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## Strengthening the Toy Handcuff: The Future of the War Powers Resolution

Ernest Shriver

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# **Strengthening the Toy Handcuff: The Future of the War Powers Resolution**

A THESIS  
The Honors Program  
College of St. Benedict/St. John's University

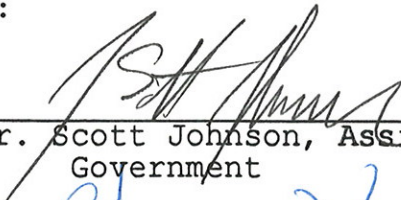
In Partial Fulfillment  
of the Requirements for the Distinction "All College Honors"  
and the Degree Bachelor of Arts  
In the Department of Government

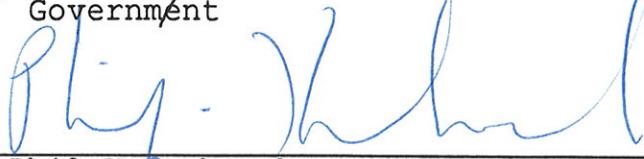
by  
Ernest Shriver  
May, 1994



PROJECT TITLE: Strengthening the Toy Handcuff: The Future  
of The War Powers Resolution

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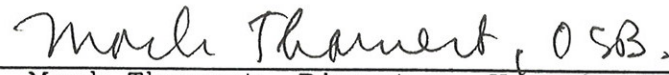
  
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No one will question that [the war] power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures.

Supreme Court Justice Robert Jackson  
*Woods v. Miller Company* (1948)

## Introduction

In late 1992, President George Bush sent several thousand U.S. military personnel to the small African country of Somalia to assist in the distribution of food to stave off rampant famine. Initial reactions from both Congress and the American people were positive; in fact, there was almost overwhelming support for the President's humanitarian action. It appeared that U.S. forces were assisting those less fortunate, while the President could be seen as a statesman generously helping the Somali people even as his own days in office dwindled.

By the fall of 1993, however, the situation had deteriorated. By then, American forces were actively engaged in seeking to capture General Mohammed Aidid, using force in their pursuit of the person perceived to be the main obstruction to order in the country. In October of that year, 14 Americans were killed in an ambush by Aidid's forces. U.S. military personnel were regularly challenged not only by Somali gunmen, but also by ostensibly neutral Somalis angered over the innocent blood that had been shed in the pursuit of Aidid. American and Congressional sentiment turned against the Somali mission, which had turned from one of humanitarian aid to a military excursion reminiscent of the U.S. invasion of Panama. Yet to this point, there was no formal declaration of war, and Congress' acquiescence was the sole authorization of the President's projection of power as a means of foreign policy.



How has the deployment of military personnel in combat situations come to be seen by the President as an extension of "foreign policy"? What role (if any) should Congress have in making momentous decisions such as the use of military force for humanitarian missions? And what does our Constitution and subsequent legislation say about the relationship between the Legislative and Executive branches of our government in this area?

The Constitution states explicitly in article I, section 8, clause 11 that Congress has the power to declare war, a power it has exercised eleven times<sup>1</sup>. Yet it is evident from history that the military has often been used by the President for offensive military operations without congressional authorization. In the last fifteen years, the military has been involved offensively in Beirut, Grenada, Panama, Somalia, and Kuwait and Iraq. None of these actions were accompanied by a declaration of war.

Congress has lost control of the war-making power for various reasons. It has been reluctant to make the often tough choice to go to war, preferring to defer to the

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<sup>1</sup> Congress declared by joint resolution on June 18, 1812 that a state of war existed with Great Britain; on May 13, 1846, with Mexico; on April 25, 1898, with Spain; on April 6, 1917, with Germany; on December 7, 1917, with Austria-Hungary; on December 8, 1941, with Japan; on December 11, 1941, with Germany; on the same day, with Italy; on June 5, 1942, with Bulgaria; on the same day, with Hungary and with Rumania. Francis D. Wormuth and Edwin B. Firmage, To Chain the Dog of War: The War Power of Congress in History and Law (Chicago: University of Illinois Press, 1989), 53-54.

executive. It has been traditionally uninvolved in foreign affairs, its other powers in this arena being limited. And it has realized that presidential initiative is most often coupled with some sort of popular mandate, and prudence dictates that Congress go with the political flow. In Congress' absence, the Executive has been only too eager to assume the mantle of responsibility for the decision to go to war in addition to his constitutional power to conduct war.

The situation, however, is unconstitutional, a fact that Congress has only recently tried to remedy. The War Powers Resolution<sup>2</sup> was enacted by Congress in 1973 over President Nixon's veto to attempt to even the balance of war powers between the President and Congress. The declared purpose of the Act was

...to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.<sup>3</sup>

The passage of the War Powers Resolution was a direct result of the United States' involvement in the undeclared

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<sup>2</sup> PL 93-148, codified at 50 USC 1541-1548 (1982).

<sup>3</sup> War Powers Resolution, sec 2(a).

war in Vietnam and was intended to "prevent future Vietnams"<sup>4</sup>. The nation was at a crucial turning point not only in the international arena, but also at home due to the Watergate scandal, which brought about remarkable change in the federal government, specifically in Presidential-Congressional relations.

The entire Resolution can be found in the appendix to this essay, but the main provisions of the resolution are as follows: first, the President is required to submit a report to Congress within 48 hours of introducing U.S. armed forces into hostilities or situations where imminent hostilities are clearly indicated by the circumstances; second, the President must withdraw these forces within 60 days unless Congress authorizes the involvement; third, Congress may force withdrawal of forces by concurrent resolution, one not requiring presidential signature; and fourth, neither appropriations nor treaties can be construed as congressional authorizations to use force.

The Resolution, however, has not had the success its authors had hoped for. Every President from Richard Nixon to Bill Clinton has asserted that the War Powers Resolution infringes upon the powers of the Executive although no attempts have been made by any President to go to court to

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<sup>4</sup> Harold H. Koh, "Lessons of Iran/Contra," Yale Law Journal 97 (June 1988): 1260.

challenge the law<sup>5</sup>. The Presidents in office since the passage of the Resolution have always avoided a constitutional battle with the Congress by appealing to public opinion and making reports to Congress that asserted the Presidential power of Commander-in-Chief rather than the War Powers Resolution as the authorization to introduce U.S. Armed Forces. For example, when Ronald Reagan finally made his report to the Congress concerning the U.S. Marine presence in Lebanon in the mid-80's, the President did not make his report under provisions of the Resolution, instead citing his "constitutional authority with respect to the conduct of foreign relations and as Commander in Chief"<sup>6</sup>.

Presidential avoidance and non-recognition together with a lack of collective will on the part of Congress<sup>7</sup> have served to make the War Powers Resolution a "paper tiger", or, as Arthur Schlesinger put it, a "toy handcuff"<sup>8</sup>.

Congress has the sole constitutional power to approve non-defensive military operations. For various reasons, however, it has lost control of these operations to the executive. This situation necessitates some action to

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<sup>5</sup> Daniel P. Franklin, "War Powers in the Modern Context," Congress and the Presidency 14 (Spring 1987): 82.

<sup>6</sup> Jacob K. Javits, "War Powers Reconsidered," Foreign Affairs 64 (Fall 1985): 130, 135.

<sup>7</sup> Javits, "War Powers Reconsidered," 139.

<sup>8</sup> Arthur M. Schlesinger Jr., The Imperial Presidency (Boston: Houghton Mifflin Company, 1973).

restore the war-making powers to their proper constitutional place, within the powers of Congress. It will be argued that the mechanism which was supposed to do so, the War Powers Resolution, has been insufficient for this end.

This essay will explore the War Powers Resolution in the following ways. First, the constitutionality of the resolution will be explored, both in broad sense of whether it violates separation of powers, as well as from the technical considerations as a result of the Supreme Court's decision in INS v. Chadha. Second, I will show that Congress has had difficulty enforcing the Resolution due to flaws in the Resolution and the non-enforcement that comes from these flaws. Third, specific changes to the Resolution will be suggested to ensure that the Resolution will fulfill its promise in the face of the United States' ever-changing role in world affairs.

### The Constitutionality of the War Powers Resolution

The constitutionality of the War Powers Resolution has never been the subject of a Federal Court ruling. Nevertheless, courts have ruled that constitutional questions concerning the resolution may be raised under sufficient conditions of ripeness<sup>9</sup>. Chief among the constitutional questions raised by the resolution are first, whether the resolution usurps either Executive or Congressional powers under the Constitution; and second, whether the invalidation of the legislative veto in Immigration and Naturalization Service v. Chadha<sup>10</sup> affects the resolution (which does contain a clause concerning concurrent resolutions).

#### Broad questions of the War Powers Resolution's constitutionality

In order to determine whether the War Powers Resolution is constitutional or not, we must first ask what this law is, what it was designed to do, and what impact it has had and continues to have on the relationship between Congress and the President.

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<sup>9</sup> Crockett v. Reagan 558 F. Supp. 893 (D.D.C. 1982); also Lowry v. Reagan 676 F. Supp. 333 (D.D.C. 1987) 341, ("Although adjudication of constitutional questions should not be encouraged, the courts nonetheless would have the responsibility of resolving the constitutionality of this provision if it were properly presented").

<sup>10</sup> 462 U.S. 919 (1983).

One supposition that can be and has been made is that the War Powers Resolution fundamentally redraws the constitutional roles of Congress and the President in foreign policy-making; that in effect, it redraws the constitution by statute alone. In his Message to the House of Representatives returning the War Powers Resolution without approval<sup>11</sup>, President Nixon related his concerns that the resolution would fundamentally alter the relationship in foreign policy-making between the President and the Executive. Nixon asserted that the War Powers Resolution represented "a serious challenge to the wisdom of the Founding Fathers in choosing not to draw a precise and detailed line of demarcation between the foreign policy powers of the two branches"<sup>12</sup>, and that the War Powers Resolution "would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years"<sup>13</sup>. According to Nixon "[t]he only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution"<sup>14</sup>.

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<sup>11</sup> Presidential Documents: Richard Nixon, 1973: vol 9, no. 43, 1285-1287.

<sup>12</sup> Nixon, 1286.

<sup>13</sup> Nixon, 1286.

<sup>14</sup> Nixon, 1286.

But is this so? Did the War Powers Resolution constitutionally change the roles of the Congress and the President? In Congress' words,

[i]t is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities.<sup>15</sup>

In other words, the War Powers Resolution is nothing more than a congressional definition of the relationship of the President and Congress in the initiation of armed hostilities<sup>16</sup>. The War Powers Resolution changes the roles of the two parties only in the sense that what had previously been allowed on the part of the President by Congressional inaction or silent acquiescence is now restricted by Congressional action, the War Powers Resolution. In essence, the War Powers Resolution addresses the problem of what is to be done when the joint responsibilities of the President and Congress are not exercised equally. Truthfully, Congress could retain complete control of the initiation of hostilities and completely restrict the President's ability to initiate war.

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<sup>15</sup> War Powers Resolution, sec 2(a).

<sup>16</sup> "The War Powers Resolution is not constitutional as an exercise of the war power. It is constitutional because it defines the war power. The War Powers Resolution is nothing more or less than a congressional definition of the word "war" in article I [of the Constitution]", Stephen L. Carter, "The Constitutionality of the War Powers Resolution," Virginia Law Review 70 (Feb. 1984): 101.



The only argument that the Executive could make that his power was unconstitutionally restricted is that precedent exists for autonomous action on the part of the Commander-in-Chief. Precedent, however, pales in the face of explicit congressional action.

Further evidence that the War Powers Resolution was not meant to alter the fundamental, constitutional relationship between the President and Congress can be found in section 8, the interpretation of joint resolution. Part (d) of this section states that

Nothing in this joint resolution--

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

### The Ascendancy of the Executive

The contemporary crisis over war powers represents the problems that are inherent in applying an unchanging document, the constitution, to the political reality of ever-changing relationships, perceptions, and balances of power between the actors to which the document applies. Were there a controversy over war powers as they exist defined in the constitution, it is unlikely that the constitutional convention would have passed them as such, nor would Congress have waited nearly 200 years before

acting to address the imbalance. The balance of war-making power between Congress and the President, however, has shifted throughout our nation's history, necessitating a re-evaluation of the processes by which we initiate and conduct war.

Much has been made over the evolution of the "Imperial Presidency"<sup>17</sup>. The American Presidency has grown from an important administrative position of Chief Magistrate to a near-mythic post in which the personality of the man elected to the position is subsumed by the traditions and expectations of the office. While the various congressmen and other elected officials (with some exceptions) have been able to maintain an air of ordinariness about their persons, the office of the Presidency has imposed certain conditions upon whomever happens to occupy it at the time. We have moved from the time of Jefferson, who was not afforded table space at his own inaugural dinner, to the present "MTV Presidency" of Bill Clinton, where pomp, circumstance and flash can eclipse the substance of the presidency. History dictates not only that successive Presidents maintain this imperial air, but that they better their predecessors. Unfortunately, a President's success is measured not by his competence or adherence to the Constitution, but by his

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<sup>17</sup> Schlesinger, viii. ("The constitutional Presidency...has become the imperial Presidency and threatens to be the revolutionary Presidency" ). See also Jacob K. Javits, Who Makes War (New York: William Morrow & Company Inc., 1973), 262.

expansion of executive power. This has manifested itself in the area of war powers by Presidential usurpation of Congressional powers<sup>18</sup>.

During the American Revolution, broad power was granted to General George Washington, then Commander in Chief of the Continental Army. In December of 1776, the Continental Congress passed a bill that said in part:

Resolve, that General Washington...is vested with full, ample and complete powers to raise and collect together, in the most speedy and effectual manner [troops]...to establish their pay...to displace and appoint all officers...to take wherever he may be whatever he may want for the use of the army...to arrest and confine persons...disaffected from the American cause.<sup>19</sup>

Although the bill is remarkable in itself, and its like would hardly be considered today, perhaps more remarkable is the reaction of Washington to his powers. Given a six-month limit on his powers, Washington dutifully surrendered them on the date designated not once, but three times, wisely recognizing the importance and propriety of adhering to democratic processes. Compare this to executive protestations about restriction of supposedly inherent powers as commander-in-chief<sup>20</sup>, or to the avoidance of Congressional mandate as in the Iran-Contra affair.

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<sup>18</sup> See generally Javits, Who Makes War, chapter 18.

<sup>19</sup> Quoted in Javits, Who Makes War, 5.

<sup>20</sup> See generally Nixon.

### A Constitutional History

*The constitution supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care vested the question of war in the Legisl. - James Madison, 1798, in a letter to Thomas Jefferson*

Article I, Section 8 of the Constitution explicitly gives Congress the power to declare war; this much is beyond dispute. But, as evidenced by history and the political struggles between the legislature and the President, the power to conduct war on the behalf of the Executive has presented formidable problems. In order to determine how the language of the Constitution applies to the activity of declaring and making war, a short history of the constitutional struggle pertaining to war powers is appropriate<sup>21</sup>.

A study of the general relationship between the federal branches of government and the correct amounts of power assigned to each is beyond the scope of this thesis. Volumes have been and will continue to be produced on the subject. Nevertheless, something of the intent of the Founding Fathers can be divined from their writings, as well as subsequent actions on the part of the President, Congress, and the Supreme Court.

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<sup>21</sup> For a more comprehensive study of the Constitutional struggle over war powers, see Schlesinger, The Imperial Presidency.

The Early Constitution. The intent of the members of the Constitutional convention in the area of war powers was to restrict the power of the President in order to deny him the powers of the British King, which were "the sole prerogative of making war and peace"<sup>22</sup>. Alexander Hamilton, a figure associated with expansive executive power, proposed during the convention that the Senate "have the sole power of declaring war" with the executive to "have the direction of war when authorized or begun"<sup>23</sup>. A problem arose, however, in determining what action was necessary on the part of Congress for the President, as Commander in Chief, to repel sudden attacks.

A famous compromise was made by Madison and Gerry of the convention. As originally written, Congress was to have the power to make war. Madison and Gerry moved to substitute "declare" for "make" war, leaving to the President the power to repel sudden attacks.

During the convention there was little dissent over the necessity of changing the wording of the clause. The movement from "make" to "declare" was seen by many participants as either an indistinguishable difference or as a clarification of the war powers which would maintain the

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<sup>22</sup> E.S. Corwin, The President: Office and Powers (New York: New York University Press, 1940), 154.

<sup>23</sup> C.C. Tansill, ed., Documents Illustrative of the Formation of the Union of the American States (Washington: Government Printing Office, 1927), 224; quoted in Schlesinger, The Imperial Presidency, 3.

initiation of hostilities as a congressional prerogative<sup>24</sup>. While this switch was certainly expeditious, and some provision needed to be made to address the very real fear of foreign invasion<sup>25</sup>, this action also has helped to provoke the controversy which exists yet today.

Several problems cropped up soon after ratification of the Constitution. In 1798, during a war between France and Great Britain, President Washington unilaterally declared American neutrality, possibly in repudiation of the U.S. treaty with France of 1778<sup>26</sup>. This pointed out a hole in the constitutional fabric, in that while the Congress had the sole power of declaring war, it said nothing about who could declare the absence of it. Pro-French congressmen and newspapers promptly objected to the President's action on

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<sup>24</sup> "[M]ost if not all of the delegates believed [that]...the [Constitutional] Convention endowed Congress with the authority to raise and support armies and navies, make rules and regulations for the military forces, call out the militia and to exercise all of the policy functions associated with the war power. The executive role, in the convention's view, was to be limited to the function of Commander-in-Chief". Javits, Who Makes War, 14.

<sup>25</sup> The powers of national defense "ought to exist without limitation, BECAUSE IT IS IMPOSSIBLE TO FORESEE OR DEFINE THE EXTENT AND VARIETY OF NATIONAL EXIGENCIES, OR THE CORRESPONDENT EXTENT AND VARIETY OF THE MEANS WHICH MAY BE NECESSARY TO SATISFY THEM. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense." 23rd Federalist.

<sup>26</sup> Schlesinger, The Imperial Presidency, 18-20.

the grounds that his action usurped what was properly Congress' power.

Alexander Hamilton, writing as "Pacificus", defended Washington's action. He argued that foreign policy by nature was an executive function, and that powers relating to foreign policy given to Congress by the Constitution were "exceptions out of the general 'executive power' vested in the President" and "ought to be extended no further than is essential to their execution". Hamilton conceded that such action might influence the legislature in the exercise of their power, but felt that "the executive...may establish an antecedent state of things, which ought to weigh in the legislative decision"<sup>27</sup>.

James Madison, writing as "Helvidius", denied that the President maintained inherently executive powers in the area of foreign relations, calling this a "vicious" doctrine obviously "borrowed" from Britain. He stated that the legislature's power to declare war included everything necessary to make that power effective, including whether the United States was obliged to declare war or not pursuant to a treaty<sup>28</sup>.

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<sup>27</sup> Quoted in Schlesinger, The Imperial Presidency, 18-19.

<sup>28</sup> Schlesinger, The Imperial Presidency, 19.

President Washington, agreeing with "Hamilton in theory but with Madison in spirit"<sup>29</sup>, wisely requested Congress to act, observing that it "rested with the wisdom of Congress to correct, improve, or enforce" neutrality policy. Hereafter, neutrality became a matter of congressional prerogative, but the controversy exhibited by Washington's action pointed out the difficulty in maintaining a separation between congressional and executive powers concerning foreign policy.

Abraham Lincoln and The Prize Cases. Lincoln is remembered as one of our nation's greatest presidents, rightly deserving of praise for resolve in the face of adversity, and for the preservation of the union of the states. Yet while he was perceived as a man ruled by law, Lincoln perhaps acted most unconstitutionally regarding the war powers than any of his presidential peers. No President has ever undertaken such sweeping powers in the absence of congressional authorization, nor had any President presented Congress with such a collection of *faits accompli*<sup>30</sup>.

The election of Abraham Lincoln to the office of President was one of the triggers of the civil war. States' rights advocates in the South perceived, perhaps correctly, that the abolitionist movement in the North, coupled with an

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<sup>29</sup> Schlesinger, The Imperial Presidency, 20.

<sup>30</sup> Schlesinger, The Imperial Presidency, 59.



administration sympathetic to its cause and committed to centralized government, would bring an end to southern slavery, and by extension, the plantation system. The conflict exploded into violence when Confederate batteries opened fire on Fort Sumter.

In response to this armed insurrection, President Lincoln (amongst other things<sup>31</sup>) emplaced a naval blockade against the southern states, and notified neutral nations of his action. By so doing, Lincoln entered the sphere of international law, which considered a blockade an act of war. Lincoln had, in the eyes of many, unilaterally declared war *de facto*.

Within a month of Lincoln's proclamations, Union ships were capturing vessels and sending them to federal courts on grounds of violating the blockade<sup>32</sup>. Some of these ships were British-owned, some were owned by persons residing in the Confederate states. Predictably, the counsels of the owners of these vessels began using the argument that

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<sup>31</sup> In addition to ordering a naval blockade, Lincoln asserted his right to suspend the writ of *habeus corpus*, the right to order summary arrest, the right to confiscate private property, and the right to suppress free expression. He also barred from the mails materials he deemed "inimical to the national interest". Javits, Who Makes War: The President versus Congress, 119-20.

<sup>32</sup> Some of the cases involved include; The Tropic Wind 28 Fed. Cases 218 (1861), The Parkhill 18 Fed. Cases 1187 (1861), The Hiawatha, The Crenshaw 12 Fed. Cases 95 (1861), and The Amy Warwick 1 Fed. Cases 799 (1862).

because the Constitution reserved to Congress the right to declare war, the President's blockade was unconstitutional.

The federal courts began relying on arguments such as those in The Tropic Wind, which recognized that "war declared by congress is not the only war within the contemplation of the constitution"<sup>33</sup>. The federal courts consistently ruled in favor of the President, noting generally that a state of war existed previous to Lincoln's orders; that Lincoln was reacting to a pre-existent situation in his capacity as Commander-in-Chief. Meanwhile, Congress further confused the issue by passing laws on August 6, 1861 which not only recognized the existence of a state of war, but also retroactively approved Lincoln's actions.

These issues came to a head in late 1862 in the Prize Cases<sup>34</sup>. The Supreme Court, in a divided opinion, ruled that the President had a right to institute a blockade in response to civil insurrection, and that the property of persons domiciled within those states (those having seceded from the union) was a proper subject of capture on the seas. The Supreme Court also recognized the right of a President to determine whether an armed insurrection or other incursion into United States territory constituted war, and to act to defend the U.S. interest in his role as Commander-

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<sup>33</sup> 28 Fed. Cases 218, 220.

<sup>34</sup> 2 Black 635 (1863).

in-Chief. In his actions pursuant to the outbreak of war, Lincoln had also authorized the raising of troops, and had paid these soldiers and sailors out of the public treasury without congressional appropriation, despite his lack of constitutional authority. The Supreme Court also let this stand, and, by doing so, implicitly endorsed the executive's right to inaugurate and carry on a war of "indefinite duration and proportions"<sup>35</sup>. John S. Carlisle, a counsel for appellants in the case, said that the opinion that the Court later adopted made the president

the impersonation of the country, and invokes for him the power and right to use all the force he can command, to 'save the life of the nation.' The principle of self-defense is asserted; and all power is claimed for the President. This is to assert that the Constitution contemplated and tacitly provided that the President should be dictator, and all Constitutional Government be at an end, whenever he should think that 'the life of the nation' is in danger.<sup>36</sup>

President Truman and the Steel-Seizure Case. The Second World War had a profound effect on American politics, the separation of powers, and the American people. President Roosevelt had, albeit constitutionally, become arguably the most powerful man on earth. His conduct of American foreign policy, both before and after America's

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<sup>35</sup> Ludwell H. Johnson III, "Abraham Lincoln and the Development of Presidential War-Making Powers: Prize Cases (1863) Revisited", Civil War History 35 (Sept. 1989): 208, 219-220.

<sup>36</sup> Prize Cases, 2 Black 635, 648 (1863).

official declaration of war, greatly expanded the implicit powers of the Executive. Congress, understandably in full agreement with the President's actions, rarely put obstacles in the Commander in Chief's path, contrary to its resistance to Roosevelt's New Deal. The American people, as Jacob Javits put it, had "been conditioned by four years of war to respond to new alerts with the reflexes of disciplined soldiers"<sup>37</sup>. It was then, perhaps, not implausible for President Truman to think that the Executive's war powers would continue to grow unchecked.

News of North Korea's invasion of South Korea reached Washington on June 24, 1950<sup>38</sup>. This was seen by President Truman as a threat to U.S. interests as well as collective security in the post-WWII world order; some action on his part was called for. The next day, June 25, the United Nations Security council pronounced North Korean aggression "a breach of the peace," called for the withdrawal of invading forces, and directed member states to "render every assistance" to the UN to enforce this resolution. That same evening, Truman decided to commit American sea and air forces in support of South Korea. This chronology is important because it wasn't until June 27, two days after his decision, that Truman met with congressional leaders to

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<sup>37</sup> Javits, Who Makes War: The President versus Congress, 240.

<sup>38</sup> For this and following dates, see Schlesinger, The Imperial Presidency, 131-32.

receive their support, and afterward announced his decision to the nation.

Senator Robert A. Taft, a Republican opponent of Truman's, while supporting American intervention, argued that there was no legal authority for Truman's action. Other congressmen joined Taft, suggesting that Truman request a joint resolution approving his action, with the indication that its passage would be nearly automatic. Meanwhile, Truman was increasing the U.S. military commitment, including ground forces.

Truman, on the advice of Secretary of State Acheson, decided not to request a congressional resolution approving his action, relying instead on the President's constitutional powers as Commander in Chief to justify his intervention in Korea. Based also on precedent, represented by the State Department's memorandum listing of 87 instances in which the President had sent American forces into combat on his own initiative<sup>39</sup>, Truman decided to ignore Congress' role in introducing military force into Korea. Despite individual protests, Congress succumbed to Truman's initiative and public opinion and tacitly approved his

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<sup>39</sup> Many of these instances can hardly be considered war in the traditional sense. Included in them are limited action to suppress pirates and to protect American citizens in conditions of local disorder. This list has since grown, as of January 10, 1991, to 215 instances of American military excursions. Congressional Record, "Instances of Use of United States Armed Forces Abroad, 1798-1989," S130, (daily ed. Jan. 10, 1991).

action by subsequent appropriations and the extension of the selective service.

His role as sovereign in foreign policy secure, Truman was faced with another dilemma. In early 1952, workers in the steel industry threatened a strike that would shut down production of vital war material. In April 1952, President Truman ordered the Secretary of Commerce to seize and operate the steel mills until the threat of strike was past. In fairness to Truman it should be noted that he intended the seizure to be temporary, that it represented an exercise of emergency power, and that he recognized Congress' power to supersede his policy with its own. Indeed, he did write the Senate requesting that Congress act, preferably in support of his action<sup>40</sup>.

Not unpredictably, the steel companies sued to get their property back. The administration claimed that the President had inherent and independent power which could be limited only by impeachment or electoral defeat<sup>41</sup>. The district judge denied this sweeping argument, and the case moved to the Supreme Court, where the government tempered its argument.

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<sup>40</sup> Schlesinger, The Imperial Presidency, 142.

<sup>41</sup> "In the lower court an Assistant Attorney general defended the seizure in Trumanesque terms, claiming that the President had inherent and independent power, limited only by impeachment or by defeat in the next election, to save the nation from catastrophe." Quoted in Schlesinger, The Imperial Presidency, 143.

The decision in Youngstown Sheet & Tube Co. v. Sawyer<sup>42</sup> was made 8 weeks after the President's action. The Court, in a divided (nearly splintered) decision, pronounced the seizure unconstitutional. The decision itself said little about Presidential independence in foreign policy, instead limiting the specifics of the decision to the domestic sphere, and to general comments on the relationship of presidential power to the legislative power.

What was important about the decision, at least as it impacts the war powers, was how the President's constitutional duties were defined. While both sides recognized legislative supremacy, the government contended that the President had the right to act unless his action was expressly denied by Congress, while the steel companies maintained that the President had no power to act without congressional authorization or against prior congressional instruction.

The Supreme Court ruled in favor of the steel companies, that the President had overstepped his power by ordering their seizure. The Court found that

The President's power, if any, to issue the order must stem from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied...It is clear that if the President had authority to issue the order he did,

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<sup>42</sup> 343 U.S. 579 (1952).

it must be found in some provisions of the Constitution, [however] the order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces...[n]or can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President.<sup>43</sup>

It was also in the Youngstown decision that Justice Jackson formulated his famous tripartite definition of Presidential authority. In the first instance, when acting in accord with "express or implied authorization of Congress", the President's authority is at a maximum. When acting with neither Congress' grant or denial of power, the President can rely only on his independent powers, although there exists a "zone of twilight" in which the President and Congress have concurrent authority. It is in cases such as this that "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility". The third case is when the President acts counter to the expressed or implied will of Congress, for then "his power is at its lowest ebb"<sup>44</sup>.

The decision in the Youngstown case restricted Presidential power in an instance devoid of congressional direction, and in so doing, set limits upon the Presidential exercise of power. Yet, while seen as a victory for those

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<sup>43</sup> Youngstown, 343 U.S. 579, 585-587.

<sup>44</sup> Entire test found in Youngstown, 343 U.S. 579, 635-7.



desirous of limiting the President's power, Youngstown also carried a message for Congress that the Court was not to be used as a tool in the void of congressional inaction to keep the President in check. Justice Jackson said "I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems"<sup>45</sup>, and that "We [the Court] may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers"<sup>46</sup>. The Court passed on the guardianship of war powers to where it properly belongs, to the Congress itself.

Vietnam and the Tonkin Gulf Resolution. Although the authority of the President had been successfully challenged in the Youngstown case, the Cold War brought with it a host of new problems for a nation finding itself struggling for parity with the Soviet bloc. Covert wars, brushfire wars, the resurgence of gunboat diplomacy, and the domino theory of communist expansion provoked even greater, and potentially more unconstitutional usages of presidential power.

Despite the placement of American advisors in Vietnam during the Kennedy administration, relatively little attention was given to the possible implications of American

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<sup>45</sup> Youngstown, 343 U.S. 579, 654.

<sup>46</sup> Youngstown, 343 U.S. 579, 654.

involvement. While American troops were sometimes found in harm's way, this was seen as a necessary evil of the advisor role they held. The attack on the U.S. destroyer *Maddox*<sup>47</sup> in August, 1964 changed things, however.

In that same month, Congress passed the Gulf of Tonkin Resolution<sup>48</sup> with only two dissenting votes (both in the Senate). The resolution gave the President the power to use armed force to assist "any Southeast Asian country requesting assistance in defending its right to self-determination". A resolution of this type was hardly unprecedented. Congress had passed similar resolutions in January 1955 to protect Formosa (Taiwan) from armed attack, in January 1957 to declare American interests in the Middle East, and in September 1962 in response to Soviet expansion in Cuba. These resolutions had served their purpose to deter whatever conflict they were aimed at. The Tonkin Gulf Resolution was used, however, to justify massive American involvement in Vietnam and was widely viewed, both inside and outside of government, as the President's authorization to escalate the war in Vietnam. It was, as Jacob Javits writes, "the extreme point in the process of constitutional

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<sup>47</sup> "Red PT Boats fire at U.S. Destroyer on Vietnam Duty," New York Times, 3 Aug 1964, A1.

<sup>48</sup> 78 Stat. 384 (1964).

erosion that had begun to accelerate at the opening of this century"<sup>49</sup>.

What the Tonkin Gulf Resolution did was precedent-setting. The President (Johnson) maintained that a resolution (not a declaration of war) authorized him to conduct offensive operations outside of our national borders. Vietnam could hardly be considered a defensive engagement, unless the definition of defense included any potentially harmful military action on the globe. In addition, despite the language of the Tonkin Gulf Resolution that allowed the use of force for any Southeast Asian nation requesting assistance to maintain its right to self-determination, the resolution operated outside any extra-national organizations, such as the United Nations or SEATO. The Resolution was geared specifically for the war in Vietnam.

It is not even clear if President Johnson felt dependent on Congressional authorization in his escalation of hostilities. When requesting Congressional action, Johnson phrased his request for the "opinion of Congress", and not explicit authorization. It was his opinion that the

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<sup>49</sup> Javits, Who Makes War: The President versus Congress, 258.

resolution was a political necessity, but not a constitutional one<sup>50</sup>.

American involvement in Vietnam became rapidly unpopular, and as a result, congressional support of the war became commensurately reduced. In January 1971, the Resolution was revoked by Congress. Despite this, the war lumbered on, its slow death impeded by Presidential determination, concern over the political costs of withdrawal, congressional restriction of the war in practical terms, and the cutting off of monies to fund the war. The experience of Vietnam led directly to the passage of the War Powers Resolution in 1973.

#### The impact of INS v. Chadha

The most direct constitutional challenge to the War Powers Resolution is the attack on the inclusion of the legislative veto provisions of Sections 5(b) and 5(c). A legislative veto "constitutes a provision by which Congress reserves to itself a power to affect, by later action less than a law, authority that it has previously delegated to some other agency or branch of government, typically to the

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<sup>50</sup> "We stated then, and we repeat now, we did not think the [Tonkin Gulf] resolution was necessary to what we did and what we're doing." Quoted from "Transcript of the President's News Conference on Foreign and Domestic Affairs," New York Times, August 19, 1967, A10.

executive branch or to an administrative agency exercising quasi-legislative, rule-making authority."<sup>51</sup>

In INS v. Chadha<sup>52</sup>, the Court held that any bill passed by Congress must pass through the full legislative process prescribed by the Constitution. In this process, bills must be submitted and passed by both houses of Congress and presented to the President for his signature or veto. Chadha invalidated a tool used by Congress for oversight of executive action, in which a clause was inserted into bills which allowed executive action pursuant to a bill to be invalidated by a resolution by either the Senate or the House of Representatives. The Supreme Court ruled that this violated the presentment clause, in that the President had no opportunity to accept or veto the congressional action.

The Resolution contains two different veto provisions, a two-House veto in section 5(c) of the Resolution, and a silent veto provision in section 5(b)<sup>53</sup>. They differ in the activity required of Congress; section 5(c) allows for the removal of U.S. forces at any time if Congress passes a

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<sup>51</sup> G. Sidney Buchanan, "In Defense of the War Powers Resolution: Chadha does not Apply", Houston Law Review 22 (Oct. 1985): 1155, 1155, n. 4.

<sup>52</sup> 462 U.S. 919.

<sup>53</sup> Robert A. Weikert, "Applying Chadha: The Fate of the War Powers Resolution", Santa Clara Law Review 24 (Summer 1984): 697, 703. Weikert divides legislative vetoes into six categories; one-House, modified one-House, two-House, committee, committee chairman's, and silent vetoes. As noted in the text, only the two-House and silent vetoes are present in the War Powers Resolution.

concurrent resolution, while section 5(b) requires the President to remove U.S. Armed Forces after the specified time period (60 days) unless Congress has declared war, extended the 60-day time period, or is physically unable to meet.

I would argue that the Court's decision in Chadha does not extend to instances such as the one occurring in the Resolution. For instance, Congress' action in passing the legislation challenged by Chadha was a delegation of Congressional power to the Attorney General which could not be removed without going through the legislative method mandated by the Constitution<sup>54</sup>. James Nathan, however, suggests that the Resolution differs from the situation in Chadha, because the War Powers Resolution seeks to buttress Congressional power as written in the Constitution and therefore is not a delegation of congressional war-making powers to the executive; it would not be outside Congress' realm to include a concurrent resolution clause in such a law<sup>55</sup>. Chadha challenged an attempt by Congress to change the legal status quo outside the methods mandated by the constitution; the War Powers Resolution is different from the Immigration and Nationality Act (the legislative veto

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<sup>54</sup> "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked"; Chadha, 462 U.S. 919, 955 (1983).

<sup>55</sup> James Nathan, "Salvaging the war powers resolution" Presidential Studies Quarterly 23, no. 2 (Spring 1993): 235, 249-250.

provisions of which were at issue in Chadha) in that the War Powers Resolution serves as an attempt by Congress to codify its own understanding of the proper division of constitutional power between Congress and the President regarding the use of military force<sup>56</sup>. The powers of the President and the Congress were not fundamentally changed, nor was there a delegation of Congressional power to the President<sup>57</sup>; therefore there was no change in the legal status quo.

The Court's decision in Chadha, however, doesn't seem to recognize that the legislative veto could, in certain situations, be a legitimate tool for Congress. The decision has been called "a work of mechanical simplicity" that doesn't distinguish among provisions that resemble the

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<sup>56</sup> Weikert, 1177. Also, "In the case of the War Powers Resolution, Congress delegated nothing. It merely established a procedure to facilitate the collective judgment of the executive and legislative branches." Louis Fisher, "How Tightly can Congress Draw the Purse Strings", The American Journal of International Law 83, no. 4 (1989): 758, 763.

<sup>57</sup> This point is stressed in section 8(d)(2) of the Resolution, which states that "Nothing in this joint resolution...shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution."

situation in Chadha<sup>58</sup>. Justice Powell lamented the sweeping scope of the decision in Chadha, saying

Whether the veto complies with the Presentment clause may well turn on the particular context in which it is exercised, and I would be hesitant to conclude that every veto is unconstitutional on the basis of the unusual example presented by this legislation.<sup>59</sup>

Justice White decried the invalidation of the legislative veto in his dissent, saying "[t]oday 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,""<sup>60</sup> and mentioned the War Powers Resolution by name<sup>61</sup> as one piece of legislation that would be invalidated by the Court's decision.

Because of the wide scope of the Court's decision, it is likely that the section 5(c) of the War Powers Resolution would be invalidated should it be challenged in Federal Court. Perhaps in recognition of this, the Plaintiffs in Lowry v. Reagan<sup>62</sup> conceded that Chadha invalidated the

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<sup>58</sup> Ides, "Congress, Constitutional Responsibility and the War Power," Loyola L.A. Law Review 17 (1984): 599, 630 n. 101.

<sup>59</sup> Chadha, 462 U.S. 919, 960 (1983), n.1; Powell, J. concurring.

<sup>60</sup> Chadha, 462 U.S. 919, 967 (1983).

<sup>61</sup> Chadha, 462 U.S. 919, 977 (1983).

<sup>62</sup> 676 F.Supp. 333 (D.D.C. 1987).



concurrent resolution provision in the War Powers Resolution<sup>63</sup>.

Setting the stage for the War Powers Resolution

The placement of excessive power in the hands of one person or body of persons is the first step on the road to tyranny. The Constitution recognizes this by separating the powers of government to ensure that no one branch of government exercises an inordinate amount of power. It is for this reason that the Executive is constitutionally designated the Commander in Chief of the Armed Forces with the responsibility of conducting war once initiated, while Congress is entrusted with the power to declare war and raise and support the Army and the Navy.

Several reasons can be given for the passage of the War Powers Resolution. Although the reality of politics sometimes dictates that the normally polite collegiality between the legislative and the executive be set aside, until the 20th century the President and Congress enjoyed a like-minded relationship in the arena of foreign policies. Even when the President overstepped his constitutional boundaries in the area of war powers, as did President Lincoln, the Congress was wont to agree with his judgment

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<sup>63</sup> "In the aftermath of the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*..., however, it is conceded [by the Plaintiffs] that this provision does not have the force and effect of law." *Lowry*, 676 F. Supp. 333, 335 (D.D.C. 1987).

and ratify his actions, explicitly as well as implicitly. By the time of the Korean war, however, individual congressmen began to question the method of the President if not the mission in war powers, and by Vietnam began to oppose not only the means of conduct of foreign conflict, but the very issue of whether or not American forces belonged in overseas wars. Much to their chagrin, Congress found that by historically deferring to the judgment of the Executive, the initiative to employ American forces in hostilities had been lost. The difficulty of Congress in stopping the war in Vietnam is testament to the new power of the President.

The bond between congressional authorization to conduct hostilities and the President's conduct of same has become more tenuous over time. Once dependent on explicit authorization to wage war, the President's role has become the initiator of hostilities, and Congress' role has become that of approving the President's action. The use of the Tonkin Gulf resolution to wage a war involving the full might of the U.S. military against a small Asian nation despite the lack of a declaration of war showed how the President has become more apt to use narrower and narrower resolutions to validate his exercise of power.

Congress' complicity in this process of the shift in the usage of war powers cannot be ignored. By historically entrusting the Executive with not only the conduct of war

but the initiation of it, Congress partially abdicated its role in the area of foreign affairs. By deferring to the President's judgment in many cases, the Congress has placed itself in the unenviable role of trying to even the constitutional balance between itself and the President.

### The Enforceability of the War Powers Resolution

*If we chose to make it work, it will work, but we do not have within ourselves the gumption to make it work. It is workable if we choose to, but we do not choose to.*<sup>64</sup> - Senator Claiborne Pell

Prospects for the success of the War Powers Resolution immediately after its passage seemed bright. Congress as an institution found itself, if not more powerful, at least more powerful proportionally than the executive. The office of the President had been greatly weakened by the Watergate scandal. President Ford was widely perceived as relatively weak, and was faced with a "veto-proof" Democratic Congress. A reassertion of legislative priorities in foreign policy seemed imminent.

Challenges to the War Powers Resolution sprang up soon after its passage, however. In April of 1975, Ford unilaterally ordered U.S. forces to evacuate Americans from Cambodia and South Vietnam when these countries fell to Communist forces. Despite the fact that a mission of rescuing American civilians was outside the confines of the Resolution, Congress did not oppose the President's action because of the short nature and limited size of the

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<sup>64</sup> Congressional Record vol. 134 S7173 (daily ed. June 6, 1988).

operation, and the fact that the actions were completed before they became widely known<sup>65</sup>.

The next month, the Communist Cambodian government seized the S.S. *Mayaguez*, a U.S. merchant ship, and detained it and its crew. Despite the fact that the situation of unilateral presidential action to rescue U.S. civilians was considered and deleted from the War Powers Resolution, and that more than enough time, two and one-half days, elapsed between the time of seizure and the time that President Ford ordered the rescue mission, the provisions of the War Powers Resolution were not followed. By the time Congressional leaders were even notified of the action, the decision had been made to put the plan into effect, and protestations that the military actions including the bombing of targets far from the detention site were out of proportion to the mission were excused away as necessary for the success of the operation. Many congressmen supported the President's action, foregoing the democratic process outlined in the War Powers Resolution for endorsement of the President's policy.

To this date, Congress has yet to see the promise of the War Powers Resolution fulfilled. Almost every President, beginning with Richard Nixon, has questioned the resolution's constitutionality. No President has willingly

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<sup>65</sup> Rourke, John T. Presidential Wars and American Democracy: Rally 'Round the Chief. (New York: Paragon House, 1993), 120-21.

acted in direct accord with the resolution<sup>66</sup>, although several have acted within its spirit<sup>67</sup>. The only formal invocation of the War Powers Resolution is found in a compromise resolution signed by President Reagan on October 12, 1983, which stated that U.S. forces in Lebanon "are now in hostilities requiring authorization for their continued presence under the War Powers Resolution"<sup>68</sup>. The fact that the compromise resolution was adopted only after U.S. forces had been in Beirut almost 14 months and were involved in almost daily hostilities points out the impotence of Congress and its war-making powers.

The problem with congressional enforcement of the resolution is indicative of a problem encountered generally in the interaction between Congress and the President: how

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<sup>66</sup> Presidents have made 19 general reports to Congress, but only President Ford has made specific reference to the provisions of the War Powers Resolution. In 1975, while reporting on the *Mayaguez* operation, Ford specifically "took note" of Section 4(a)(1). While this could be seen as promising, the operation by nature was swift, with no likelihood of an extended deployment. Where longer deployments have been likely, not one section 4(a)(1) report has been filed. Thomas M. Franck, "Rethinking War Powers: By Law or by 'Thaumaturgic Invocation'?", The American Journal of International Law 83, no. 4 (1989): 766, 769, n. 15.

<sup>67</sup> "[T]o avoid appearing to acquiesce in what I saw as a clearly unconstitutional law...I submitted my reports 'consistent with' rather than 'pursuant to' the resolution." Ford, Gerald R., foreword to Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy, by Robert F. Turner (McLean, Virginia: Brassey's, 1991), viii.

<sup>68</sup> Rourke, 128-29.

does Congress, a legislative body, ensure that the Executive, the man entrusted to carry out its laws, actually does so, and what recourse does Congress have in the event that these laws are not carried out?

This problem is not unique to the War Powers Resolution. In Goldwater v. Carter<sup>69</sup>, a suit was brought against the President to stop the termination of a U.S.-Taiwan treaty, on the grounds that the Senate had the power of advice and consent in treaty termination as well as formulation. The case was decided in favor of the President. In Nixon v. Administrator of General Services<sup>70</sup>, a dispute arose over the propriety of a congressional impoundment of Presidential documents and recordings. This case was decided against the President.

We needn't look so far as Supreme Court cases involving both the Congress and the President to find conflict and its resolution, however. From the near impeachment of President Andrew Johnson to the daily battles over impending legislation, the political landscape is filled with the pitched battles and small skirmishes that are fought on the political front lines. Our system of separation of powers guarantees that our political decisions are made with measured step and are made collectively.

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<sup>69</sup> 444 U.S. 996 (1979).

<sup>70</sup> 433 U.S. 425 (1977).

How then should the resolution be enforced, barring executive cooperation? Should the resolution be enforced? And, are the mechanisms found in the War Powers Resolution sufficient for these ends?

### Flaws in the Law

The basic problem facing enforcement of the provisions of the War Powers Resolution is one of ambiguity. When a Congress and a President are acting in concert, or at least in a collegial atmosphere, the question of ambiguity is not a problem. Congress can pass a broad law, content that the President will at least make an attempt to act within the spirit of the law. Major details of the law, such as its implementation and enforcement, are left to the executive branch. As well, questions of the constitutionality of such law, while certainly important and examined by the legislature during the drafting and ratification process, will certainly be examined by federal courts in the event of challenge.

The question of ambiguity becomes a problem in legislation such as the War Powers Resolution for two reasons. First, such legislation is by nature adversarial and provokes uncommon controversy and dissent between the branches. Second, the resolution is aimed specifically at, and concerns only, the President. While the War Powers Resolution certainly impacts the entire nation, its provisions are binding only upon the Executive, the office



charged with enforcing the laws passed by Congress. When such legislation provokes such disagreement by Presidents, its enforcement is made that much more difficult.

Several of the provisions of the War Powers Resolution are ambiguous by design and/or have an impact not intended by its framers. These all contribute to the ineffectiveness of the resolution and the unwillingness of Congress and the federal courts to police the President's adherence to its provisions.

The Consultation Requirement. Section 3 of the War Powers Resolution provides that "[t]he President in every possible instance shall consult with Congress" before the introduction of U.S. Armed Forces into hostilities or situations of imminent hostilities. The definition of consultation as used in the resolution is indeterminate and subject to interpretation, but there is little doubt that the this section of the resolution demands more than has been given by several of our Chief Executives.

Consultation at its core means more than mere notification. Inherent in its definition are the notions of the solicitation of advice and opinion, and an extreme, but perhaps appropriate, usage of the term consultation includes consent. It can be assumed, and shall be here, that the inclusion of the consultation requirement infers that Congress be a part of the decision-making process about the use of armed force in the arena of foreign policy.

Opponents of the resolution assert that the consultation requirement of section 3 merely requires that the President notify Congress about the introduction of US forces into hostilities. This is the tactic used by President Reagan during the invasion of Grenada. The directive authorizing the invasion was signed at 6:00 PM on October 24, 1983, and commenced at 5:30 PM the next day. Reagan did not meet with Congressional leaders until 8:00 PM the night before the invasion, and then only to inform them. The administration contended that the 8:00 PM meeting met the consultation requirement, but Claiborne Pell, a ranking member of the Senate Foreign Relations Committee, noted that "[t]here is a world of difference between being consulted and being asked do we think this is wise or not, or being informed"<sup>71</sup>.

An omission that opponents of the resolution make is that the consultation clause is separate from the reporting clause. The reporting clause provides that the President inform Congress within 48 hours if certain conditions are met, conditions such as those as the invasion of a sovereign nation like Grenada. Why, except to mandate consultation beyond mere reporting, would Congress insert a clause such as Section 3? The answer can only be that Congress must expect to be integrally involved in the war-making process.

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<sup>71</sup> Quoted in Wormuth, 220.

Other ambiguities exist in section 3 that make enforcement of the resolution difficult, if only because the determination of the terminology can be disputed. The clause states that the President must consult with Congress "in every possible instance". Drafters of the resolution meant to exclude those situations where it is obviously impossible for the President to consult Congress, such as an immediate missile assault upon the US, but the definition of every possible instance is ambiguous.

Yet another problem exists with the definition of "situations where imminent involvement in hostilities is clearly indicated by the circumstances". This clearly includes situations that do not entail overt hostilities, but Presidents have used this to mask military deployments. For instance, President Reagan stated that the marines stationed in Beirut in 1983-84 were deployed defensively, and were not involved in hostilities or imminent hostilities<sup>72</sup>.

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<sup>72</sup> Wormuth, 261-63.

The Reporting Requirement. Section 4 of the resolution provides that upon the incidence of certain defined conditions<sup>73</sup>, the President shall report, in writing, to the Speaker of the House of Representatives and the President pro tempore of the Senate the circumstances, authority, and scope and duration of the deployment of forces.

A similar problem exists with this clause as with the consultation clause. There is no clear-cut definition of hostilities or imminent hostilities. Do hostilities include only large-scale, organized battles and skirmishes, or do guerilla attacks on US forces qualify as hostilities? Do imminent hostilities include only mobilization and expected battlefield deployment of armies, or does the introduction of US forces into a potentially hostile environment come under this provision? Taken across the spectrum, one could make arguments that this clause is only in effect in the large-scale introduction of the US forces into a shooting war, to the opposite extreme that any introduction of US forces is a potential target/instrument of violence, and

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<sup>73</sup> The introduction of U.S. Armed Forces

(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.

therefore comes under the reporting provision. The clause is indeterminate.

The 60-90 day "clock". Section 5(b) of the resolution provides that the President shall terminate the use of military force within 60 days after a report is submitted or required to be submitted pursuant to section 4(a)(1) (interestingly enough, sections 4(a)(2) and 4(a)(3) are left out of this consideration), unless Congress has declared war, extended the sixty-day period, or is physically unable to convene because of an armed attack. Several problems stem from this clause.

First and foremost, because of the difficulty noted above as to when the report mandated by section 4(a)(1) must be submitted, there is confusion over when the clock starts to run. Does the clock begin when forces are introduced into a potentially hostile situation, or does the sixty-day period begin only when hostilities are initiated? What if the President never submits a report with the assertion that imminent hostilities are not present? This is the tactic used by President Reagan during the Beirut operation, and marines stayed in Beirut well past the sixty-day period of the War Powers Resolution. Who makes the determination of whether or not the report *should* have been submitted? It would seem that the clock starts to run when the report is required to be submitted. Does Congress decide, in the absence of a Presidential report, to start the clock

running? Is this determination a proper decision of the federal courts? These questions have never been answered by any of the principal actors.

Two potentially dangerous situations also arise out of this clause. First, the restriction of a sixty-day limit joined with a Congress unsympathetic to the President's policy puts US forces into danger. Potential enemies could conceivably wait out the President, knowing that after 60 days (or 90, as provided by the clause), forces must be withdrawn.

Secondly, the reality is that most Presidents choose to act and are expected to act in moments of crisis. The imposition of a sixty-day limit compels the President to choose his battles not on the basis of sound policy, but on their expected success given his tools. This clause in effect grants the President a sixty-day window in which to act as he sees fit (barring the consultation requirement or the congressionally-mandated withdrawal of troops). The high-tech, high-speed nature of modern warfare means that many conflicts can be ended well within a sixty-day period (witness Desert Storm). The sixty-day limit of Section 5 may be no restriction on the President, and may in fact have the reverse effect of granting the President more power.

#### Civil Action

Presidential actions relating to war powers, and specifically the War Powers Resolution, have been challenged

in Federal Courts on several occasions by individual members of Congress and groups of Congressmen. These efforts have been generally unsuccessful, pointing out the necessity of Congress to act vigorously on its own behalf. The decisions were not entirely friendly to the Executive's position, however, leaving the question of the constitutionality of the War Powers Resolution and the legality of Executive actions pursuant to the Resolution unresolved, and these decisions should be examined to provide guidance as to the prospects of future enforcement of the Resolution.

Crockett v. Reagan<sup>74</sup>

In reaction to continuous guerilla attacks by left-wing rebels in El Salvador, President Ronald Reagan increased the limited military aid granted initially by the Carter administration to the government of El Salvador. After leftist insurgents started a "final offensive" to topple the government in January 1981, Reagan dispatched 20 military advisors to supplement the 5 already placed there by President Carter.

In reaction to the President's initiative, 29 members of Congress brought suit against Reagan, the secretary of defense, and the secretary of state for violation of the War Powers Clause of the Constitution and the War Powers Resolution. The suit specifically requested a judgment

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<sup>74</sup> 558 F. Supp. 893 (D.D.C. 1982).

against the President requiring him to submit a report in accord with section 4 of the War Powers Resolution.

The administration argued that its authorization for the increase in advisor strength could be found in the International Security and Development Cooperation Act of 1981<sup>75</sup>. Indeed, section 728 of the act did specifically authorize military aid to El Salvador, but the Court concluded, pursuant to section 8(a) of the War Powers Resolution, that such means did not constitute statutory authority to increase the number of advisors. Unfortunately for Congress, however, the Court dismissed the suit without reaching decision on the merits, stating that "[t]he Court concludes that the factfinding that would be necessary to determine whether U.S. forces have been introduced into hostilities or imminent hostilities in El Salvador renders this case in its current posture non-justiciable"<sup>76</sup>.

Sanchez-Espinoza v. Reagan<sup>77</sup>

Another war-powers controversy in Central America arose when the Reagan administration decided in 1982 to train Cuban and Nicaraguan exiles to assist the Nicaraguan contra movement. Also, and perhaps more disturbing, was the administration's involvement in the mining of Nicaraguan

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<sup>75</sup> 21 U.S.C. § 2151 (1980).

<sup>76</sup> 558 F. Supp. 893, 898 (D.D.C. 1982).

<sup>77</sup> 568 F.Supp. 596 (D.D.C. 1983).



harbors, an action for which the United States was sanctioned by the World Court.

Several members of Congress as well as several Nicaraguan and Floridian citizens challenged the U.S. action as violations of, among other things, the War Powers Resolution and U.S. neutrality laws<sup>78</sup>. The Plaintiffs in the case sought declaratory as well as injunctive relief. The Court again refused to hear the case on its merits, stating that "[t]he instant action is replete with insurmountable obstacles to justiciability"<sup>79</sup>.

Lowry v. Reagan<sup>80</sup>

In 1987, the United States responded affirmatively to a request by the Kuwaiti government to flag commercial oil tankers traversing the Persian Gulf to prevent attacks on these vessels. The S.S. *Bridgeton*, a reflagged tanker, struck a mine and was damaged in July of that year, and in September U.S. naval forces fired at an Iranian navy ship that was mining the Persian Gulf. 110 members of the House of Representatives petitioned in federal court for summary judgment on the assertion that U.S. forces had been introduced "into hostilities or into situations where imminent hostilities is clearly indicated by the

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<sup>78</sup> 18 U.S.C. §§ 956 et seq. (1980).

<sup>79</sup> Sanchez-Espinoza, 568 F.Supp. 596, 602 (D.D.C. 1983).

<sup>80</sup> 676 F. Supp. 333 (D.D.C. 1987).

circumstances" thus requiring the President to submit reports according to section 4 of the War Powers Resolution. The Court dismissed the action on two points; that the action was violative of the political question doctrine, and that no private right of action is available under the War Powers Resolution.

Regarding the political question doctrine, the Court said that it would be "inappropriate and imprudent" to exercise jurisdiction in this case, because deciding the matter would, in order to determine whether the President must submit reports pursuant to section 4(a)(1), require the Court to determine whether or not U.S. Armed Forces were engaged in "hostilities" or in "situations where imminent involvement in hostilities is clearly indicated by the circumstances."<sup>81</sup>

In addition, the Court felt that the political process would be circumvented. It noted that before the suit was brought to court, several bills compelling the President to invoke section 4(a)(1) were introduced into Congress, as were several motions to repeal or strengthen the War Powers Resolution.<sup>82</sup> Because of the indeterminacy of these actions (none of the motions carried), the Court felt that the controversy existed "primarily with [their] fellow

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<sup>81</sup> Lowry, 676 F. Supp. 333, 337 (D.D.C. 1987).

<sup>82</sup> Lowry, 676 F. Supp. 333, 338 (D.D.C. 1987).

legislators<sup>83</sup>. The Court ruled that Congress had means at its disposal to determine whether or not the Resolution should have been invoked and failed to, and the Court was unwilling to do Congress' work<sup>84</sup>.

Citing the doctrine of equitable discretion, the Court felt that allowing the petition by any subsidiary group of congressmen would bypass the legislative process. By their reasoning, the plaintiffs could obtain relief by persuading a majority of their peers to invoke the War Powers Resolution. Quoting Riegle v. Federal Open Market Committee<sup>85</sup>, the Court said that injunctive relief would "thwart Congress's [sic] will by allowing a plaintiff to circumvent the processes of democratic decisionmaking"<sup>86</sup>. By this ruling, Congress would have to act with a collective will to gain a hearing in federal court.

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<sup>83</sup> Lowry, 676 F. Supp. 333, 339 (D.D.C. 1987).

<sup>84</sup> "This Court declines to accept jurisdiction to render a decision that, regardless of its substance, would impose a consensus on Congress. Congress is free to adopt a variety of positions on the War Powers Resolution, depending on its ability to achieve a political consensus". Lowry, 676 F. Supp. 333, 339 (D.D.C. 1987).

<sup>85</sup> 656 F. 2d 879 (D.C. Cir.); cert. denied, 454 U.S. 1082 (1981).

<sup>86</sup> Lowry, 676 F. Supp. 333, 338 (D.D.C. 1987).

Dellums v. Bush<sup>87</sup>

Although not specifically concerned with the War Powers Resolution, Dellums represents the most recent case to come before the federal courts concerning war powers, and perhaps the most important since Vietnam. The details of the case are similar to the others; Representative Dellums along with fifty-two other members of the House of Representatives and one Senator sought injunctive relief to prevent President Bush from going to war with Iraq. The suit, as were the others, was not concerned with the substantive decision to go to war, but rather with the question of who gets to make that decision.

The decision of the Court followed a familiar pattern. The plaintiffs were found to have standing to bring the action; dismissal as requested by the Department of Justice was denied; and the controversy was determined not to be ripe for adjudication because Congress as a whole had not sought a political resolution.

Lessons from the Court

Was anything gained from the civil actions described above? Upon first glance, it appears not. All the cases were dismissed, the President's status as the near-exclusive author of U.S. foreign policy remained secure. The impact of the cases were by and large negligible; the President's

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<sup>87</sup> 752 F. Supp. 1141 (D.D.C. 1990).

action was not substantively changed, although the impact of the cases upon the President's political considerations is hard to measure.

All of the cases mentioned above were dismissed, at least in part, due to the political question doctrine<sup>88</sup>. The doctrine lists several conditions that make a question political and therefore non-justiciable, including: a textually demonstrable constitutional commitment of the issue to a coordinate political department; a lack of "judicially discoverable and manageable standards" for resolving the dispute; the impossibility of a decision without an initial policy determination; and the potentiality of embarrassment from multifarious pronouncements by various departments on one question<sup>89</sup>. In the face of these repeated pronouncements, it is doubtful that any federal court will decide a case involving the War Powers Resolution on its merits.

Congress' failure to act directly influenced the Court's decisions. The necessity of Congressional action was pointed up by *dicta* in Lowry stating that "if Congress had enacted a joint resolution stating that "hostilities"

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<sup>88</sup> Sanchez, 568 F.Supp. 596, 599 (D.D.C. 1983); Crockett, 558 F. Supp. 893, 898 (D.D.C. 1982); Lowry, 676 F.Supp. 333 339-41 (D.D.C. 1987); Dellums, 752 F Supp. 1141, 1144-46 (D.D.C. 1990).

<sup>89</sup> Baker v. Carr, 396 U.S. 186, 217 (1962) (see case for a comprehensive list of conditions necessary for invocation of the political question doctrine).

existed in the Persian Gulf for purposes of section 4(a)(1) of the War Powers Resolution, but if the President still refused to file a section 4(a) report, this Court would have been presented with an issue ripe for judicial review"<sup>90</sup>. This indeterminacy of Congress was pointed out in Dellums when the court stated that "No one knows the position of the Legislative Branch on the issue of war or peace with Iraq"<sup>91</sup>. In short, the Court felt it could not make a decision in the absence of some congressional action"<sup>92</sup>.

Must Congress declare "not" war? Must they make an affirmative "declaration of peace" in order to protect their interest vis-a-vis war powers? There seems to be a sense among the various administrations that Congress must act, as a whole, to stop any Presidential warmaking. A section of the Brief for the Plaintiff in Dellums states that

For this court to require that plaintiffs seek relief from their fellow members of Congress is to reverse the constitutional mandate. It would allow the president to go to war unless a majority of Congress are willing to affirmatively vote against war. But our Constitution does not read that the president can go to war alone unless a majority of Congress are willing to openly oppose him...<sup>93</sup>

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<sup>90</sup> Lowry, 676 F. Supp. 333, 341 (D.D.C. 1987).

<sup>91</sup> Dellums, 752 F. Supp. 1141, 1149 (D.D.C. 1990).

<sup>92</sup> "Judge Harold Greene [the judge in Dellums] essentially told Congress to put up or shut up." Rourke, 156.

<sup>93</sup> "Lawmakers Sue Over Power to Wage War", Legal Times 13 (Dec 1990): 18.

Were this true, the President could find a "mandate" with only 50 percent plus one of either the House or Senate to continue whatever military activity he was involved in. This is not constitutional; a declaration of war requires an active Congress. Without the requirement for Congressional action, a state of war can depend solely on Executive prerogative.

An even more troublesome scenario presents itself. Suppose Congress must act affirmatively to protect its interests (a "declaration of peace", for example). Assuming that these, like other legislation, were subject to Presidential veto, the President could continue military options with only one-third of either house of the Congress. It is doubtful that the Constitution supports a scheme whereby the President and one-third of either the House of Representatives or Senate can *de facto* declare war.

The Court seemed to answer this question. In Dellums, the Court stated that "[I]n principle, an injunction may issue at the request of Members of Congress to prevent the conduct of a war which is about to be carried on without congressional authorization"<sup>94</sup>. The Court's ruling suggests that were a majority of Congressmen or Congress as an

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<sup>94</sup> Dellums, 752 F.Supp. 1141, 1149 (D.D.C. 1990).

institution to bring a dispute before the Court on this issue, the Court would be compelled to make a ruling<sup>95</sup>.

The problem in these cases, as the Courts found it, is one of ripeness. There was no one voice of Congress to be found; disputes over the propriety and legality of the President's action had been debated and were even being debated while the Court was considering the questions at hand. Without some type of action by Congress, the federal courts have been unwilling to make a decision.

Yet there was some gain to Congress, however incremental. While the Court has repeatedly refused to decide war-powers cases, it has held out hope that, given the right circumstances, it would have to make a decision. "Although adjudication of constitutional questions should not be encouraged, the courts nonetheless would have the responsibility of resolving the constitutionality of [the War Powers Resolution] if it were properly presented"<sup>96</sup>.

One small victory is that individual congressmen and minority groups of congressmen were granted standing in the court on this issue. In Dellums, the Court stated that "members of Congress plainly have an interest in protecting

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<sup>95</sup> "In short, unless the Congress as a whole, or by a majority, is heard from, the controversy here cannot be deemed ripe; it is only if the majority of the Congress seeks relief from an infringement on its constitutional war-declaration power that it may be entitled to receive it." Dellums, 752 F.Supp. 1141, 1151 (D.D.C. 1990).

<sup>96</sup> Lowry, 676 F. Supp. 333, 341 (D.D.C. 1987).



their right to vote on matters entrusted to their respective chambers by the Constitution"<sup>97</sup>. Gaining recognition by the Court, however, is much different from gaining relief.

If one lesson is to be learned from the recent line of war-powers cases, it is that the federal courts are, if anything, a last resort for Congress. The Courts are understandably wary about inserting themselves into a dispute between Congress and the President over such momentous issues such as war and peace. Unlike the individual victim that has no recourse but the courthouse, the Congress has the means to define and defend its interests - if only it had the will.

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<sup>97</sup> Dellums, 752 F.Supp. 1141, 1147 (D.D.C. 1990) .

### The Future of the War Powers Resolution

The first twenty years in the life of the War Powers Resolution provide clear indication that in order to make this work as it should, some reform is needed. The President hasn't complied with the Resolution, the Congress hasn't invoked it, and the Courts haven't enforced it.

We must go on the assumption that the Executive branch will resist any attempt to change the balance of war power. There are two main areas in which active measures could be taken to ensure that Congress regains some semblance participation in the war-making process. First, Congress could make changes to the Resolution. Second, the Federal Courts could assume a more active role in the enforcement of the Resolution. It is unrealistic to expect the courts to enforce a poorly-written Resolution that Congress itself will not stand by, and they shouldn't have to do so without some sort of direction. A Resolution like the War Powers Resolution requires, perhaps, more direction by Congress as to its enforcement by the Courts. Therefore, the changes below both tighten the Resolution, as well as guarantee that the Courts will become more active on this issue.

#### Substantive changes to the Resolution

Numerous changes to the War Powers Resolution have been suggested by various authors representing a variety of

successive viewpoints<sup>98</sup>. Congress itself considered amendments to the War Powers Resolution in 1988 (see appendix). The following are my recommendations for amendment of the War Powers Resolution to ensure that the objective of the Resolution is met.

Change the Title. There may be confusion over the title of the Resolution; what it means legally, and what it implies. Calling an act of Congress a resolution seems to water down the legislation. Resolutions are commonly associated with such action as declaring unofficial national holidays (i.e. recognition of Earth Day) or requesting information or action on the part of the President or a subordinate agency. A resolution certainly doesn't seem to suggest any more resolve on the part of Congress.

The official name of the legislation in question is the War Powers Resolution, but it should probably be changed to the War Powers Act. Despite the fact that a Congressional Resolution carries the same weight as other legislation,

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<sup>98</sup> See John Hart Ely, "Suppose Congress Wanted a War Powers Act that Worked?," Columbia Law Review 88 (November 1988): 1379; James Nathan, "Salvaging the War Powers Resolution," Presidential Studies Quarterly 23 (Spring 1993): 235; Edward J. Smith, "The War Powers Resolution: Historical Overview, Constitutional Analysis, and Proposals for Modification," Suffolk University Law Review 21 (1987): 1157; Robert F. Turner, Repealing the War Powers Resolution. (McLean, Virginia: Brassey's, 1991).

there are some who feel that it is "merely" a resolution<sup>99</sup> and lacks the force of law. This confusion could be solved by changing the official name.

Strengthen the Consultation Requirement. As noted above, the consultation requirement of Section 2 is, at best, vague. Consultation is not defined, nor is it clear with whom consultation is required. This section should be modified to make clear that consultation includes not only reporting, but a seeking of advice and counsel. Perhaps something akin to the Senate's power of advice and consent in Ambassadorial appointments should be considered. This would end the problem of Presidential "consultation" taking the form of notification as currently exists.

A consultation "chain-of-command" needs to be set up. It is not practical for the President to consult with the whole Congress, so it should be written into the Resolution that the majority leaders of Congress, or the Speaker of the House and the President Pro Tempore of the Senate be consulted prior to military involvement (see proposed amendments of 1988).

Remove Section 5(c). The legislative veto provision of Section 5(c) is the lightning rod for critics of the War

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<sup>99</sup> "[T]he War Powers Resolution...does not have quite the same legal level as an ordinary statute passed through the usual congressional channels." A. Thomas & A. Thomas, The War-Making Powers of the President, (Dallas: SMU Press, 1982) 141.

Powers Resolution, and detracts from its overall effectiveness. I remain unconvinced that the section as written is unconstitutional, but its probability of invocation (nil), as well as its abandonment by the Plaintiffs in Lowry v. Reagan<sup>100</sup> make it more trouble than it's worth.

No tears need be shed over the removal of this section, arguably the strongest section of the resolution. It is doubtful that it would ever be invoked. It is probably unreasonable to expect that Congress, which has been unable to recognize the fact that hostilities or imminent hostilities exist in situations like Desert Storm, will pull troops out of such a situation in defiance of the Presidential will by invoking the concurrent resolution provision. The Resolution would be better served by relying upon its proponents in Congress to aggressively enforce its extant sections.

One further note: the "silent veto" of section 5(b) requiring the withdrawal of troops within 60 days should remain. It gets scant mention in discussion about the impact of Chadha, and it appears that the President would be less willing to challenge this provision. It would be hard to show that a clause requiring the President to do something within a certain time-frame is violative of the Chadha decision, because the section in question was already

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<sup>100</sup> 676 F. Supp. 333, 335 (D.D.C. 1987).

passed as a part of the entire Resolution in accord with the Constitution in 1973. It could be effective, provided the 60-day (or 15-day) clock is activated, and merits retention.

Shorten the 60-day free period. Currently, Section 5(b) of the War Powers Resolution allows the President 60 days in which to operate. The logic is that 60 days allows the Congress ample time to convene, debate, and vote on a Presidential use of force. A more realistic explanation is that the 60-day period was the result of compromise between the Senate version's 30 days and the House of Representatives' of 120 days<sup>101</sup>. The 60-day period, however, gives the President too much leeway, allowing the entrenchment of military force, and perhaps inhibits the Congress from acting, hoping that such action will be over before congressional activity is necessary.

A more realistic and manageable period of time is 15 days. There is no reason why Congress cannot convene, debate, and vote on an issue of such moment of war in 15 days (the clause that renders the time limit ineffective in the event that Congress is unable to meet should remain). We can witness the declaration of war in WWII, which came less than 48 hours after the bombing of Pearl Harbor, or the

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<sup>101</sup> Ely, 1398, n. 58.

quick Congressional authorization of force in Kuwait<sup>102</sup>. The 60-day limit gives the President too much leeway.

Modify Sections 4(a)(2) and 4(a)(3). One of the greatest problems in enforcing the War Powers Resolution is getting the executive to file a report in accord with section 4, thus setting into motion the other provisions of the Resolution. On the infrequent occasion that a President has reported military activity in accord with the War Powers Resolution, he has purposely neglected to mention under which section of the Resolution he is reporting, and the 60-day clock never starts.

Also, only Section 4(a)(1) triggers the Congressional action of Section 5. Filing reports under sections 4(a)(2) or 4(a)(3) does not invoke the 60-day clock, nor is further reporting mandated. This loophole allows the President a possible cop-out.

There are two ways of remedying this. Perhaps the easiest is to treat sections 4(a)(2) and 4(a)(3) the same as 4(a)(1). Reporting by the President pursuant to these sections would start the clock running, and would require further reporting mandated by section 4(c). The second

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<sup>102</sup> Congress passed the Authorization for Use of Military Force Against Iraq Resolution, PL 102-1 (1991), within 4 days of the formal Presidential request for support of his use of force. Harold Koh, "Presidential War and Congressional Consent: The Law Professors' Memorandum in *Dellums v. Bush*," Stanford Journal of International Law 27 (Spring 1991): 247, 252-53.

would be to repeal these two sections outright<sup>103</sup>. These sections mean much less than 4(a)(1), and were presumably included to cover augmentations of U.S. military commitments such as our formerly large NATO forces. It is doubtful, however, that any situation covered by either 4(a)(2) or 4(a)(3) would not soon be a 4(a)(1) situation, so that clause could cover all situations involving introduction of troops into situations of hostilities or imminent hostilities.

Get the Clock running! The reluctance of the President to make reports under the War Powers Resolution stems directly from the fact that when the reports are made the 60-day clock of section 5(b) starts running, thus limiting the President's possible courses of action. In a perfect world the President would assent to Congress' will as written in the War Powers Resolution, but we have seen that this is not so. It is probably reasonable for the President not to start the clock if he doesn't have to. Another means must be found to start it.

The most obvious way to start the clock is to let Congress decide when to start it in the absence of a Presidential report. Section 5(b) of the Resolution states that the President shall terminate the use of U.S. armed forces "within sixty calendar days after a report is

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<sup>103</sup> Ely, 1404.



submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier" (emphasis added). However, no concrete means of determining who decides when such a report is required to be submitted is required.

It can be assumed, and will be here, that Congress should make that determination. It should be written directly into the Resolution that Congress is able make the determination by concurrent resolution. This presents a problem because, in the light of the Chadha decision, such resolution would most likely be subject to the Presentment clause, and most likely a Presidential veto. Could we expect a President who declined to submit a report in accord with section 4 to approve a resolution determining that he should have? Of course not. Once again, however, it is doubtful that Congress would have the institutional fortitude to pass such a resolution; witness the failure of Congress to start the clock in a situation as clear as the introduction of U.S. forces into imminent hostilities as the Persian Gulf.

Therefore, the courts must be depended upon to make the determination of whether or not the 4(a)(1) conditions are met. One significant change must be made by Congress, however. To facilitate the process of allowing a judicial decision on the question of whether the War Powers Resolution's reporting requirements should be invoked, section 5(b) must be modified to allow any member or group

of members of Congress to bring suit requesting declaratory relief<sup>104</sup>. Included in this section must be a statement to the effect that a court may not refuse to reach a decision based on either the political question doctrine or the doctrine of equitable discretion. This will remove the Court's reluctance to enter into the fray over war powers.

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<sup>104</sup> Ely, 1427.

### Conclusion

The War Powers Resolution represents something of a dichotomy. It is an active attempt by an inactive body to defend its power in the face of its own lethargy. Perhaps it should be expected that the President treats the Resolution as insignificant, because this is the way it has been presented by Congress. If Congress does not awaken from its self-imposed slumber, it probably does not deserve to participate in this most important power of our government.

The struggle over war powers illustrates the difficulty of Congress' relationship with the President in foreign affairs. Compared to the President, the Congress is weak in foreign affairs. One might think that this reality would prod Congress to assert itself where it can, but its relative lack of power has nudged Congress further and further from making the important decisions in foreign policy. Individual Congressmen can become invaluable as foreign policy "gurus" and advisors, but the real power in this area lies with the President.

Part of the problem may be the American people's expectations. It is assumed by the electorate that the President be preeminent in foreign affairs. It is here that Presidents can assert their independence, being relatively free of the institutional structures that bind the formulation of domestic policy. The President's fortunes

rise and fall with the success of his foreign policy. We remember our wartime Presidents with reverence; we remember our domestically successful Presidents with footnotes.

It may be that political considerations render moot any institutional controls that Congress may institute to check the President's power. We not only allow our Presidents to make war, we expect it. When President Bush increased our commitment in the Persian Gulf in 1990 the question was not whether he had the power to do so, but rather if the policy was correct. Further hampering Congress is the phenomenon of assent to the President's wishes in times of crisis<sup>105</sup>. Perhaps Congress has no recourse but to follow the President's lead.

This does not have to be the case, however. The mechanism, a modified War Powers Resolution, could exist to rein in the executive, to restore the constitutional balance. It might be painful, it might be contentious, but if Congress wishes to do so, it may assume its proper role as determiner of entry into war.

The judiciary has shown some signs of participating in the process, of meeting Congress halfway. In Lowry, the Court said that "Judicial review of the constitutionality of the War Powers Resolution is not precluded by this

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<sup>105</sup> John Rourke calls this the "Rally 'round the Chief" phenomenon.

decision"<sup>106</sup>, and the only thing preventing a decision in Dellums was the lack of ripeness.

While the court has periodically ruled on foreign policy cases<sup>107</sup>, it has perhaps shown a new willingness to rule on separation of powers cases involving the war powers. In Dellums the court said

While the Constitution grants to the political branches, and in particular to the Executive, responsibility for conducting the nation's foreign affairs, it does not follow that the judicial power is excluded from the resolution of cases merely because they may touch upon such affairs. The court must instead look at "the particular question posed" in the case<sup>108</sup>.

The signals seem to be there that, given some shelter by Congress the court may enter the fray over war powers, or at least accept a shift in the war-making powers to the Congress.

The onus is on Congress, however. To make the Resolution work, it must become more involved in the process. First, it must redraft the Resolution in order that it may perform the function for which it was created, and to allow the federal courts to become more involved in its enforcement. Second, it must stop the trend of single-handed executive direction of military force. Each

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<sup>106</sup> Lowry, 676 F. Supp. 333, 339 (D.D.C. 1987).

<sup>107</sup> United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

<sup>108</sup> Dellums, 752 F. Supp. 1141, 1146 (D.D.C. 1990).

occurrence where the Executive gets his way decreases the chance that either the courts or public opinion will support the Congress. Vigilance must be Congress' watchword if they are serious about protecting their war powers.

## Appendix A: The War Powers Resolution

Public Law 93-148

H.J.Res. 542, 87 Stat. 555, 50 U.S.C. 1541-1548, passed over President's veto November 7, 1973

### JOINT RESOLUTION

Concerning the war powers of Congress and the President.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,*

### SHORT TITLE

SECTION 1. This joint resolution may be cited as the "War Powers Resolution".

### PURPOSE AND POLICY

SEC. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department of officer thereof.

(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.

### CONSULTATION

SEC. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations 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.

#### REPORTING

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.

#### CONGRESSIONAL ACTION

SEC. 5. (a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the



House of Representatives and to the Committee on foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(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.

#### CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTION OR BILL

SEC. 6. (a) Any joint resolution or bill introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided

between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 5(b). The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 5(b). In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

#### CONGRESSIONAL PRIORITY PROCEDURES FOR CONCURRENT RESOLUTION

SEC. 7. (a) Any concurrent resolution introduced pursuant to section 5(c) shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Any concurrent resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a concurrent resolution passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted upon within three calendar days, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

#### INTERPRETATION OF JOINT 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) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution, or
- (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.

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

(c) For purposes of this joint resolution, the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the

regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Nothing in this joint resolution--

- (1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or
- (2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

#### SEPARABILITY CLAUSE

SEC. 9. If any provision of this joint resolution or the application thereof to any person or circumstances is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby.

#### EFFECTIVE DATE

SEC. 10. This joint resolution shall take effect on the date of its enactment.

**Appendix B: S.2 Proposed War Powers Resolution Amendments  
of 1988 (100th Congress 2d Session, May 1988)**

(from James Nathan, "Salvaging the War Powers Resolution",  
23 Presidential Studies Quarterly 235 (Spring 1993))

**Joint Resolution** amends the War Powers Resolution to provide expedited procedures...for requiring disengagement of United States Armed Forces involved in hostilities [and provides] specific authorization for their continued engagement in such hostilities, and for other purposes.

**Section 2 of S.2** repeals section 2(C) of the War Powers Act regarding authorizing the President to "introduce...[f]orces 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 an attack upon the United States, its territories, or its armed forces."

**Section of 3(a) of S.2** embraces Section 3 of the War Powers Act enjoining the President to "in every possible instance...consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress...and inserts "the President shall consult with the Speaker of the House and the President pro tempore of the Senate and the Majority Leader and the Minority Leader of the House and Senate."

**Section 3(a) of S.2** enjoins the President and the above group shall establish a schedule of regular meetings.

**Section 3(b) of S.2** enjoins the President to meet with the group above at their request unless the President determines that consultation needs to be limited because of "extraordinary circumstances affecting the most vital security interests of the United States."

**Section 3(1) (c) and (d) (1) (2) (3) of S.2** establishes a "permanent consultative group" composed of those listed in 3(a) S.2 and the Chairman and ranking members of both Houses of the Committees on Foreign Affairs, Armed Services, and intelligence. Some 18 members are specified in all. But S.2 also calls for a potential limit to 6 rather than 18 members at the discretion of the President, the Speaker, the President Pro Tempore and the majority and minority leaders of both Houses.

**Section 3(2) (a) of S.2** rotates the Chairmanship of the Permanent Group between the Majority Leader and the Speaker of the House.

**Section 3(2) of S.2** requests that whenever the Chair or majority of the membership or Vice Chair of the Permanent Group request, the Group will convene a meeting with each other.

**Section 4 of S.2, "Congressional Action: Judicial Review and Reporting,"** requires, in the absence of a declaration of war, a report to be submitted whenever U.S. armed forces are introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances that a Joint Resolution be introduced by the Permanent Consultative Group which requires the President to disengage or authorizes continued use of the forces.

**Section 4(4) (c) of S.2** declares that any member may bring an action in the US District Court of Columbia for declarative and injunctive relief if the President does not comply with consultation and reporting requirements.

**Section 5 of S.2** prohibits the use of funds to fund an enterprise that does not follow the consultative and reporting requirements of specified above.

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