Since passage of the War Powers Resolution in 1973,1 each President, despite lingering questions about its constitutionality,2 has submitted reports to Congress consistent3 with the legislation. While the resolution does not require the Executive Branch to specify the basis for the report,4 the circumstances surrounding a deployment normally demonstrate if it was made under section 4(a)(1),5 involving introduction of forces into actual or imminent hostilities,6 or under section 4(a)(2), the provision concerning introduction of forces into the territory of another state while “equipped for combat.”7

Those seeking to safeguard Congress’s involvement on decisions of war stand on firmer ground when requiring the President to report deployments involving hostilities, imminent hostilities, or, at least, the strong potential for hostilities. Yet, Congress’s authority “to declare War,” the constitutional justification for the War Powers Resolution, has little relevance to the President’s decision to deploy forces into foreign territories, where U.S. forces do not intend or are unlikely to encounter hostilities. Successive administrations, while recognizing the questionable basis for applying the resolution to situations not involving hostilities or potential hostilities, have opted not to press the issue and liberally report in order “to keep Congress fully informed.”8 While

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6 Judge Advocate, U.S. Army. Currently assigned as Senior Associate General Counsel (Military Fellow), Office of the General Counsel, Office of the Director of National Intelligence.

7 Much has been written on the constitutionality of the resolution, particularly on the necessity to obtain congressional approval within sixty days for deployments involving hostilities. On the one hand, Article 1, Section 8 of the U.S. Constitution gives Congress the power to declare war, raise and support armies (to include a militia), to provide and maintain a Navy and to make rules to govern and regulate these forces. U.S. CONST. art. II, § 8. On the other hand, Article II, Section 2 states the President is the “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.” U.S. CONST. art. II, § 2. This paper does not intend to rehash these constitutional arguments, but seeks to examine the practice of reporting solely on the basis of the weapons carried by U.S. forces.

8 In his most recent unclassified, consolidated War Powers Resolution report, submitted in June 2016, the President identified fifteen geographic areas where the United States deployed forces to conduct military operations. Letter from the President of the United States to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (June 13, 2016), https://www.whitehouse.gov/the-press-office/2016/06/13/letter-president-war-powers-resolution. A month later, the President informed Congress of the deployment of forces “equipped for combat” “to support the security of U.S. personnel” at the embassy in South Sudan. Letter from the President of the United States to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, July 13, 2016, https://www. whitehouse.gov/the-press-office/2016/07/13/letter-president-war-powers-resolution. Of the operations in the consolidated report, eleven squarely meet the first prong of the reporting requirement because they involve situations where U.S. forces were directly involved in actual or imminent hostilities. These can be further divided into deployments in support of ongoing combat operations, to include direct action operations (Afghanistan, Iraq, Syria, Somalia, Yemen, and Libya); staging areas for combat operations (Turkey and Djibouti); and countries, of varying degrees of stability, where U.S. forces were deployed to deter hostilities (Kosovo, Egypt, and Jordan). While the Cuba report was most likely made under the theory that the deployment of troops to support detention operation is an integral part of ongoing hostilities, authorized by the 2001 Authorization to Use Military Force, the remaining three either involve Intelligence, Surveillance, and Reconnaissance (Niger and Cameroon) or Advice and Assistance (counter-LRA) missions. Professor Robert Chesney explains that the Executive Branch has interpreted hostilities to mean “sustained hostilities,” where U.S. forces are “actively engaged in exchanges of fire with opposing units,” not “episodic,” “sporadic,” or “intermittent military engagements.” Robert M. Chesney, White House Clarifies Position on Libya and the WPR: US Forces Not Engaged in “Hostilities,” LAWFARE BLOG (June 15, 2011), https://www.lawfareblog.com/white-house-clarifies-position-libya-and-wpr-us-forces-not-engaged-hostilities.


some democratic benefit may be achieved by this practice, valid policy reasons exist for why congressional notification should be limited, particularly when outside the scope of Congress’s purview. Not only does unnecessary reporting erode presidential authority and create a precedent for subsequent administrations, but it also may create a risk to operational security, while unduly politicizing matters that should be confined to the chain of command.9

This paper examines how various administrations have decided to notify (or not notify) Congress of military deployments under section 4(a)(2) of the War Powers Resolution solely based on the type of arms carried by U.S. forces, and not on the potential for the forces to be involved in hostilities. This paper discusses what it means to be “equipped for combat” in the context of section 4(a)(2) of the War Powers Resolution by looking at two deployments where the weapons carried played the determining factor on whether to make a report. The paper then discusses the wisdom of rigidly applying section 4(a)(2) based solely on the presence of certain weapons and argues that the Executive Branch should review the entirety of the circumstances surrounding the deployment, not just the weapons carried, to include the operational mission, purpose for the weapons (e.g., offensive versus defensive), potential for forces to be engaged in hostilities, and rules of engagement.

Section 4 of the War Powers Resolution requires the President to report to Congress within 48 hours, absent a congressional declaration of war, any time U.S. 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

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9 The operational chain of command runs from the President to the Secretary of Defense (through the Chairman of the Joint Chiefs of Staff) to the Combatant Commanders. 10 USC § 162(b) (1996). See Frederick S. Berry, The Impact of the 1973 War Powers Resolution on the Military (April 7, 1989) (unpublished study project, U.S. Army War College) (on file with the U.S. Army War College Library). The author illustrates the impact that the War Powers Resolution played in the security measures taken by the Marines in Lebanon, based on a concern that heightened security would indicate to Congress that the Marines were being introduced into a situation of hostilities or imminent hostilities.


11 Id. at § 1544(b).

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Significantly, the 60-day clock for obtaining congressional authorization for military deployments under the resolution only applies to section 4(a)(1), which involves situations of actual or imminent hostilities. A report under section 4(a)(2) would not involve circumstances that would trigger the 60-day clock.11

The resolution itself neither explains nor defines the term “equipped for combat,” but states the resolution, in its entirety, is intended to apply to operational deployments of U.S. forces into “hostilities, or into situations where imminent involvement of hostilities is clearly indicated by the circumstances . . . .”12 Since its passage, neither the Executive or Legislative Branches have provided any official guidance or clarification on what it means to be combat-equipped, but two historical examples provide insight into how the Executive Branch’s application of section 4(a)(2) has evolved.

The first public debate over section 4(a)(2) surrounded the deployment of U.S. forces to El Salvador in the early 1980s, part of the United States strategy to prevent the spread of communism in Central America. In November 1979, President Carter sent the first military advisors to El Salvador to support the Salvadoran government in their ongoing civil war.13 By March 1981, the Reagan Administration had agreed to a 55-person limit on the number of military advisors that could be deployed to El Salvador.14 In explaining the role of the advisors, President Reagan stated, “We’re sending and have sent teams down there to train. They do not accompany them into combat. They train recruits in the garrison area.”15 Additionally, the State Department made clear that the forces in El Salvador were armed with “personal sidearms, which they [were] only authorized to use in their own defense or the defense of other Americans,” and were not “equipped for combat” for purposes of section 4(a)(2) of the War Powers Resolution.16

The Reagan Administration concluded that the War Powers Resolution reporting requirements were not triggered in El Salvador because U.S. forces were (1) not involved in hostilities or imminent hostilities, i.e., only training foreign forces in areas where they would not be involved in hostilities

12 Id. at § 1541(a).


14 Id.


or potential hostilities; and (2) not combat-equipped because they were only allowed to carry personal sidearms. While some in Congress contended from the outset that the chaotic situation in El Salvador required the Administration to make a report, these protests gained more traction when five U.S. military advisors were videotaped, in February 1982, carrying M-16 rifles in an “insecure” area of El Salvador. The Administration conceded that the soldiers had violated the sidearm policy and would be disciplined, but explained that the M16s were for purely defensive purposes for U.S. forces training Salvadorans to build bridges destroyed by the guerillas. The incident sparked several reactions. Senator Paul Tsongas argued that if the M-16 was considered a combat weapon, the Administration would need to consider the implications under the War Powers Resolution. Secretary of Defense Caspar Weinberger defended the decision to carry M16s, “Trainers down there have to have some kind of personal protection. It is essential in that kind of a situation.”20 Despite a request by the U.S. Ambassador to El Salvador to permit advisors to carry rifles for defensive purposes,21 the Reagan Administration stood by its policy of limiting the military advisors to the use of sidearms and maintained that the situation did not warrant congressional notification under the War Powers Resolution. The reluctance to allow U.S. forces to carry M16s for purely defensive purposes can be attributed to two principle concerns: (1) armaments greater than a personal sidearm would be considered “equipped for combat” under section 4(a)(2); and (2) the mission would be limited to training in areas not involving hostilities.

30 years later, the deployment of U.S. forces to assist African regional forces in countering the Lord’s Resistance Army demonstrates how the Executive Branch’s application of section 4(a)(2) had matured. In October 2011, President Obama informed Congress of his decision to send U.S. forces to Uganda to advise and assist in the mission to counter the Lord’s Resistance Army (LRA). At the time of the report, defense officials stated that the report was required due to the introduction of forces into a country while “equipped for combat,” not because of actual or imminent hostilities. Testifying before Congress, the Assistant Secretary of Defense for International Security Affairs Alexander Vershbow stated, the President submitted the report “based on one simple fact: that the nature of the weapons that our forces are carrying for self-defense . . . make those forces considered to be equipped for combat . . . .”25 Another Department of Defense (DoD) representative said that the presence of “crew-served” weapons with the forces triggered the reporting requirement, despite the fact that they would only be used if “the need to fight arises.”27 This interpretation of section 4(a)(2) is not new. In 2007, former National Security Council Legal Advisor James E. Baker wrote, “[f] or some time the executive branch applied an informal rule of thumb that ‘equipped for combat’ meant armed with crew-served weapons.”28 Taken together, the evidence points to an ongoing practice of reporting deployments of U.S. forces, in situations not involving hostilities or imminent hostilities, purely based on the presence of crew-served weapons.29

On the one hand, the Executive Branch’s more recent approach to section 4(a)(2) makes for a fairly easy determination.20 The International Committee of the Red Cross (ICRC), in its recently published Commentary on the First Geneva Convention, took a similar “crew-served weapon” approach to the issue of weaponry carried by medical personnel in discriminating between offensive and defensive weapons. In concluding that medical personnel, responsible for protecting a medical unit or establishment, may be armed with “light individual weapons” or “individual portable weapons, such as pistols or rifles” without losing their protected status, the ICRC states:

[It] must always be borne in mind that the use of light individual weapons by medical personnel must not result in the commission of an act harmful to the enemy. The scope of defence would not cover cases of enemy military advances aimed at taking control over the area where the medical establishments or units are located, nor would the use of force to prevent the capture of their unit by the enemy be permitted. . . . Similar considerations apply to mounting weaponry, for instance on mobile military medical units. On this basis, heavy weapons, such as ‘crew-served’ machine guns (requiring a team of at least two people to operate them), could not be mounted on a mobile military medical unit without that unit losing its specific protection [footnotes omitted].

International Committee of the Red Cross, Commentary of 2016 on the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, ¶¶ 1867-68, https://ihl-databases.icrc.org/applic/ihl.nsf/EN/36590Open Document. The ICRC’s rationale is grounded on three primary concerns: (1) that the weapons only be those required for strictly defensive purposes; (2) that the weapons give the perception that the medical unit is armed for offensive purposes; and (3) that the weapons only be employed against unlawful attacks. Id. ¶ 1864. The ICRC further clarified that "carrying weapons which are portable by one individual yet which go beyond the purpose of self-defence, such as man-portable missile or an anti-tank missile, would
determination of when notification is required in situations not involving hostilities—the presence of crew-served weapons. On the other hand, the position that forces are combat-equipped based solely on the armaments carried, without consideration of any other factors, results in unnecessary reporting and erosion of presidential authority over foreign affairs. It also risks political considerations, at any level of command, driving the decision on the type of weapons carried by U.S. for defensive purposes, a framework that invites disaster.

Take the following hypothetical. If U.S. forces are conducting an advice and assistance mission with local forces in areas not involving hostilities, and mission commanders would like to introduce an aircraft or ground vehicle, equipped with a crew-served weapon, into the territory of a foreign state (e.g., for the purpose of transportation of U.S. or foreign forces; assistance in intelligence, surveillance, or reconnaissance; logistics support; or casualty evacuation) then the current policy would mandate a report, regardless of the purpose of the equipment. The vehicle may be armed in such manner because it is its normal configuration or U.S. military commanders are simply taking routine force protection measures to minimize risk and promote safety in the event of unforeseen circumstances (likely in a military culture that seeks to minimize risk and prepare for all eventualities). When DoD informs the administration that introduction of the vehicle would trigger a report, White House policy advisors will either (1) recommend the President make a report, fraught with a number of political and national security considerations; (2) ask that the crew-served weapon be removed, placing political pressure on a tactical commander’s force protection decision; or (3) suggest that the deployment be scuttled. Requiring a report, purely based on the presence of a crew-served weapon, makes a routine force protection decision in support of a foreign assistance mission, conducted under the President’s Article II authority, into a potential political hot potato. Understandably, the operations may occur in regions with varying degrees of law and order, but the Executive Branch should not limit its examination to purely the armaments carried by U.S. forces; rather it should examine the totality of the circumstances surrounding the deployment with the most important factors being the likelihood that the forces will encounter hostilities, the nature of the mission, and whether the weapons are carried for purely defensive purposes.

The “equipped for combat” language in section 4(a)(2) should be read in conjunction with both the situations covered in section 4(a)(1) and the overall stated purpose of the legislation. Read together, the sections form a spectrum of hostilities, with deployments under section 4(a)(1) involving situations where troops will most likely be exposed to hostilities, and section 4(a)(2) covering circumstances where exposure to hostilities is less likely, but probable enough that the forces should expect and prepare for them—which would not include all situations where forces may be carrying crew-served weapons for purely defensive purposes. Ultimately, a binary determination, are they carrying a crew-served weapon or not, while easy to apply, risks the unnecessary expansion of the War Powers Resolution into areas that should be exclusively within the President’s foreign affairs and Commander-in-Chief powers.

lead to a loss of specific protection. Id. ¶ 1865. It also stated that personnel would lose their protection if the weapons “cannot easily be transported by an individual and which have to be operated by several persons . . . .” Id. ¶ 1868.

While informative, the comparison of the Department of Defense’s approach to how the ICRC’s characterizes defensive versus offensive weapons for the purpose of Geneva Convention protections actually demonstrates the shortcomings in the Department of Defense’s, and, by extension, the Administration’s current approach. The ICRC is concerned with the protection of medical personnel and units during a time of war, and seeks rules that will increase respect for international humanitarian law in the heat of combat. It makes sense that the ICRC would believe that allowing a medical unit to carry heavy weapons would be inconsistent with their function, create confusion in targeting, and erode justification for protection from attack. This rationale does not readily translate to peacetime situations outside the context of an ongoing armed conflict.

30 In this instance, the term “hostilities” is used in its broadest sense, i.e., exposing U.S. forces to the likelihood of hostile fire, but not in the context of section 4(a)(1), which would trigger the sixty-day reporting requirement under section 5(b) of the resolution. See supra note 6 and accompanying text. This paper argues that submitting reports under section 4(a)(2), where troops will not be in situations of actual or imminent hostilities, is not required merely because of the presence of a certain weapon, although that may be a factor to be considered.

31 Former National Security Council Legal Advisor James E. Baker, in fact, recognizes the problems with the Executive Branch’s approach to section 4(a)(2). He states: “This presented an absurd hair-trigger as crew-served weapons, like machine guns and mortars, are organic to most ground units, whether or not those units anticipate hostile circumstances or are engaged in routine training or deployments.” BAKER, supra note 3, at 362 n.20.

32 Other factors that should be considered include whether the forces employed are combat or service support forces (e.g., infantry, military police, Special Forces, or logistics), the stability of the area, the ability of the host nation to provide law and order, the nature and mission of the forces that U.S. forces may be accompanying or training, the proximity to potential hostilities of the U.S. forces, and type of weapons potential hostile forces in the area employ.