIPER.
1. Is there a constitutional problem for the President to order the military to make plans in preparation for a military action?_____
 2. Would it be permissible for the President to order U.S. forces to execute OPERATION VIPER before notifying Congress?_____
 3. If OPERATION VIPER looks like it's going to last more than 60 days, what options does the President have?_____

B. Troops from warlords in Somalia start massing on the border of Ethiopia, a nation the U.S. is allies with. The President of Ethiopia asks the President of the United States for help. The President orders the military to begin a massive airlift of troops and equipment to bases in Ethiopia, and to send four squadrons of fighter planes, and a small fleet of warships. This massive operation is called OPERATION MIRAGE. It appears the operation will last more than 60 days. In fact, the President orders the military to plan for attacks into Somalia to defeat the warlords and their armies. These attacks will be called OEPRATION DUST DEVIL. So far, only thirty days have passed since the President ordered the beginning of OPERATION MIRAGE. Some members of Congress have stated they believe this action is against the best interests of the United States, and they have introduced a concurrent resolution to force the President to bring the troops home. (A concurrent resolution does not require the President's signature.)

1. So far, has the President violated the Constitution or the War Powers Act? _____

2. What is supposed to happen if Congress passes the concurrent resolution? _____

3. If Congress passes the concurrent resolution and the President continues with OPERATION MIRAGE, is that permissible? _____

4. If Congress passes the concurrent resolution and the President orders OPERATION DUST DEVIL, is that permissible? _____

C. The United States is part of a military alliance called NATO (North Atlantic Treaty Organization). Besides the United States, members of NATO include Canada and most European nations. The United States became a part of NATO by a treaty that was made by the President and agreed to by two-thirds of the Senate. A specific section of the treaty states that an attack against one member of NATO shall be viewed as an attack against all members of NATO—and that all NATO members should come to the defense of the member that was attacked. Now imagine the year is 2025. Britain, a NATO member, is attacked by Iran. The President of the U.S. immediately orders attacks on Iran, and planning begins for the eventual invasion of Iran by NATO forces (this will involve many U.S. forces as part of the NATO force, and will certainly last more than 60 days).

1. Does the President need to seek a declaration of war from Congress? Why or why not? _____

2. Does the President need to follow the terms described in the War Powers Act? Why or why not? _____

3. What should happen if Congress passes a concurrent resolution in an attempt to halt U.S. involvement in NATO's war against Iran? _____

Presidential War Powers **KEY**

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NOTE: Every President since 1973 has argued that the War Powers Act is unconstitutional. Nevertheless, they sometimes follow its provisions of reporting to Congress (but not "pursuant to" the Act—only "consistent with" the Act—so that they may maintain their argument that the Act is unconstitutional).

QUESTIONS FOR READING SELECTIONS.

1. Who has the power to declare war? **the Congress**
2. May states have their own armies and navies? **no, unless they have the consent of Congress**
3. What may states have for their defense? **each have their own militia (today's National Guard)**
4. Who is Commander-in-Chief of the armed forces of the United States? **the President of the United States**
5. When may a state engage in war without consent of Congress? **when actually invaded or in imminent danger of invasion**
6. According to the War Powers Act, for how long may a president use U.S. forces without congressional approval? **60 (calendar) days**
7. At the end of that time, what are the three reasons why the president may continue to use U.S. forces in battle?
 - (1) **Congress has declared war or authorized the military action**
 - (2) **Congress has by law extended the deadline**
 - (3) **Congress is physically unable to meet due to an attack**
8. Is there any way the president can get an extension to the original time limit? How? **President certifies in writing that an additional 30 days are needed for "unavoidable military necessity". / President may ask Congress for an extension.**
9. What happens at the end of the time limit if the president continues to use U.S. forces in battle? **Student answers will vary. Impeachment is a possibility, but takes a 2/3rds vote in the House, and expulsion takes a 2/3rds vote in the Senate. This leads to the question, what if a majority of Congress opposes the military action, but there is not a sufficient vote for impeachment and expulsion?**
10. Do you think the War Powers Act is constitutional? Why or why not? **Student answers will vary.**

SITUATIONS.

- A. North Korean special forces storm a U.S. merchant ship, the S.S. *Savannah*, in international waters sailing between Japan and China. The ship has been towed to a North Korean port, and the crew taken to a North Korean prison camp. The President orders the Secretary of Defense and the Joint Chiefs (chiefs of the different branches of the military) to draw up plans to retake the ship and rescue the crew. The plans are given the name OPERATION VIPER.
1. Is there a constitutional problem for the President to order the military to make plans in preparation for a military action? **No, because no U.S. forces have been sent into hostilities yet.**
 2. Would it be permissible for the President to order U.S. forces to execute OPERATION VIPER before notifying Congress? **No, unless prior consultation was not possible. (Who decides?)**
 3. If OPERATION VIPER looks like it's going to last more than 60 days, what options does the President have? **1) President may certify "unavoidable military necessity" on his own thereby extending the deadline 30 days; 2) President may get Congress to declare war or extend the deadline.**

B. Troops from warlords in Somalia start massing on the border of Ethiopia, a nation the U.S. is allies with. The President of Ethiopia asks the President of the United States for help. The President orders the military to begin a massive airlift of troops and equipment to bases in Ethiopia, and to send four squadrons of fighter planes, and a small fleet of warships. This massive operation is called OPERATION MIRAGE. It appears the operation will last more than 60 days. In fact, the President orders the military to plan for attacks into Somalia to defeat the warlords and their armies. These attacks will be called OEPRATION DUST DEVIL. So far, only thirty days have passed since the President ordered the beginning of OPERATION MIRAGE. Some members of Congress have stated they believe this action is against the best interests of the United States, and they have introduced a concurrent resolution to force the President to bring the troops home. (A concurrent resolution does not require the President's signature.)

1. So far, has the President violated the Constitution or the War Powers Act? **No, unless prior consultation with Congress was possible. (Again, who decides? Is the danger that members of Congress may leak sensitive information to the media sufficient to say prior consultation is not possible?)**
2. What is supposed to happen if Congress passes the concurrent resolution? **The President will remove our forces from the hostilities.**
3. If Congress passes the concurrent resolution and the President continues with OPERATION MIRAGE, is that permissible? **No, the hostilities are the same hostilities; changing the name of the operation would not matter (presumably).**
4. If Congress passes the concurrent resolution and the President orders OPERATION DUST DEVIL, is that permissible? **No, without a declaration of war or specific authorization, Congress may pass a concurrent resolution at any time that recalls our forces.**

C. The United States is part of a military alliance called NATO (North Atlantic Treaty Organization). Besides the United States, members of NATO include Canada and most European nations. The United States became a part of NATO by a treaty that was made by the President and agreed to by two-thirds of the Senate. A specific section of the treaty states that an attack against one member of NATO shall be viewed as an attack against all members of NATO—and that all NATO members should come to the defense of the member that was attacked. Now imagine the year is 2025. Britain, a NATO member, is attacked by Iran. The President of the U.S. immediately orders attacks on Iran, and planning begins for the eventual invasion of Iran by NATO forces (this will involve many U.S. forces as part of the NATO force, and will certainly last more than 60 days).

1. Does the President need to seek a declaration of war from Congress? Why or why not? **No, so far the action is covered under either the War Powers Act or the NATO Treaty (Article 5 states that an attack on any member shall be considered an attack on all members; this has only been invoked once so far—after September 11, 2001).**
2. Does the President need to follow the terms described in the War Powers Act? Why or why not? **Possibly: So far, NATO actions of which the US has been a participant have either been approved by Congress anyway (such as the authorization for military action after September 11, 2001) or have not been challenged in any significant way (such as our intervention in Libya in 2011). In this scenario, students may argue that Section 8(a)(2) of the War Powers Act may not allow continued military action after 60 days without specific authorization; but students may also argue that the NATO Treaty is sufficient. The main point of this question is to get students to realize things can quickly go into a constitutionally gray area.**
3. What should happen if Congress passes a concurrent resolution in an attempt to halt U.S. involvement in NATO's war against Iran? **The President would likely argue the concurrent resolution has no effect since this is a NATO action. Congress would likely argue that Section 5(c) of the War Powers Act takes precedence over the NATO Treaty, and that the President should remove our forces from the hostilities accordingly.**