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## THE IMPACT OF THE 1973 WAR POWERS RESOLUTION ON THE MILITARY

BY

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THE IMPACT OF THE 1973 WAR POWERS RESOLUTION  
ON THE MILITARY

An Individual Study Project  
Intended for Publication

by

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## ABSTRACT

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The War Powers Resolution was passed over President Richard Nixon's veto on 7 November 1973. Since passage, that legislation has generated considerable debate and conflict between the Legislative and Executive branches of government, as every President since Nixon has exercised his constitutional powers as commander in chief of the armed forces and chief architect of America's foreign policy. But the conflict between the President and Congress also reflects Congress' suspicion of presidential war-making powers, which began in the 19th century, gained momentum during the Korean War, and culminated in the war in Vietnam by a Congress that is no longer satisfied to exercise restraint on the President only through the power of the purse. Congress also wants to be co-determinants of foreign policy, especially when decisions are made for deployment of military forces. Caught in the middle of this controversy is the armed forces of the United States. This paper provides a brief historical overview of presidential war-making powers, the development of the War Powers Resolution, and it examines the impacts, both real and perceived, which that resolution has had on military operations since that legislation was passed. This paper also examines some of the ethical issues facing senior military leaders and makes recommendations for their response in the heat of the War Powers debate whenever a national crisis occurs.

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## **Chapter One: The War Powers Resolution: Issues and Debates**

### **Purpose:**

It was suggested by one of the guest speakers at the Army War College, that one of the reasons why the Marine barracks was blown up in Beirut in October 1983 was because Reagan administration policies in Lebanon created a perception that some security measures could not be taken to protect the Marines for fear that the wrong signal would be sent to Congress. That Congress would have started the sixty-day clock requiring the Marines to come home before their mission was complete, or force a constitutional show down between the Congress and the President over his war powers. If this were true, it would raise a number of ethical, if not legal, questions about the law that is commonly referred to as the War Powers Act of 1973. It was that statement that caused me to examine everything I could about this law in order to discover what the role of the military should be vis a vis the War Powers Resolution, which has proved to be such a thorn in the sides of the Congress, the President, and the Armed Forces of the United States.

My method is to examine the 1973 War Powers Resolution, discuss what it is, how we got it, why we got it, and review some of its criticisms in the context of how the resolution has impacted on the President in the conduct of foreign affairs, but more importantly for my purposes, how the resolution has impacted on the military as it supports the President in the conduct of his foreign policy objectives.

I have also tried to find out what impacts (either real or perceived) this law imposes on the development and conduct of military operations, and

how they are manifested at either the strategic, operational and tactical level, and I have questioned whether these impacts present any dilemmas for senior military leaders, and if so, what.

Finally, I have tried to suggest ways for senior military leaders to deal with those dilemmas.

### **Basic Tenants of the Resolution**

The War Powers Resolution was passed by Congress on November 7, 1973 over the veto of President Richard Nixon. The purpose of the law was to create a better dialogue between the President and the Congress. It was the perception at that time that the Congress was powerless to constrain an "imperial President" during the Vietnam War. More than anything else, the Resolution was a reaction to the war-making power of the Presidency during that war. As a result, the War Powers Resolution imposes constraints on the President of the United States for the use of the armed forces in the conduct of foreign affairs. Before American troops are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, the President is to consult with Congress "in every possible instance."<sup>1</sup>

After troops are introduced, in the absence of a declaration of war, the President has forty-eight hours to submit a report to Congress. Afterwards, the President has sixty days---in special cases ninety days-- to terminate the involvement unless the Congress has taken affirmative action to approve it.<sup>2</sup>

Congress can also terminate the involvement before the sixty days have elapsed by passing a concurrent resolution, which does not require the



President's signature and is therefore not subject to a veto. ( A concurrent resolution must be passed by both houses of Congress, but it does not go to the President, and it does not have the force of law---it is designed to avoid a Presidential veto.)

The conference bill (the final bill became an amalgamation of the House and Senate bill, referred to here as the conference bill) abandoned that section of the Senate bill that spelled out the circumstances in which U.S. armed Forces could be involved in hostilities. In its place, the bill provided it in the purpose and policy section stating that:

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. }

The significance of placing the presidential authorities in the purpose and policy section was that it would not be considered legally binding on the President since that portion of any bill is not normally meant to carry the force of law. Therefore, by defining the President's authority in that section of the bill, the original drafters of the Senate version of the bill thought that the conferees had watered the bill down too much.

### **The Debate Over the War Powers Resolution**

First, the War Powers Resolution does not provide for all of the obvious contingencies that could arise from an attack by a foreign nation. The War Powers Resolution provides for the President to react to attacks on the

territory or possession of the United States or its armed forces, but it makes no provision for attack against civilians or national emergencies arising from other causes.<sup>4</sup> Additionally, the law does not define what a national emergency is. This distinction may be necessary because what may constitute a national emergency to one President, may not to another. Certainly attacks on the territory of the United States would constitute a national emergency, but it is not clear that every attack on the Armed Forces of the United States would be viewed the same.<sup>5</sup> What about the attack on our vessels in the Persian Gulf by Iranian P.T. boats?

The resolution also prevents the President from putting forces into situations where there is a clear threat of hostilities.<sup>6</sup> The whole idea of the threat hinges on analysis of the environment into which armed forces would be introduced. Such was the initial debate surrounding the initial introduction of the Marines in Beirut and our naval vessels sailing in international water in the Persian Gulf. As long as the environment remains benign, there is no problem. But as the environment changes from benign to hostile, the War Powers Resolution would prevent those forces from remaining or require presidential reporting with the possibility of removal after sixty or ninety days.

Another problem with Section 2 (c) is since it is located in the purpose and policy section of the resolution it has no legally binding force or effect. "Such sections are usually regarded as general statements of congressional intent rather than as operative sections of the law. In most codifications of law, for example, such sections are omitted."<sup>7</sup> Presidents usually report, not by this provision, but by their Commander in Chief provision of the Constitution.<sup>8</sup>

There were some who thought that the conference bill was too weak in its attempt to curb presidential power in the use of force. While even Senator Goldwater would agree, Senator Tom Eagleton said in opposition to the bill just before it passed the Senate 75-20, "what we have here today is a 60- to 90-day open-ended blank check which says, 'You fight the war for whatever reason, wherever you want to, Mr. President.' That is what we are legislating here today."<sup>9</sup> In other words, the President would have the unilateral authority to commit American troops anywhere in the world, under any conditions he decides, for 60 or 90 days.

### **Consultation:**

The mechanics for consultation are not neatly spelled out. With whom does the President consult? About what? Under what mechanics or structure of discussion? During a real national emergency there will likely be many instances where meaningful discussions are possible. Presidents have generally chosen to consult with the leaders of Congress, but the issue with Congress has been one of discussing versus informing. The Congress wants to be let in on the decision-making process. They want to provide their input before a decision to commit armed forces is made. They were insulted that the President didn't consult or inform them about the Grenada invasion until long after the planning had started.<sup>10</sup> Congress wants to be let in on the process and decision making of war planning long before the actual use of force or introduction of armed forces begins.

However, from the the point of view of the President, the need for urgency precludes the possibility of such discussions. For one thing, the response to crises often requires immediate action. That may mean a few hours to a few days. When the response involves the introduction of newly

committed armed forces, the need for absolute secrecy is paramount. That doesn't mean that it wouldn't be necessary if those forces were already in position, like the naval forces in the Persian Gulf. Deployments are particularly vulnerable periods for the military anyway. If that information was prematurely divulged, or leaked out, it would tip off our adversaries and place American lives at greater risk. Such secrecy is part of what the military calls operational security, OPSEC.

The attack on Qaddafi's headquarters illustrates what an unreliable exponent of OPSEC the congressional leaders of Congress can be. After Reagan consulted with [informed] Congress about his decision to attack Moamar Qaddafi, and after presenting those leaders with "overwhelming evidence" of Qaddafi's responsibility for terrorist attacks, Senator Byrd and Senator Pell informed the press at 6:35 PM, some 45 minutes before the White House Press Secretary, Larry Speakes. "Those 45 minutes were crucial to our pilots getting out," stresses a White House aid. "Byrd and Pell had to get their headlines, trade off the big story despite national security."<sup>11</sup>

Our founding fathers understood the importance of secrecy for the conduct of foreign affairs, especially when time is the critical essence for the negotiation of treaties. This does not mean that they did not appreciate the role the Congress plays when it provides advice and consent to the President, quite the contrary. But our founding fathers did understand that the use of the armed forces was an extension of the President's conduct of foreign policy. To the extent that an urgent situation required secrecy, they would never have approved the kind of public debate that commonly describes the environment in Congress today whenever armed forces are used. Writing in the *Federalist*, John Jay shows that he understood well that in rare instances

the President would have to resort to secrecy for the good of the nation in the conduct of foreign policy:

It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate despatch [sic] are sometimes requisite. There are cases where the most useful intelligence may be obtained if the persons possessing it can be relieved from apprehensions of discovery...The convention have [sic] done well, therefore, in so disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest.<sup>12</sup>

The passage is significant, because it shows that the Constitution was written to permit the chief executive the power to act prudently for the sake of national security, even if it means keeping the facts from Congress until prudence dictates informing them.

### **Presidential reporting**

The requirement for presidential reporting is grossly incomplete. "Only in the case where hostilities have occurred, or imminent involvement in hostilities is indicated, is consultation with Congress required and the sixty-day cutoff provision is triggered. It does not cover military alerts; naval quarantines or blockades in international waters; the use of naval vessels for convoys; the training, equipping, or transporting of mercenaries or guerillas for combat on foreign territory; or the supply, financing, training, or transportation of forces of another nation into combat on foreign territory. Thus, had such a resolution been in effect in 1941, Roosevelt would not have been required to report his decision to use American patrols near Allied convoys; in 1962 Kennedy would not have had to make a report on the Ameri-

can role in the Bay of Pigs invasion of Cuba, and in 1962 he would have not have had to report on the imposition of a quarantine line around Cuba." 13

There are more circumstances, too---intermittent aerial bombing, naval deployments, and hostilities between third parties.

For one thing, the War Powers Resolution does not define what is meant by "hostilities." Does a single, isolated incident such as the attack on the U.S.S. Stark, or the accidental or indiscriminate shelling of the Marines when they were in Beirut constitute "hostilities"? Generally, Presidents have not regarded those kinds of isolated acts as falling within the province of the resolution. However, not everyone in Congress would agree. The question is a political one that has caused quite a bit of acrimony and debate between the Congress and the President. The word "hostility" has been construed (or misconstrued) to mean everything from a stray rifle shot all the way to general war.

Some have openly suggested that "hostilities" begin whenever American blood is drawn, which is ridiculous. Certainly, that was not the intent of the original writers of the law. American foreign policy, in so far as it is designed to protect the vital interests and freedoms of Americans and her allies, has often required the sacrifice of American lives and the shedding American blood. Unfortunately, diplomacy hasn't always worked. All throughout history Americans have had to stand and fight. Peace and freedom has never been won through "cut-and-run" foreign policy. It has been won through American steadfastness, unity, and resolve.

The interpretation of the "joint resolution" section also causes problems in section 8 of the War Powers Resolution, which clearly goes against the intent of our founding fathers:

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---(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of 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. 14

However:

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; 15

The legislation does not reconcile the apparent dichotomy between these two provisions of section 8. The founding fathers had no intention of reneging on legally binding treaties between the United States and other countries:

They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government. 16

Article 5 of the North Atlantic Treaty specifies that "an armed attack against one or more of them shall be considered an attack against them all."

Meaning that an attack against West Germany would be the same as an attack against California, and the President would be just as bound to retaliate against the aggressor as Franklin Roosevelt was when the Japanese attacked Pearl Harbor.<sup>17</sup>

### **Constitutionality:**

Section 5 of the resolution requires the President to withdraw U.S. forces from a situation of actual or "imminent hostilities" in two circumstances:

- Where 60 days have elapsed without specific congressional authorization for the continuation of their use, with some specific exceptions; and
- Where the Congress at any time enacts a concurrent resolution requiring such withdrawal.

The 60-day provision presents several problems. The President as Commander in Chief and chief executive officer has the authority to deploy and use U.S. forces in a variety of circumstances, such as the inherent right of self-defense, including the protection of American citizens, forces, and vessels from attack.<sup>18</sup> The provision is particularly troublesome because it is perceived as a "do nothing law" that would permit the the withdrawal of U.S. forces from an area at the end of an arbitrary 60-day period by the mere inaction of Congress. If one grants that the President is permitted to employ the armed forces for certain purposes, it is inconceivable that those forces should be withdrawn through the mere passage of time. This problem causes concern for the military because such limits may signal a divided nation, giving our adversaries a basis for hoping that the President may be



forced to desist, or feel pressured to do so. As Senator Tower recently testified: "The important thing is that we be perceived as being able to act with dispatch, and that the policy that we employ will not be picked to pieces through Congressional debates or nitpicking Congressional action."<sup>19</sup> Such limits could also increase the risk to U.S. forces in the field, who could be forced to withdraw under fire.<sup>20</sup>

The concurrent resolution aspect of section 5 does not carry the force of law and is unconstitutional under the decision of the *Immigration and Naturalization Service v. Chadha*, June 23, 1983. In that case an appellate court ruled that the legislative veto provision violates the doctrine of separation of powers and was therefore unconstitutional. This was later affirmed by the U.S. Supreme Court.<sup>21</sup> This decision impacts on the War Powers Resolution as well as other legislation governing foreign affairs.<sup>22</sup>

The tendency in Congress in recent years to resort to the use of the legislative veto with increasing frequency, especially in the foreign affairs area, created apprehensions that this constitutional mechanism would be used to achieve over a period of time a fundamental shift in the balance between the executive and legislative branches of Government in the United States. The Chief Justice's opinion in the present case serves to quiet these apprehensions and to allay to some degree the tensions that have arisen between these two branches of government since the Watergate years.<sup>23</sup>

It appears that Congress may not impose restrictions on the use of military force through legislative action that is not first subject to a presidential veto.<sup>24</sup> The sixty-day withdrawal requirement of the War Powers Resolution represents a de facto "silent veto" over a presidential deployment of troops.<sup>25</sup> Since the War Powers Resolution concurrent-resolution proce-

dure violates the principle of executive-legislative separation of powers, it is unconstitutional and should be repealed.

It also appears that this portion of the Resolution is of no consequence to the presidential decision-making process for the use of force to conduct foreign policy. In order to constrain a President, the Congress will have to use the one tool originally designed by our founding fathers---the power of the purse. Congress must vote to deny the funds necessary to pay for those forces. Admittedly, this is an action that the Congress has seldom used. The reason is that it can't be done without exposure to inherently dangerous political risk. Normally, the American people rally around the President when force is used. History shows that Congress is seldom willing to take on the President during a wave of patriotic sentiment by the people.

Also, since enactment, none of the Presidents has implemented the full measure of the law, because in each crisis situation the President has said that the law did not apply. The Congress has not always agreed, but so far it has not gone far enough to issue an injunction against the President. It is conceivable; however, that a crisis of such magnitude will occur where the Congress may succeed in their attempt to require the President to start the 60-day clock. But so far those attempts have failed because the Supreme Court has determined that the debate between the Congress and the President is political, and the Court therefore has no jurisdiction.

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<sup>1</sup>Sec. 4 (a)(1), Public Law 93-148, 93rd Congress, H.J. Res. 542, November 7, 1973, Hereafter referred to as the War Powers Resolution (WPR).

<sup>2</sup>*Ibid.*, Sec. 5(b).

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<sup>3</sup>Ibid., Sec. 2(c).

<sup>4</sup>Pam M. Holt, *The War Powers Resolution: The Role of Congress in U.S. Armed Intervention* (Washington, D.C.: American Enterprise Institute for Public Policy Research 1978) p. 23.

<sup>5</sup>Idem.

<sup>6</sup>Ibid., p. 24.

<sup>7</sup>Richard M. Pious *The American Presidency* (New York: Basic Books, Inc., 1979), p. 404.

<sup>8</sup>Idem.

<sup>9</sup>Thomas F. Eagleton *War and Presidential Power: A Chronicle of Congressional Surrender* (New York: Liveright, 1974) p. 212.

<sup>10</sup>"Ballots and Bloodshed," *New Republic*, 19 Oct 87, Vol 197, p.4.

<sup>11</sup>"Letter from Washington," *National Review*, 9 May 1986, Vol. 38, p.15.

<sup>12</sup>Jay, *Federalist Papers No. 64*.

<sup>13</sup>Pius, pp.405-406.

<sup>14</sup>WPR, Sec. 8. (a) (2).

<sup>15</sup>WPR, Sec. 8. (d)

<sup>16</sup>Jay, *Federalist Papers No. 64*

<sup>17</sup>Holt, p. 29.

<sup>18</sup>Abraham D. Sofaer, statement to Senate Foreign Relations Committee, Washington, D.C., 15 Sep. 1988, p.5.

<sup>19</sup>Sofaer, p. 3.

<sup>20</sup>Idem.

<sup>21</sup>Monroe Leigh, "Judicial Decisions," *American Journal of International Law*, Vol. 78 No. 1, January 1984, p. 227.

<sup>22</sup>Other legislation includes the Foreign Assistance Act of 1961, the Arms Export Control Act, the Trade Expansion Act of 1962, and the Trade Act of 1974, all contain legislative veto provisions. Ibid. p. 229-230.

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<sup>23</sup>Idid., p. 230.

<sup>24</sup>Sofaer, p. 4.

<sup>25</sup>Kenneth M. Holland, "The War Powers Resolution: An Infringement on The President's Constitutional and Prerogative Powers," in *The Presidency and National Security Policy*, editor in chief R. Gordon Hoxie, Vol. V, (New York: Center for the Study of the Presidency, 1984) p. 399.

## **Chapter Two: Historical Overview of Presidential War-Making Power**

There is concern by many that there is no need for the act in the first place, given the fact that the Constitution of the United States clearly specifies that the Congress of the United States shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." Only Congress can declare war. However, the President, as commander in chief, has engaged the United States in wars without a declaration by Congress. Undeclared wars include the Korean War (1950-1953) and the Vietnam War (1957-1975). In fact there have been over 200 instances where the President of the United States has used American forces without a formal declaration of war. Of those two-hundred-plus instances, the President has only declared war five times.

History then, if not the Constitution, appears to have justified a degree of presidential war making when it involves the use of armed forces to defend the security of the United States. Although this has often been questioned, it has never been denied.<sup>1</sup> Presidents have relied on precedent to enhance their power, and the actual attempts by the Congress to curb presidential war-making power probably began in 1843 when President John Tyler tried to send the U.S. Army to lend assistance to Texas when Texas claimed it was being invaded by Mexico. Congress won that round by denying Tyler the authority to send troops, but acquiesced in 1844 when

Tyler sent naval vessels to the Gulf of Texas in the heat of the presidential election.<sup>2</sup>

Presidential war-making power increased exponentially in the aftermath of World War II as America's self-image became one of world policeman. But it was during the prolonged war in Vietnam that the Congress became intent on limiting presidential war-making powers, and during the difficult Watergate period, a weakened Nixon administration made it possible for the Congress to override his veto, and pass the current 1973 War Powers Act.

There are some who view the Act as a total abrogation of responsibility of the Congress for declaring war. They state further that the Act actually permits the President the power to wage war for 60 days without any declaration of war whatsoever. And these critics see the act as an unwitting addition to the President's power that the Congress had no intention of giving.

On the contrary, President Ford has argued that the resolution gives Congress unprecedented power in the conduct of foreign policy, while holding the President in strict account for his own actions in international affairs. The resolution codifies the military powers of the President by spelling out specifically how, and under what circumstances he may defend the United States and its citizens from international danger.<sup>3</sup> Although he and other presidents have generally complied with the provisions of the resolution, neither he nor other presidents have felt constitutionally bound by it.

### **War Powers Objectives of the Framers of the Constitution**

What power does the Constitution provide to the President and the Congress, and what is the significance of those provisions as it applies to the War Powers Resolution?

Article I, Section 7: "Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it.---This portion of the Constitution makes it unconstitutional for Congress to pass a bill without giving the President an opportunity to veto that bill. This is one of the principle means in which the Constitution guarantees the separation of powers. It guarantees it not only by defining the powers of each of the three branches of government, but also by specifying the procedures in which those powers will be exercised. Opponents of the War Powers Resolution claim that the portion of the bill, which calls for the automatic withdrawal of forces after 60 days, or in special circumstances 90 days, is unconstitutional because it constitutes a de facto veto of the President's directive that introduced forces in the first place.

Article I, Section 8, gives the Congress power "to declare War, grant Letters of Marque", order "Reprisal," "raise and support Armies"---for no more than two years at a time, "provide and maintain a Navy," and "to make Rules for the Government and Regulation of the land and naval Forces."---Key to this section is that the Congress was given power to *declare* war, not *make* war. That is a point that was debated to a considerable extent at the Second Constitutional Convention. The framers wanted a strong chief execu-

tive who would prosecute the war as commander in chief, while the Congress would concur or non-concur through a formal declaration of war that would signal the will of the people and the government for war.

Article I, Section 10, forbids the states, without congressional consent, from keeping military forces in time of peace and from engaging "in war, unless actually invaded, or in such imminent Danger as will not admit of Delay."---This section merely describes the authority the states have for maintaining and employing local militias.

Article II, Section 2, makes the President "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."---This means that as long as military forces remain actively in being, the President of the United States remains their commander in chief. All orders to those forces come from him, and it is to the commander in chief that the military owes its fealty, not the Congress of the United States. From the context of the War Powers Resolution, the implication is that regardless of the dispute of the constitutionality, disagreement between the President and the Congress, the military must obey the President, and not the Congress nor injunctions against the President by the Supreme Court. If an injunction is ordered, it is incumbent upon the President to follow that injunction and issue the proper orders to the military.

"He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur"--- Stated simply, the President of the United States, and his administration, those appointed to foreign policy positions, are empowered to conduct for-



foreign policy. Treaties, which are a by-product of the foreign policy process, must be ratified by a two-thirds vote of the Senate, and it is through the Senate that the President must consult in all matters concerning foreign policy.

Article IV, Section 4, provides that the central government shall guarantee "a Republican Form of Government" to every state and "shall protect each of them against Invasion."<sup>4</sup>---This provision gives the President part of his emergency power to react to aggression immediately without a formal declaration of war from the Congress. This provision is strictly defensive in nature, and leaves some room for interpretation for overt threats from foreign governments.

The objectives the framers wanted from the results of the Constitutional Convention held in Philadelphia in 1787 were several. Going to war was intended to be an orderly process in which deliberation would go unabated before conflict occurred, and one in which reason and caution would prevail before hostilities had commenced. First, they wanted to ensure the national defense. The Articles of Confederation had provided little capability for a strong, central government, much less one that was capable of prosecuting war. Second, their experiences in England and elsewhere in Europe made them resolute that the Constitution should hinder the use of the military for domestic tyranny and for aggression abroad. The framers also understood the need for political will and sought to ensure that the Constitution created and maintained national consensus behind American action for war or peace. They also felt it was necessary that the Constitution ensure democratic control over war and peace policy---war and peace policy decisions were to

be rational. They also wanted to ensure continuity in American war and peace policy, when desirable, and its revision as necessary. They also wanted to ensure American capacity to move toward war or peace rapidly or secretly when necessary, and that the process was to be flexible and proportionate. The whole question of war or peace hinged on the development of the war powers of the President and Congress; who decides whether America fights?

Nowhere in the Constitution did the framers make more of an effort to force legislative and executive branches to share responsibility for policy making than in the provisions that deal with the power to make war. There, they strove to set up procedures under which neither the President nor the Congress could make war without the aid of the other. This was to be a delicate balance between the primacy of the legislative and the efficiency of the presidency. The intent was to produce an orderliness for war.<sup>5</sup>

The founding fathers drew a distinction between offensive and defensive hostilities. If the United States were attacked, the commander in chief would repel the attack. If an individual state was militarily challenged---even it would possess a right to fight back. Thus, the states could maintain a militia which would be available for duty if hostilities arose. For on its part, Congress could provide the President with a small standing army and navy so that he could fulfill his duty to put down insurrection, although such a course was frowned upon. In addition, Congress was authorized to establish procedures under which the President might respond effectively to foreign attack.

Second, in cases where defensive action needed to be supplemented by offensive action, the concurrence of Congress would be required.

Third, the President would direct military operations: Congress would play no part in the day-to-day tactics.

Fourth, the start of hostilities was not to mark the end of congressional responsibility. For while Congress was not to make particular, tactical decisions, it would not surrender its wider policy prerogatives...the Founding Fathers were realistic enough to anticipate that a strong-willed President exercising his power as commander in chief, might be very reluctant to return to Congress for approval...The response of the Founding Fathers to this dilemma was to give Congress full power over the expenditure of funds for the military and to insist that the Congress review military appropriations at least every two years.<sup>6</sup>

In the original draft of the Constitution, the Congress was given permission to "make war." This verb was later changed so that Congress was empowered to "declare war." Although this weakened the original language and caused considerable debate ever since, the reason for the change was to ensure the executive could repel sudden attacks. Thus, Congress has the sole power to declare war.<sup>7</sup>

"It was agreed that the President was to have power to negotiate treaties as a check against Senate action, but the right of approval of treaties was reserved to two-thirds of the Senate as a check on executive action."<sup>8</sup> This particular provision is important in the study of the War Powers Resolution, because some Congressmen have advocated that the NATO treaties do not give the President carte blanche authority to commit troops to combat if an attack on a Nato country occurred. In the case of a Warsaw Pact attack on West Germany, some contend that the War Powers Resolution would require a 48-hour notification of Congress, and that Congress would have the authority to bring the troops home by concurrent resolution prior

the the end of the 60-day period or they could bring them home after 60 days by just doing nothing.

In case of insurrection or invasion, the federal government was given power to call up the state militias into national service. The President was also given the power to commission national military officers, but those selections were subject to the advice and consent of the Senate. But the power to declare war was placed with the whole Congress subject only to presidential veto. The President was empowered to repel sudden attacks, but the Constitution never defined what that meant. One must look at how forces have been used throughout history to understand that.<sup>9</sup>

In 1798, after Great Britain and France engaged in war with each other, George Washington declared the neutrality of the United States. This action caused quite a controversy, but it was defended by Alexander Hamilton who thought the Presidential power to declare neutrality did not contradict the Congressional power to declare war.

Between 1798 and 1800, the United States engaged in an undeclared war against France. But this war was not waged by unilateral Presidential action, because the Congress, in a series of acts authorized a limited war. The Supreme Court later held such authorization as constitutional.

In 1801, the United States went to war against the Barbary Pirates after they went to war against America. Hamilton believed that once a foreign government declares war against the United States the United States is automatically at war and needs no formal declaration.

The first declared war by the United States is the War of 1812, at a time when a belligerent faction in Congress *demand*ed war with Britain.

In 1817 President Monroe failed to consult with Congress when he sent forces under Andrew Jackson into Florida to harass marauders, Seminole Indians, who were raiding United States territory. It was claimed that there was a right to pursue an enemy in self-defense and that defensive acts of hostility could be authorized by the President alone.<sup>10</sup>

In 1846 after annexing Texas, President Polk ordered American troops into disputed territory between Mexico and the United States. The President requested that war not be declared, but that the existence of war be recognized. Although the Congress consented, this action was later disputed because the Congress said that Mexico was provoked and the President had in effect handed the Congress a fait accompli in which it was forced to accede. The Congress later censured the President's action by a statement where the Congress called the war unnecessary and unconstitutionally begun by the President of the United States.<sup>11</sup>

From the end of the nineteenth century up to the end of World War I, American Presidents were quick to protect American lives and property in Central and South America, and the Caribbean. Besides, the Presidents wanted to keep Europeans out of those areas, which America deemed her national interest. This was American imperialism and dollar diplomacy at its height. For its part, the Congress was content with Presidential actions abroad, including forays into foreign nations such as Haiti (1915), Nicaragua (1909, 1912, 1912, 1927, 1928, 1933), the Dominican Republic (1916-1924), Mexico (1911) and Cuba (1903 intermittently to the end of the FDR administration).<sup>12</sup>

After World War I, a long period of isolation set in and interventions, except in the Caribbean came to a halt, which ended when the Japanese attacked Pearl Harbor on December 7, 1941. Even so, FDR authorized an undeclared naval war with Germany without congressional authorization when he ordered the navy to fire upon Axis vessels in American defensive waters. He also swapped United States destroyers with the British in exchange for the use of bases. The military occupation of Greenland and Iceland was done in agreement with Denmark and Iceland. These and other actions that favored the British over Germany and the Axis powers was done without a congressional declaration of war and has been remarked by some as suggesting that declarations of war are in reality a recognition of a war already in being and brought about by a President in the conduct of his foreign policy.<sup>13</sup> A survey of American wars shows that congressional declarations of war have little or nothing to do with committing the nation's Armed Forces. Only the War of 1812 followed congressional debate culminating in a declaration of war. In every other instance Congress followed presidential leadership by declaring war or supporting undeclared war.<sup>14</sup> Indeed, "Congress has never in its history declared war except as a consequence of the President's acts or recommendations. It has never refused a request from the President that war be declared."<sup>15</sup> This is born out by one of our congressmen when he said that history shows that while Congress does possess power to declare war, in reality, the President exercises it. Also, Congress has tended to rubber stamp presidential requests for authority to use force, but on some occasions presidents have been forced to constrain a more "hawkish" Congress.<sup>16</sup>

<sup>1</sup>Ann Van Wynen Thomas and A. J. Thomas, Jr. *The War-Making Powers of the President* (Dallas: SMU Press, 1982), p ix-x.

<sup>2</sup>Thomas F. Eagleton *War and Presidential Power* (New York: Liveright, 1974), p 38.

<sup>3</sup>Gerald R. Ford *The War Powers Resolution: Striking a Balance between the Executive and the Legislative Branches* (Washington, D.C.: American Enterprise Institute, 1977), p. 2-3.

<sup>4</sup>Charles W. Elliott, ed., "American Historical Documents: The Constitution of the United States" *The Harvard Classics* (New York: P.F. Collier & Son, 1938) p. 180-191.

<sup>5</sup>Eagleton, p. 9.

<sup>6</sup>Ibid., p. 10-13.

<sup>7</sup>Ann Van Wynen, p. 6.

<sup>8</sup>Ibid., p. 7.

<sup>9</sup>Idem.

<sup>10</sup>Ibid., p. 10-11.

<sup>11</sup>Idem.

<sup>12</sup>Ibid., p. 13-17.

<sup>13</sup>Ibid., p. 18.

<sup>14</sup>William W. Schwartz and Robert W. Wood, "Presidential Power and Aggression Abroad: A Constitutional Dilemma," *American Bar Association Journal*, May 1954, p. 395.

<sup>15</sup>*United States v. Anderson*, 17 U.S.C.M.A. 558, 591 (1968) (Judge Kilday, concurring)

<sup>16</sup>Robert F. Turner, *The War Powers Resolution: Its implementation in Theory and Practice*, (Philadelphia: Foreign Policy Research Institute, 1983) p. 31.

### **Chapter Three: The Development of the War Powers Resolution**

Although the War Powers Resolution came about as a reaction to the war in Vietnam, the antecedents of discontent actually began long before American involvement in that war. In fact the conflict between the Congress and the President for control over foreign policy goes back to George Washington's day. By the 1950's and 1960's it looked like the fight was over as the executive branch dominated more and more the formulation of foreign policy. "People believed that only the President could make the quick decisions that were necessary in the nuclear age, and congressional prerogatives, especially the power to declare war, seemed almost like anachronisms."<sup>1</sup> However, this attitude was not altogether without challenge. The Congress enacted the United Nations Participation Act in 1945 with the hope of restricting the President's authority to negotiate agreements with the United Nations. Their purpose was to ensure Congress approved any plan to assign American soldiers to peace-keeping duties around the world. However, to date, there have been no negotiations such as those referred to in the Participation Act. In deploying troops to Korea in 1950, Truman acted without any authorization at all. When committing those forces, he justified his actions by claiming our obligation to the United Nations.<sup>2</sup>

Truman further enlarged the concern about his powers when he announced the addition of four divisions to Western Europe late in 1950. The "great debate" developed in the Senate early in 1951, which scrutinized the



wisdom of the President's policy as well as his authority to make such a deployment. Even Gallup Polls suggested that the people desired the President obtain the Congress' consent. These polls also reflect the decline in Truman's popularity at home. <sup>3</sup>

During the period from 1951-1953, Congress had become increasingly concerned about secret presidential agreements in foreign policy, especially in the aftermath of the Yalta, Tehran, and Potsdam agreements that had "dragged America down almost to the brink of Ruin," and according to Representative John Williams who asserted that "100,000 casualties in an undeclared Korean war, undeclared by Congress, should convince every member of this House that it is his responsibility...to take part in and to know as much about foreign affairs as possible." It was also during this period of heightened concern that Congress attempted to pass the Bricker Amendment, which sought to prevent another Yalta and force the President to consult with Congress on important foreign policy matters. This amendment had more than sixty cosponsors in the Senate from all ideological backgrounds. Eisenhower opposed the amendment, fearing that it would cripple the President's authority and make it impossible for him to conduct foreign policy; however, the amendment was never adopted. <sup>4</sup>

Yet, Dwight D. Eisenhower was as devoted to the idea of civilian control of the military as any President had ever been. A military man, he understood the importance of public will before committing forces in foreign lands. His own presidency was characterized by his determination to involve the Congress in the decision-making process of American foreign

intervention. After the Chinese shelled the islands of Quemoy and Matsu, Eisenhower affirmed to the Congress in his January 24, 1955 address:

Until Congress can act I would not hesitate, so far as my constitutional powers extend, to take whatever emergency action might be forced upon us in order to protect the rights and security of the United States.

However, a suitable congressional resolution would clearly and publicly establish the authority of the President as commander in chief to employ the armed forces of this nation promptly and effectively for the purposes indicated if in his judgment it became necessary.<sup>5</sup>

The United States became fully committed to the Vietnam War after the Tonkin-Gulf Resolution was passed in 1964 giving President Johnson sweeping discretion in his direction of American involvement in the Indochina War. The Resolution provided little ambiguity for anyone curious about America's task:

The Congress approves and supports the determination of the President...to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol of [SEATO] requesting assistance in defense of its freedom.

Sec 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.<sup>6</sup>

Congress was more than willing to pass this resolution. It passed the House by a vote of 414-0 and the Senate by a vote of 88-2. The following spring Johnson again handily won congressional support by declaring that his proposal for \$400 million to support military operations in Vietnam would constitute a referendum on his policies.<sup>7</sup>

Congressional critics of the Gulf of Tonkin Resolution, in a twist of hindsight, have argued that by approving the resolution in 1964, Congress had "offered to pay for the trip without asking how long it would take, where it would end, or whether it was necessary...When President Johnson, in 1965 and thereafter, decided to boost the United States contribution, he did so not against the expressed wish of Congress, but with it."<sup>8</sup>

As the conflict continued, month after month and year after year, the appetite for the war became increasingly difficult for Americans to stomach. The anti-war movement picked up steam, especially after the North Vietnamese Tet offensive in early 1968. Despite the Gulf of Tonkin Resolution, the various appropriations bills urged Presidents Johnson and Nixon to bring peace with honor as quickly as possible.<sup>9</sup> Additionally, a number of legislative efforts sought to end the war and curb presidential power.

In 1969, the Church Amendment to the defense appropriations bill sought to deny funds for the deployment of combat troops into Laos and

Thailand. The amendment was designed to assert Congress in the war-making process and avoid an American escalation of the war into those countries.

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As the Vietnam War progressed, the American and Congressional weariness continued to wane. By March 1969, more Americans had been killed in the Vietnam War than had been killed in the Korean war. In June, President Nixon announced the first of several withdrawals of United States forces from Vietnam. Johnson's war became Nixon's war, and the patience of Congress wore thin as the Paris peace talks, begun in January 1969, continued without much progress, and Nixon's "Vietnamization" of the war progressed at a snail's pace. In April 1970, United States and South Vietnamese troops invaded Cambodia to attack the North Vietnamese supply depots there. The Cambodian incursion showed that the Congress had picked the wrong countries in its attempt to make a showing of its ability to thwart presidential war-making ability. In June 1970, Senator Jacob Javits of New York opened the battle on the Senate side first by introducing a war powers bill that was slightly stronger than a similar House bill introduced by Congressman Zablocki in August 1970, although there had been many precursors during the previous twenty years.<sup>11</sup>

Between 1966 and July 1973, Congress took 113 roll call votes on measures to limit or end combat activities, with 94 votes occurring during the Nixon administration. Almost all resolutions failed to pass as a result of a coalition of "hawks," who were predominately made up of a coalition of conservative Republicans and Southern Democrats, and "doves," who were

predominately liberal Democrats and a handful of liberal Republicans. The so-called "end-the-war amendments were introduced by the "doves" in Congress and all of these amendments were defeated. However, several pieces of legislation threatened to hamper the war effort and some did restrict presidential power.

The Hatfield-McGovern amendment of 1970, which was part of the Military Procurement Act of 1971 would have limited appropriated funds after April 30, 1971 to those expenditures that would affect the "orderly termination of military operations and the safe and systematic withdrawal of remaining armed forces by December 31, 1971." <sup>12</sup> The amendment never passed.

In 1971 the Cooper-Church Amendment to the Special Foreign Assistance Act of 1971 Supplemental Appropriations was introduced, which provided none of the funds authorized or appropriated pursuant to that act or any portion of the act to finance the introduction of United States ground combat troops into Cambodia, or to provide advisors to the Cambodian military forces in Cambodia. The Hatfield Amendment sought to cut off money, while the Church Amendment sought to cut off authority. It, too, was defeated.<sup>13</sup>

Being unsuccessful in curtailing money or authority, the "doves" in Congress next sought to constrain the war effort, and speed an end to the war by several attempts to end the bombing of North Vietnam. Most notable, perhaps, was the Gravel Amendment to a defense procurement authorization bill that would have ended the bombing in Indochina "except as necessary to

provide for the safe withdrawal of American forces from Indochina." This measure was also defeated by the Senate, nineteen to sixty-four.<sup>14</sup>

The only successful legislation by the anti-war forces prior to the passage of the actual War Powers Resolution was the Mansfield amendment to the Military Procurement Authorization Act of 1972, which provided that the policy of the United States was to terminate all military operations in Indochina at the earliest practicable date; provide for prompt and orderly withdrawal of all American armed forces from Indochina subject to release of all United States and allied prisoners and an accounting for the missing in action. Although this measure passed, Nixon considered it an unconstitutional infringement on his powers as commander in chief to deploy forces when peace powers should be exercised.<sup>15</sup>

In the June of 1973, the Democratic Senate Caucus put itself on record against military operations in Cambodia, and the House Democratic Caucus approved a motion sponsored by the Steering Committee to bar transfer of funds in the Defense Department for Cambodian bombings. The House Democrats then attached an amendment to an appropriations measure barring bombing throughout Indochina. The President's decision to keep up the heavy bombing effort over Cambodia in January 1973 accelerated the challenge of the President's war-making powers. The Democrats finally reached a compromise with President Nixon that established a 15 August date for the cutoff of funds for bombing in Indochina.<sup>16</sup>

On October 12, 1973 the House passed the conference bill of the War Powers Resolution by a vote of 238-123. Many of the bill's original backers

were stunned by the result of the final bill, because it put the authority of the President portion under Subsection 2(c) of the "Purpose and Policy" clause, which divorced the interpretive definition of the President's emergency authority from the legally binding portions elsewhere in the bill. "This provided a legal basis for the President's broad claims of inherent power to initiate war. Congress would not participate in the war-making decision until *after* forces had been committed to battle."<sup>17</sup>

President Nixon vetoed the bill on October 25, 1973. The veto may have been sustained were it not for the swelling tide of events in the Watergate scandal. On October 20, 1973 both Elliott Richardson, then Attorney General, and William French Smith, his deputy, refused to fire special prosecutor Archibald Cox over a compromise proposal by President Nixon, which he had been trying for months to get accepted. The plan was for Senator Stennis to hear presidential tapes personally and provide a written summary to the Grand Jury. With their firings, President Nixon's stock hit an all-time low.<sup>18</sup> The vote on the War Powers' override of the Nixon veto could have been predicted by anyone. In spite of its flaws, and the arguments of its most ardent backers and opponents of the original Senate version, the bill passed and became law; however, the vote was seen more as a vote of no confidence for the presidency of Richard Nixon, than an affirmative vote for a bill limiting presidential war-making powers.<sup>19</sup>

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<sup>1</sup>Duane Tananbaum "Not for the First Time: Antecedents and Origins of the War Powers Resolution, 1945-1970," in *Congress and United States Foreign Policy: Controlling the*

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*Use of Force in the Nuclear Age*, edited by Michael Barnhart, (Albany: State University Press of New York, 1987), p. 39.

<sup>2</sup>Eagleton, p.66-68.

<sup>3</sup>Tananbaum, p. 42.

<sup>4</sup>Ibid., p. 43.

<sup>5</sup>Eagleton, p. 74.

<sup>6</sup>W. Taylor Reveley III *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?* (Charlottesville: University Press of Virginia, 1981), p. 128-129.

<sup>7</sup>Osborne, p. 107.

<sup>8</sup>Eagleton, p. 109.

<sup>9</sup>Thomas, p. 119-120.

<sup>10</sup>Tanenbaum, p. 49.

<sup>11</sup>Eagleton, p. 120.

<sup>12</sup>Pious, p. 401-402.

<sup>13</sup>Senator Jacob K. Javits "The Debate over the War Powers Resolution" in *Congress and the United States Foreign Policy: Controlling the use of Force in the Nuclear Age* (Albany: State University of New York Press, 1987), p. 56.

<sup>14</sup>Pious, p. 401.

<sup>15</sup>Ibid., p. 402.

<sup>16</sup>Thomas, p.126-127.

<sup>17</sup>Eagleton, p. 202-203.

<sup>18</sup>Ibid., p. 213.

<sup>19</sup>Idem.



## **Chapter Four: Presidential Misgivings and Potential Military Impacts**

The problems associated with the War Powers Resolution are numerous and widely written about. President Nixon, as well as every President who has followed him to date, thought it unconstitutional and therefore totally unbinding.

The law is not only unconstitutional but also unsound. It infringes on the authority of the President as commander in chief of the armed forces. Congressional-veto clauses in other laws but similar to the one in the War Powers Act have been ruled unconstitutional by the Supreme Court. It is with good reason that the Founding Fathers put authority over the armed forces into the President's hands. Congress is incapable of acting as commander in chief. As de Gaulle once said, "Parliaments can only paralyze policy; they cannot initiate it."

Given the realities of the world, the United States will sometimes need to use force in actions short of all-out war and will have to be able to act quickly and decisively. While 535 would-be commanders in chief dissect the merits and demerits of the intervention, the President will have to keep glancing over his shoulder to check the clock while fighting to defend American interests. Anyone who has witnessed the gridlock on Capitol Hill over the budget deficit and other critical issues in the last few years knows that the most likely action would turn out to be no action. As a result, by doing nothing---or by filibustering to ensure the outcome---opponents of the President's actions can achieve the same result as if their view prevailed in both houses of the Congress.

Those who passed the War Powers Act believed that the United States should rule out the use of force in the world. While such forbearance might be considered an act of virtue in the West, the Soviets and other potential adversaries consider it a sign of weakness and a green light to press forward with their aggression. A unilateral American renunciation of the use of force would provoke the use of force against us. In the U.S.-Soviet contest, Gorbachev has the freedom to conduct a free-wheeling foreign policy. If we restrict the President's ability to

act, America will be like a prizefighter boxing with one hand tied behind his back.<sup>1</sup>

According to these men, the only way to change the powers of any of the branches is to amend the Constitution. Some critics have wondered if Abraham Lincoln could have prosecuted the Civil War if such a law had been legally bound upon him. President Gerald Ford has leveled several sharp criticisms about the act that impacts on all branches of government:

It is impractical to ask them [Congress] to be as well-versed in fast breaking developments as the President, National Security Council, the Joint Chiefs of Staff, and others who deal with foreign policy...it is also impossible to wait for consensus among those congressional leaders...there is risk of disclosure of sensitive information through insecure means of communication...the potential consequences of taking executive action before mandated congressional consultation can be completed...how can consultation...bind the entire Congress...Congress has little to gain and much to loose politically...in times of crisis, decisiveness is everything...no way for a government to serve the American people...the sure way to division at home and danger abroad.<sup>2</sup>

While, I think the impacts of this resolution on the Presidency are obvious, what I think is less obvious, but just as dangerous is the impact of this law on the military. Little if anything has been written about the specific impacts of this law on the military. Lawyers who serve the Department of State and The Joint Chiefs of Staff, and others who serve at the highest levels of government typically believe that whatever impact this law has had on the military is relatively minor<sup>3</sup>, and that indeed, if there has been any impact at all, it has been an impact that has affected perceptions more than reality.<sup>4</sup>

That perception, however, is not universally held by senior military leaders who have had to conduct operations before the backdrop of an envi-

ronment where War Powers considerations are ever present: The War Powers Act has had quite an impact on my business."<sup>5</sup>

I think there were a number of times in the last year where...we considered doing a number of things that we thought would be wise to protect our people, to facilitate the mission we were carrying out in the Gulf and so forth. In every instance we had to ask ourselves the question: is it worth provoking what it would have provoked by a notification and stimulation of debate, et cetera. In some instances, we did not take action which I would have advised militarily to do... There were specific instances where...the War Powers Resolution either made us temper what we thought was the wisest course or inhibited us.<sup>6</sup>

According to Rear Admiral R.J. Kelly, "It colors everything we do. It impacts on alternatives" he said without going into specifics, "on what forces or equipment are introduced an area." According to him and others, the War Powers Resolution always impacts on options, alternatives and what is introduced into a crisis situation and how.<sup>7</sup> Likewise, General Jack N. Merritt, the former Director of the Joint staff said that "what really impacted on us was anything that we thought was going to be long term, and less than war...It was one of General Vessey's pet peeves. He always said 'Let's not worry about the War Powers Resolution and figure out what we have to do first.'"<sup>8</sup>

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<sup>1</sup>Richard Nixon, *1999: Victory Without War*, (New York, London, Toronto, Sydney, Tokyo: Simon and Schuster: 1988), pp. 108-109.

<sup>2</sup>Ford, p.3-7.

<sup>3</sup>Personal interview with Navy Captain Richard D. DeBobes, Legal Advisor and Legislative Assistant to the Chairman of the Joint Chiefs of Staff, Pentagon, Washington, D.C., 11 February 1989.

<sup>4</sup>Telephone conversation with Mr. Ed. Cummings, Legal Advisor, Political-Military Affairs, Department of State, 6 February 1989.

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<sup>5</sup>Admiral William J. Crowe, Jr., USN, Chairman of the Joint Chiefs of Staff before the United States Senate, Special Subcommittee on War Powers, Committee on Foreign Relations on the War Powers Resolution, Washington, D.C. 23 Sep. 88. p. 28.

<sup>6</sup>Ibid., p. 30-31, my emphasis.

<sup>7</sup>Telephone conversation with Admiral R. J. Kelly, JCS, J3, 6 Feb 89.

<sup>8</sup>Interview with General Merritt in his office, Washington, D.C., March 17, 1989.

## **Chapter Five: The Fall of Saigon**

The debate continues to generate wide spread concern that the War Powers Resolution divides public support, providing moral support for an adversary at a time when national resolve needs to be shown. This concern was also expressed by Clausewitz when he wrote about the "trinity of war." Although the war in Vietnam was officially over with the signing of the cease-fire agreement in Paris in January 1973 and the return of American prisoners of war, President Nixon had promised the South Vietnamese government that we would still support them militarily with supplies and hardware. The commitment of soldiers was finished, but the prospect of a resumption of bombing was still an open issue. Of course, neither President Nixon nor South Vietnamese President Thieu could have predicted Watergate. Besides causing the resignation of Nixon, it spelled the beginning of the end for the Thieu regime in South Vietnam, and final victory for North Vietnam.

The fall of Saigon in April 1975 truly marks the end of American involvement in Vietnam. At the risk of being accused of trying to blame our defeat in Vietnam on the lack of American moral support after many years of fighting and providing military and economic support, what I really want to do is illustrate the role that American support played in that war, as indeed it plays in any war, by showing what the North Vietnamese strategy was and how the anti-war debate in America fit in with their strategy. The War Powers Resolution became a symbol of the success of that strategy for North Vietnam and severely complicated the ability of the administrations to prosecute the war. The total impact on the military as it affected soldier

morale, recruiting, retention, the attendant quality of the force cannot be quantified. Suffice it to say, the impact was enormous, especially on the Army.

"War," Clausewitz said, "is more than a true chameleon that slightly adapts its characteristics to the given case. As a total phenomenon its dominant tendencies always make war a remarkable *trinity*--composed of primordial violence, hatred, and enmity, which are to be regarded as a blind natural force---the first of these three aspects mainly concerns the *people* - -The *passions* that are to be kindled in war must already be inherent in the *people*."<sup>1</sup> In essence, Clausewitz says that war consists of three elements that must be in balance: 1) government policy and objectives, which must be subjected to reason alone; 2) the commander and the army where the creative spirit, chance and probability are free to roam; 3) blind force derived from the will of the people as manifested by the magnitude of their enmity towards the enemy. If any part of the trinity gets too far out of balance, the nation will ultimately suffer defeat.

Likewise, Sun Tsu had written nearly 2,200 years earlier that,

War is a matter of vital importance to the State; the province of life and death; the road to survival or ruin---therefore, appraise it in terms of the five fundamental factors---the first of these factors is moral influence---by moral influence I mean that which causes the people to be in harmony with their leaders, so that they will accompany them in life and unto death without fear of mortal peril.<sup>2</sup>

In other words, one of the main fundamentals of war is the will of the people for its government and armies to support and wage that war. Without will, a people unified towards their government's objectives, victory cannot

be assured. The war in Vietnam was a guerrilla war, whose American objectives were not well understood by their people. Unfortunately, the Army prosecuted the war without the means of generating American will. And as the war progressed, the President lost his ability to keep public support alive. This happened in the wake of an ever-cowering Congress that seemed to buckle under the pressure of the media and a small, but vocal anti-war movement. The Army conducted a ground war of attrition and were successful in achieving body counts that indicated that the American forces were indeed successful. But they were losing the war for want of the enmity of the American will to continue to fight.

Such was not the case in Hanoi. Taking a page from Sun Tsu, Mao Tse-tung writes:

What is the relationship of guerrilla warfare to the people? Without a political goal, guerrilla warfare must fail, as it must if its political objectives do not coincide with the aspirations of the people and their sympathy, cooperation, and assistance cannot be gained. The essence of guerrilla warfare is thus revolutionary in character---because guerrilla warfare basically derives from the masses and is supported by them, it can neither exist nor flourish if it separates itself from their sympathies and cooperation.<sup>3</sup>

None of this was lost on Ho Chi Minh, who understood the need for public will, and was able to keep public support alive in his own country, and work to undermine support in the United States.

As America's involvement in the Vietnam War progressed, the Congress became more and more divided over the war issue between hawks and doves. On the one hand the hawks were pointing to our battlefield successes, including the overwhelming defeat of the NVA regulars during the 1968 TET offensive, while the doves and television and print media were pointing at the the marches, sit-ins, and demonstrations in front of the White House and

university campuses across the country as evidence that we didn't belong in Vietnam, that it wasn't our war, and that the killing of Vietnamese as well as the whole prosecution of the war was an immoral and incorrigible act conducted by our country. The doves wanted us out and the War Powers Resolution, as it constrained the President's ability to wage war as commander in chief, became one of several means for Congress to achieve that goal.<sup>4</sup>

Of course, all of this lent credibility to the aims of North Vietnam and fit perfectly into their strategy. That it served to bolster the morale of their own people can not be over stated. Their strategy had been to weaken the will of the American people by prolonging the war and making it appear as if American participation was immoral. "In the dark days of 1966, when Americans had moved into the South in massive strength, Hanoi had come to the agonizing conclusion that it could still win the war but only if it fought so hard and for so long that pressures would build up within the United States to abandon the conflict."<sup>5</sup> The newspaper and television accounts gave them easy intelligence about the waning will of America. "Wearing down the enemy in a conflict means using *the duration of the war to bring about a gradual exhaustion of his physical and moral resistance.*"<sup>6</sup>

General Van Tien Dung began his final offensive south in January 1975. The situation for the South Vietnamese quickly became hopeless. The North Vietnamese saw that the United States was isolated from its old allies and subject to increasing pressure from the domestic anti-war movement. "At all costs the anti-war movement had to be stimulated, not merely by propaganda in the United States and elsewhere but by actions in Vietnam which would contribute to the movement."<sup>7</sup> To illustrate what was being done in the provinces in Vietnam to bolster the morale of its people, the



Baria district committee in Phuc Tuy province on July 23 issued a circular which stated:

The anti-war movement in the United States has been widely intensified from Washington to New York and other states, and supported by most of Congress, former ambassadors, former secretaries, war veterans, troops returning from Vietnam, youths who oppose the draft, and workers. The anti-war movement is a spontaneous movement which has been guided and supported by our delegation at the Paris peace talks.<sup>8</sup>

The full extent that the War Powers Resolution aided and abetted the anti-war movement is unknown. It was seen by the hawks as an unwitting part of that movement. The doves seemed too little concerned about the impact that their debate had on the morale of the North Vietnamese, as well as the anti-war movement in the United States. As for the United States forces in Vietnam, they often wondered whose side the media and Congress was on.

In 1973 the Nixon administration was still confident that its strategy of the 'Vietnamization' of the war was working and that the South Vietnamese would be able to continue to prosecute the war successfully themselves. President Thieu was also confident, having received reassurances from Nixon that support would continue after the American pullout was complete. In Hanoi, there were many who were fearful that United States intervention was inevitable, and opted for a cautious position in its war policy against the Government of South Vietnam (GVN). There was some discontent by Soviet "faintheartedness" while relations with China were sour. The first concrete indications that things would change came in November

when a North Vietnamese division overran GVN border posts in the Central Highlands. In Washington, Congress had just passed

the War Powers Act, which limited the president's authority to order military operations without congressional approval. When the Nixon administration did not react to the attacks, pressure for an escalation of the struggle mounted in Hanoi.<sup>9</sup>

By 1975 the impact of the War Powers Resolution was still not lost on the General in charge of the final offensive who led the four-month battle that finally brought victory to the North. America was in a recession, inflation was rising quickly, unemployment had become serious, and the fuel crisis was becoming an ever-mounting concern. American aid to the Saigon regime had dwindled substantially and the Ford administration was still crippled in the aftermath of Watergate and the Nixon resignation. "Now that the United States has pulled out of the South, it will be hard for them to jump back in. And no matter how they may intervene, they cannot rescue the Saigon administration from its disastrous collapse."<sup>10</sup>

The military lesson is clear: before the United States or any country becomes embroiled in a major conflict, it must have the support of its people, and that support must be sustained throughout the duration of the war. The Congress must sign up for the American commitment like it did when they passed the Gulf of Tonkin Resolution, and they must stick by their support to the end.

To do otherwise is to send the wrong signal to the enemy, providing him moral support, aid and comfort, while hanging its own military out to dry. All of this was done to some extent during the entire War Powers debate and all of the ensuing legislation, and votes that took place in the Congress during the war. It has been shown that the War Powers Resolution was viewed by the enemy as a major factor, along with the anti-war movement, that their strategy was correct, and that the United States had become powerless to enforce the Paris Peace Treaty. The lesson of that war has not been lost on

its officer corps as many of its senior leaders who served in Vietnam have commented that they do not want to fight in any war that the American people do not want.<sup>11</sup>

The military strategy should also seek to "win" the war. National and military objectives need to be understood, consistent with political ends. Both must also be based on a realistic assessment of what is achievable, given the nature of the enemy, his resources and capabilities and our own interests, and capabilities. President Johnson never appreciated that, and by the time Nixon became President, he could never do much more than slow the final outcome, and provide a modicum of honor in our withdrawal.

But the War Powers Resolution was meant to ensure that Presidents consult with Congress and get their input before committing troops to conflict. The intent was not to undermine those forces once committed, which is the inference from the fall of Saigon analogy above. But that's exactly what happened in Vietnam, and what will happen in any protracted conflict in the future. War must not be constrained by time, effort, or resources, because the enemy will eventually counter his strategy to the enemy, seizing upon any constraints that he perceives his adversary has imposed upon himself. This happened in Korea when the Chinese realized the United States would not take the ground war into China, and it happened again in Vietnam when the North Vietnamese realized the Americans would not take the ground war to the north.

Likewise, once troops are committed on foreign soil, the President must have the full and public endorsement of Congress, who must be willing to go to their constituents and explain the political objectives of the war, seeking their support. Even if the congressman privately disagrees with the President's action, once the Congress has voted a joint resolution, or

declaration of national emergency or war, it becomes his obligation to support the President, if only for the sake of the lives of the men and women of his constituency who are engaged in conflict. Now a congressman who decides to oppose a President's actions where a joint resolution is passed must understand that while it is his right in a democracy to do so, he does so at the expense of the servicemen who serve in that conflict, as well as his own honor and integrity to the armed forces who risk their lives in combat.

But suppose the President has not asked for a joint resolution, and American forces are committed, what should the congressman do? Question the foreign policy, yes. But restrain harsh judgment and contentious public debate until the facts are known. Indeed, if it appears that the President has committed the troops in haste, leave it to the leadership of Congress of both parties to challenge the President in private, out of the way of the public media. Such debate is better behind closed doors, transparent to the enemy.

But what about the public's "right to know?" This will always have to be balanced by the greater need for safety of the forces. It is dangerous for the Congress to make politics of American foreign policy when armed forces are in danger of enemy retribution. The War Powers Resolution, as it is currently written, demands that public debate should be tempered by common sense. It seems that the 60-90 clause makes the manifestation of public debate all the more dangerous, because the enemy is always given the hope that his actions will cause the removal of forces, such as happened at Beirut and the Persian Gulf. On the other hand, if there was no War Powers Act, public debate would not encourage retribution, because enemy retribution could not be unwittingly rewarded by the Congress.

I think it is often forgotten that Presidents and the military are just as wary of becoming involved in another Vietnam as the Congress is---perhaps

even more so. Presidents normally do what is popular with the people, because unpopular foreign policy adventures accrue much greater political costs to a President than to Congress. He does not want to act against the will of the people, and any President who chooses to act against the will of the people, will have to face the certainty of a backlash by them and Congress. Such a backlash can assume a variety of forms, as it did in Vietnam, by increasing congressional oversight of presidential behavior, or by denying congressional authorizations and appropriations for military procurement programs and the war.<sup>12</sup> This means that the President and the Congress must work together in pursuit of our foreign policy like our founding fathers intended---the President conducts our foreign policy, the Congress provides advice and consent.

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<sup>1</sup>Carl von Clausewitz *On War* (Princeton: Princeton University Press, 1976) p. 89. The emphasis has been added.

<sup>2</sup>Sun Tzu *The Art of War* translated by Samuel B. Griffith (New York and Oxford: Oxford University Press, 1963) p. 63-64.

<sup>3</sup>Mao Tse-tung *On Guerrilla Warfare* translated by BG Samuel B. Griffith, USMC (Ret.) (New York and Washington: Praeger Publishers, 1961) p. 43-44. Mao, writing for the defeat of the Japanese from his country during WWII goes on further to say: "The moment that this war of resistance dissociates itself from the masses of the people is the precise moment that it dissociates itself from the hope of ultimate victory over the Japanese." p. 44.

<sup>4</sup>Other prominent actions included the repeal of the Tonkin Resolution (1971), the Case Act (1972), the Budget Control and Impoundment Act (1974)

<sup>5</sup>Denis Warner *Certain Victory: How Hanoi Won the War* (Kansas City: Sheed Andrews and McNeil, Inc.: 1978) p. 184.

<sup>6</sup>Clausewitz, p. 93.

<sup>7</sup>Warner, p. 185.

<sup>8</sup>Idem.

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<sup>9</sup>William J. Duiker *The Communist Road to Power in Vietnam* (Boulder, Colorado: Westview Press, 1981), p. 303-304.

<sup>10</sup>General Van Tien Dung *Our Great Spring Victory: An Account of the Liberation of South Vietnam* (New York and London: Monthly Review Press, 1977), p. 20.

<sup>11</sup>In a CACDA briefing at Fort Leavenworth, Kansas with General Shoemaker in 1980, then FORSCOM commander, he made the emphatic statement, "I don't ever want to be involved in a war the American people don't support," expressing a sentiment common today by general officers who served in Vietnam.

<sup>12</sup>Charles W. Ostrom, Jr. and Dennis M. Simon "The President and the Politics of Military Force" ed. Joseph R. Goldman in *American Security in a Changing World: Issues and Choices* (Lanham, New York, and London: University Press of America, 1987) p. 116.

## Chapter Six: The *Mayaguez* Crisis

The War Powers Resolution has been labeled as being unresponsive to time-sensitive emergencies. Presidents have argued that the protection of American lives and her armed forces can not wait on the kind of notice and formal debate that many in Congress would like to have. And I do not believe it was the intent of the original writers of the War Powers Resolution to tie a President's hands, such as they are. Certainly the framers of the Constitution understood the need for the President to act quickly in self defense. That is part of the reason why war powers were divided between the legislative and the executive branches of government. The *Mayaguez* incident shows how President Ford responded, and why it is important for any President to use his constitutionally given power to protect our forces in self defense, and why it is necessary for the Congress to provide its outward support.

On 12 May 1975, Cambodian naval patrol boats fired upon and seized the *U.S. Mayaguez*, a United States merchant ship in the Gulf of Siam, returning from Hong Kong to Thailand in international shipping lanes. Immediately United States forces raided Cambodian territory, and the crew and vessel were retrieved at the cost of 38 American lives. <sup>1</sup>The incident is important because it was the first time that military force had been used since the end of the Vietnam War, taking place only a few weeks after the fall of Saigon (April 29). The Ford administration was taken totally by surprise, and acted quickly in order to prevent another embarrassing *Pueblo* incident. The incident was perceived as a threat to an already battered American prestige in the world. Besides the lives of the crew, American

credibility was on the line. "At issue was the status of the United States as a great power, with all that it implies in terms of commitment, resolve, and the ability to act decisively."<sup>2</sup>

The Mayaguez incident shows that it is often unrealistic to expect the President to consult with Congress *before* forces are introduced in an emergency crisis, which is contrary to what many in Congress want the President to do. In the case of the crew of the Mayaguez, deliberate consultations may have a lengthy and brutal incarceration and humiliation, such as what happened to Commander Bucher when North Korea seized the intelligence ship *Pueblo* and crew in the Sea of Japan in January 1968 and didn't release them until December. The ship was never returned. Referring to the hastened evacuation of stranded Americans and friendly Vietnamese civilians as Saigon collapsed in 1975, Barry Goldwater said it was "one example of its [Congress] inability to deal with critical foreign policy and defense needs as they arise. Five hundred thirty-five secretaries of state cannot make a fast, critical decision."<sup>3</sup> The Mayaguez incident also points to the fact that the President is America's "perpetual staff duty officer." The incident occurred during a congressional recess:

Not one of the key bipartisan leaders of Congress was in Washington....This, one might say is an unfair example, since the Congress was in recess. But it must be remembered that critical world events, *especially military operations* [my emphasis], seldom wait for Congress to meet. In fact most of what goes on in the world happens in the middle of the night, Washington time."<sup>4</sup>

With American soldiers forward deployed around the world, the potential for such incidents remains high. The Mayaguez incident shows the impossibility of the President to consult Congress in a time-sensitive crisis. The



safety of the soldiers, sailors, airmen, and marine men and women around the world depends on leaders who act without hesitation. That means the requirement to act with speed for the safety of our forces must exist unconstrained.

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<sup>1</sup>Louis W. Koenig, "The Executive Office of the President" ed by George K. Osborne, Asa A. Clark IV, Daniel J. Kaufman, and Douglas E. Lute in *Democracy, Strategy, and Vietnam: Implications for American Policy making* (Lexington, Mass.: Lexington Books, 1987) p. 97.

<sup>2</sup>Richard G. Head, Frisco W. Short, and Robert C. McFarlane *Crisis Resolution: Decision Making in the Mayaguez and Korean Confrontations* (Boulder, Colorado: Westview Press, 1978.) pp. 44-45.

<sup>3</sup>Barry M. Goldwater with Jack Casserly *Goldwater* (New York: Doubleday, 1968) p 24.

<sup>4</sup>Gerald Ford *A Time to Heal* (New York: Harper & Row, 1979). p. 252, quoted in Wallace Earl Walker "Domestic Foreign Policy: Congress and the Vietnam War" *Democracy, Strategy, and Vietnam* ed. George K. Osborn, Asa A. Clark IV, Daniel J. Kaufman, Douglas E. Lute (Lexington, Mass.: Lexington Books, 1987), p. 112.

## Chapter Seven: The Iran-Hostage Situation

There are some who claim that the War Powers Resolution does not provide the full public sanctions that a declaration of war provides. In other words, there are some advantages for a declaration of war. For one thing, a formal declaration of war sends a clear message to our adversaries in unambiguous terms what our objectives are. Also, a formal declaration tends to polarize public opinion in support of a President's actions against a foreign government. However, there are political risks for such a bold move and for the most part, Presidents have been unwilling to go so far as to ask Congress for such a declaration, but have instead settled for other options. The Iran-hostage situation is one example where a full declaration may have accrued some advantages to the President. In this case, he chose not to declare war, and it is not clear that he ever really considered such action. Regardless, the merits of such action bear close consideration in the conduct of foreign affairs before the use of military force.

In the late 1970's opposition to the Shah of Iran grew steadily primarily because of fundamentalist religious opposition to his reforms, as well as to the abusive power of his regime. The liberal and conservative opponents joined in a revolution against him, which quickly brought in to power Ayatollah Ruhollah Khomeini, a Muslim religious leader.

After a near American embassy takeover on February 14, 1979 by "irresponsible elements of the revolution", the embassy personnel were released after only a few hours. In June 1979, Bruce Lanigan took over the

embassy replacing Ambassador Sullivan, apparently over a dispute with President Carter about policy in Iran and the fate of the deposed Shah. In spite of the insistent urgings of Kissinger, Nixon and others, Carter refused to permit the entrance of the Shah to the United States because he feared something would happen to the American embassy. When the Shah developed cancer, Lanigan sounded out Iranian foreign minister Yazdi about the consequences if the Shah was admitted to this country so he could obtain necessary cancer treatment. Yazdi was not happy about it, but he gave Lanigan the impression that the government could probably prevent another takeover. On October 23, the Shah arrived in New York. But on November 1, another incident occurred and on the 4th, "a mob of chanting students broke down the gates to the compound and seized the embassy within. The fatal crisis of the Carter Administration had begun."---seventy-six Americans had been captured, while six had escaped unseen to the Canadian Embassy.<sup>1</sup>

On November 18, the Iranians freed thirteen lower-level members of the embassy staff, all who were black or women. The entire hostage ordeal lasted 444 days and absorbed more media attention than any other event since World War II, including the Vietnam war.<sup>2</sup>

In the first combat action by the United States since the 1975 *Mayaguez* incident, United States Army and Marine commandos landed in the Iranian desert on April 24, 1980, on a dramatic mission code named "Eagle's Claw" that had been planned for months to rescue the 52 remaining hostages. Mechanical failures of three of the eight helicopters caused a cancellation of the mission. While trying to redeploy out of the "Desert one" rendezvous

area, one of the helicopters accidentally ran into one of the C-130 aircraft. The helicopter exploded killing eight of United States servicemen.<sup>3</sup>

The rescue attempt was planned in total secrecy and was known by only a small circle of officials inside Washington. It had been preceded by a number of rehearsals. Of course, the reaction on Capital Hill was mixed. Senator Frank Church expressed irritation at the rescue move and said that the President had violated the War Powers Resolution. The Administration contended that the President had acted within his constitutional authority as Commander in Chief by seeking to use force to protect the lives of American citizens. He was not compelled to consult with Congress. Congressmen were also concerned about the timing of the action with regard to European allies and the perception of incompetence of the Administration. However, after Carter briefed Congressional leaders about the operation, much of their criticism was softened. According to Senator Alan Cranston, "this was viewed as a rescue mission, not a military action."<sup>4</sup> Senate sources said Majority Leader Robert Byrd of West Virginia was furious over not being informed;<sup>5</sup> however, it was later revealed that Byrd had actually been briefed on Wednesday before the actual attempt, without actually telling him exactly when the operation would be conducted.<sup>6</sup>

Public support for the operation was widespread. In a *Newsweek* Poll, 71% said they felt Carter was right to try to rescue the hostages by military force, while only 43% said they approved of the way Jimmy Carter was handling his job as President. Most of the praise expressed relief that the President had finally done something.<sup>7</sup> But when Senator Frank Church first

heard about the rescue attempt, he went public with the statement "He's flouting the law." "The law is a crock," complained a Senate staffer. "It doesn't have the teeth to accomplish what it's supposed to do."<sup>8</sup> Of course, this kind of constitutional debate in public is not understood by the young men and women, who make up the fighting strength of the Armed Forces. Because they are in a position to know first hand what is happening in the overseas environment where they are serving their country, they generally support the President and wonder why the Congress and the American people do not appreciate their sacrifices. On the other hand, those forces not overseas must wonder if the President knows what he is doing, and why his own immediate chain-of-command doesn't speak out against his policies.

As tensions eased in the Senate after the President's briefing of the failed operation, many members were still looking for a confrontation with the President fearing that Carter would follow through on the option of imposing a military blockade on Iran, and they wanted a role in the decision making. "The advance-consultation provisions of the law are intended to come into play before any such decision had been made," they wrote.<sup>9</sup>

Like the *Mayaguez* incident, this shows that Presidents are torn between the need for secrecy on the one hand, and the need to consult with Congress on the other. The Congress wants to be part of the decision-making process. When time, and OPSEC make that possible, they should at least be informed. Neither the Constitution nor the War Powers Resolution requires their permission.

The Constitution grants the commander in chief role only to the President and gives him and only him the power to make foreign policy *with the advice and consent of the Congress*. It is the confusion between these two powers that gets most juxtaposed in the debate of presidential abuse of power. The military is rightly sensitive because of the need for operational security (OPSEC), and public support. These impact on military options. There is ample evidence that the need for OPSEC prevented the operation from being properly coordinated. "Because of the fear of leaks, the departmental experts often had to operate without knowing the full picture. This was orderly, but was it optimal?"<sup>10</sup>

However, some have taken an opposite view and argued that a retaliatory attack on Iran in the event of harm to the hostages falls outside the narrow aspect of the law. Such an attack would not be in response to an ongoing attack, but only to a past episode. But the attack on an embassy is not an attack on United States territory. Although, diplomats are protected from diplomatic immunity, their embassies are not considered United States territory. Also, harm to hostages, grave as it would be, is not considered the kind of emergency envisioned by the law. And finally, retaliatory attacks do not constitute such urgency that preclude consultations.<sup>11</sup>

Actually, the Joint Chiefs of staff considered three options. One was a retaliatory strike that would cripple Iran's economy. That was rejected for fear that hostages would be killed in retaliation. Two, was the rescue operation. After discussing the possibilities with high Israeli officials involved with the Entebbe operation, they didn't believe it had any

probability of success. The distance to Tehran from facilities for United States military use along with the embassy complex located in the middle of an inflamed population center, made that kind of mission nearly impossible. Third, was how the United States might respond if Iran should disintegrate politically into anarchy.<sup>12</sup>

The JCS recommended against any immediate rescue attempt because reliable intelligence was unavailable. However, two other alternatives were discussed in the context of a military strike. One was the seizure of a piece of Iranian territory, such as an island. This was discarded because it was felt that too many casualties would result. The other was a naval blockade by use of mines dispersed throughout Iranian harbors. Mines could be placed on short notice by forces already in the region, resulting in high costs to Iran with little potential for loss of life on either side. "As United States policy moved progressively toward an embargo on all trade with Iran, the ability to mine one or more Iranian harbors was increasingly regarded as a potentially classic example of the extension of diplomatic strategy by military means."<sup>13</sup> It would have been a classic example of the juxtaposition of foreign policy power of the President and his power to make foreign policy.

Unfortunately, the most negative aspect of any mining operation is that it is internationally regarded as an act of war. This creates moral, military, and political consequences. For example, Iran might have chosen to sink United States tankers in the the Persian Gulf, which could have set off a serious string of events among the other oil-producing states in the region. Insurance rates would have surely risen, and the price of oil might have sky

rocketed, causing an outcry from those regions most dependent on Middle-East oil---Europe and Japan. Also, the Soviet Union could have offered mine sweepers to Iran, which would have been difficult for her to refuse. All of this weighed on the President's decision, and ultimately caused him to reject the plan.<sup>14</sup>

The War Powers Act, its detractors have argued, does not provide the President the ability to conduct foreign policy, especially in situations where military force might be effective. But supporters find this to be a virtue.

Interestingly, this latter judgement is shared by some within the professional military, a position most eloquently argued by retired Colonel Harry Summers in his work *On Strategy*. He argues that a major flaw of our involvement in Vietnam was that it was not preceded by some overt act of popular commitment, such as a declaration of war or at least a formal mobilization such as the calling up of reserves, as had been done in Korea. In the absence of such acts, the American people were not forced either to agree to the commitment or to say that they would not back the action. In Summers' view, this failure fatally undercut long-term support for the war effort. His conclusion is that the military should never allow itself to be committed to *major* action without the explicit blessing of the American people. The War Powers Act provides an instrument for the American people, through their elected representatives, either to bless or condemn any proposed action.<sup>15</sup>

Speaking to the Senate Committee on Foreign Relations Committee in response to a question from Senator Hayakawa about the fate of the hostages and dangers to them resulting from military options, George Kennan actually advocated a declaration of war. He argued that such a declaration would give



the United States the legal means to impose effective pressures on the Ayatollah:

A number of times since these people were locked up...I have wondered why we in our Government did not simply acknowledge the existence of a state of hostility brought about by the Iranian Government, and, having done that, then regard ourselves as *at war with that country*. Having taken that step...we could...ask a third power to represent our interests in Iran...We would then also intern the Iranian official personnel in this country...it would put us in a position to make our own decisions about such military action we might wish to take if it became necessary.<sup>16</sup>

Such a move would also provide the advantage of having something to offer in exchange for our own hostages.

Carrying this theme a bit further, William F. Buckley said that a declaration of war in November when passions were high would have passed Congress immediately. Not only impounding Iranians assets, the internment of thousands of Iranian students in this country in a "revivified army fort", and "the Commander-in-Chief licensed by the Congress of the United States to pursue the war against Iran by any means he thought applicable, would have had some influence not only on Iran, but on other fractious members of the world community, not excluding the Soviet Union." He goes on to suggest that a declaration of war is not "necessarily to dispatch troops, let alone atom bombs... It is a wonderful demystifier, sucking up the smoke from the room, so that you are left there with your objective in very plain view."<sup>17</sup>

Harry Summers contends that "a request to invoke wartime laws that are already on the statute books must be part of the package that the President submits to the Congress under the War Powers Resolution."<sup>18</sup>

However, it is my opinion that it is politically and pragmatically unreasonable to declare war or a national emergency in response to a small crisis. There will always be occasions where the United States will have to use force in order to enforce its foreign policy or protect its citizens or property. A declaration of national emergency may be provocative if it is perceived as a sign that the United States is preparing for war. Additionally, such declarations tend to polarize public opinion such that the ensuing debate may be worse than the disease. There is also the political cost if Congress enacts a joint resolution terminating an emergency against the wishes of the President.

On the other hand, declarations of national emergency and war do provide some sound benefits. They serve to demonstrate American resolve to her allies and her adversaries, which actually contributes to deterrence. Another benefit is that it may also increase public support for Presidential policies. The President would actually accrue selected authorities, such as William F. Buckley suggested. Some United States emergency codes even authorize the President to acquire foreign-flag vessels laying idle in United States waters. Others permit the President to regulate or prohibit transactions in foreign exchange, bank transfers, and importing/exporting of currency and securities, and can control transactions of foreign property subject to United States jurisdiction.<sup>19</sup>

It would appear that the Congress would have the President ask for a joint resolution, or declaration of war or national emergency whenever force was required. And in each instance he should consult with Congress first, never mind that often times such force can only be effective while in hot pursuit. Also, if the territory was deemed hostile, or subject to imminent hostilities, whatever that means, the same members of Congress would have the President remove those forces from those territories, regardless of the impact such action would have on our allies, our adversaries, or our economic, political, and strategic position in that region of the world.

But are declarations of war obsolete? Responding to a Congress, Admiral Crowe said "I do not subscribe to the proposition that the days of declaring war are gone....I can very well hypothize some situations where a President would seek a declaration of war, and I would advise him to, and it would be in a general war situation, where we might have to fight all over the world."<sup>20</sup> But such commitments have not been the nemesis of either the President or the military. It has been in those situations where we least desired war, and where the uncertainty of the length of time of commitment that the military has had the most problems with the issue of the War Powers Resolution. When it was thought that a mere show of force by a super power would be sufficient to defuse a crisis, we learned that the War Powers Act hindered the effort. In Beirut we were forced to eat humble pie at the expense of the lives of 241 Marines---was it worth it?

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<sup>1</sup>Geddis Smith *Morality, Reason, and Power: American Diplomacy in the Carter Years* (New York: Hill and Wang, 1986), p. 196-197.

<sup>2</sup>Ibid., p. 198-199.

<sup>3</sup>Thomas M. DeFrank "Armed Forces" *The World Book Year Book: 1981* (Chicago: World Book-Childcraft International, Inc. 1981), p. 188.

<sup>4</sup>Martin Tolchin "Some in Congress Criticize Mission Because of a Lack of Consultation," *New York Times*, 26 April 1980, p.10, Col 1.

<sup>5</sup>Ibid.

<sup>6</sup>A. O. Sulzberger, Jr. "Byrd Was Briefed Before Iran Action," *New York Times*, 27 April 1980, p. 17, Col 1.

<sup>7</sup>Alan J. Mayer with Thomas M. DeFrank, Eleanor Clift, Fred Coleman and John J. Lindsay, "A Mission Comes to Grief in Iran," *Newsweek* 5 May 80, p. 26, Col. 1.

<sup>8</sup>Aric Press and John J. Lindsay "The Sticky War-Powers Issue," *Newsweek* 5 May 80, p. 41, Col 2.

<sup>9</sup>Ibid.

<sup>10</sup>Warren Christopher and Gary Sick "The Iran Hostage Case, 1980," in *Decisions of the Highest Order: Perspectives on the National Security Council* ed. Karl E. Inderfurth and Loch K. Johnson, (Pacific Grove, California: Brooks/Cole Publishing Company, 1988,) p. 208.

<sup>11</sup>James Slater, "What Carter Can't Do," *The New Republic*, 26 January 1980, p. \_\_\_\_.

<sup>12</sup>Ibid., p. 210.

<sup>13</sup>Ibid., p. 211.

<sup>14</sup>Idem.

<sup>15</sup>Donald M. Snow, *National Security: Enduring Problems of U.S. Defense Policy*, (New York: St. Martin's Press, 1987), p. 35-36. My emphasis.

<sup>16</sup>George Kennan speaking before the Senate Committee on Foreign Relations, 27 February 1980. Ninety-Sixth Congress, Second Session, *Congressional Record* p.121-122.

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<sup>17</sup>William F. Buckley, Jr., "George Kennan's Bomb," *National Review*, 4 April 1980, p. 432, Col 1.

<sup>18</sup>Harry G. Summers, Jr., *On Strategy: The Vietnam War in Context* (Carlisle Barracks, Pennsylvania: Strategic Studies Institute, U.S. Army War College, 1981), p. 18.

<sup>19</sup>"Major Emergency Actions: Government Preparedness," National Readiness Division, Office of Federal Preparedness, Federal Emergency Management Agency, May 1986, p. GO-01/8.

<sup>20</sup>Crowe, p. 36.

## **Chapter Eight: Beirut August 1982-February 1984**

The War Powers Resolution is often criticized because its antagonists say it provides little flexibility for the President to conduct foreign policy. Such limitations impose unrealistic constraints on the military. Is that true, or does the military constrain itself because it doesn't want to put the President on the spot? It is easy to see how the military would be nervous about its actions. The Congress has been breathing down it back incessantly since the dropping of the atomic bomb on Hiroshima and Nagasaki in World War II, the stakes have grown bigger, to say the least. Concerned about an "accidental" starting of World War III, it is easy to see why the Congress would want to keep their fingers on what the military is doing as it wields its deterrent forces around the world. But the constant testimony before Congress, coupled with the close interaction with their lawyers, who are expert in international law, has made the senior military leader perhaps overly sensitive to the issue of Presidential War Powers. Some have even suggested that perhaps the military pays too much attention to it.

While the fall of Saigon shows how a Congressional backlash can develop slowly from an unpopular war, the turn-around in support shifted even more quickly in Beirut when the Marine barracks was destroyed by a terrorist bomb, killing 241 Marines and Navy personnel. Beirut shows what can happen to a force without a proper mission, and how little that force can impact on their environment when not fully empowered to do so. The underlying assumptions that brought the Marines to Beirut changed, but the full impact of that change was not perceived by either the administration or the military until the dramatic events occurred on October 23, 1983, too late.

The American involvement began shortly after Israel's invasion of Lebanon on June 6, 1982 increased the level of participation of forces and violence in the Middle East. After a quick victory, Israel found itself bogged down in an occupation that was unpopular at home and abroad. Their purpose was to clear the Palestine Liberation Organization from a 25-mile zone north of the Israeli-Lebanon border. The intent was to free Israeli settlements from artillery range of the PLO. Syrian units of the Arab peacekeeping force lost about 400 tanks and armored personnel carriers against the Israeli's. Unfortunately, the victory did not bring a triumph over the PLO and she found herself subject to mounting criticism at home and abroad. Pressure from the United States kept her from attacking West Beirut, the location of the PLO headquarters, while United States special envoy Philip C. Habib worked out a plan for the evacuation of PLO units from the city in August. (This was Habib's second visit to Beirut. The first time was in July 1981 when he arranged a cease fire in Lebanon after Syria moved Soviet-supplied surface-to-air missiles into Lebanon's Bekaa region.) Most of the 15,000 PLO guerrillas trapped in West Beirut were evacuated to Syria, Algeria, Jordan, Sudan, and North and South Yeman. Habib's agreement also called for a multinational peacekeeping force of American, French, and Italian troops.<sup>1</sup>

The PLO departure began as soon as the French forces arrived. Nearly 800 American Marines arrived on August 25 armed with their usual small arms infantry weapons. They continued to supervise the evacuation until September 4. Since the Marines had been invited by a legitimate government, the administration believed that the War Powers Resolution did not apply, and in any case, there was no clear "imminent involvement in hostili-

ties," so consultation as mandated by the War Powers Resolution was not necessary.<sup>2</sup>

At the time of the July 6 offer, administration officials indicated that any Lebanon deployment would be reported under section 4(a)(2)---the "equipped for combat" provision---rather than under the "imminent involvement in hostilities" language of section 4(a)(1). This position was immediately challenged in a letter from House Foreign Affairs Committee chairman Clement Zablocki, who contended that it would not accurately reflect the danger in Beirut and would deprive the Congress of its authority to determine the maximum length of the deployment.<sup>3</sup>

The President submitted a report immediately after the deployment but never specified the paragraph under which provision of the War Powers Resolution the action was taken.<sup>4</sup>

The Marines left Lebanon September 10 after the PLO eviction was completed. But on September 15, hours after the assassination of Lebanese President Gemayel, the Israeli's moved into West Beirut and stayed there despite angry protests by the United States. Several days later international criticism of Israel intensified. Israeli troops had permitted Lebanese Christian militiamen to enter the Sabra and Shitila refugee camp, ostensibly to look for PLO guerrillas hiding there. The militiamen massacred hundreds of Palestinian civilians.<sup>5</sup>

The public outcry against the Israeli's was overwhelming. After several resignations of high-ranking military and civilians, the Israeli's conducted an investigation of the massacre; however, the commission that investigated the incident found no evidence of wrong doing by the Israeli's for either knowing or preventing the massacre, nor did they find any involvement by the Lebanese Christian militia.<sup>6</sup> To many it looked like a white wash.



On September 20, the Lebanese cabinet formally asked the three countries that had participated in the original peacekeeping force to return to Beirut to help maintain the peace.<sup>7</sup> The thirty-second Marine Amphibious Unit (MAU) was ordered on that same day to land both through the Port of Beirut and by air directly into Beirut International Airport (BIA) to "establish a presence," which is a mission that no Marine had ever heard of or trained to before. Additionally, the threat was not totally clear, but the Marine commander, Colonel Jim Mead initially thought it was evident that the primary threat would be isolated acts of terrorism and, vast quantities of unexploded ammunition lying around the airport compound.<sup>8</sup>

On September 24, prior to the actual redeployment, Senators Percy and Pell again wrote the President, arguing that the "uncertainties" surrounding the deployment were much greater than before, and that the mission and objectives of the Marines were unclear. They further urged the President to submit a report under the "imminent hostilities" section rather than under the "equipped for combat" provision.<sup>9</sup>

Reagan sent a contingent of about 1,200 Marines back into Lebanon on September 29, again as part of a multinational peacekeeping force. This action caused intense debate from some members of Congress who thought the President was evading the requirements of the War Powers Resolution to seek congressional approval before introducing troops back into the region. The Congress was concerned that the United States was jeopardizing its position as a mediator by intervening militarily to prop up the existing Lebanese government. Once again the administration contended that the Marines were not going into a hostile area and therefore there was no requirement for a report.<sup>10</sup>

The Marines went ashore by landing craft and helicopter in order to set up and occupy the BIA. Mead was right, because it turned out that there were literally thousands of unexploded pieces of ordnance laying everywhere, and would have to be cleared by qualified personnel. The BIA was itself a permissive environment, open to civilians, that Marines would have to coexist with daily. However it was felt that the airport could not be sealed off since the operation of the BIA was crucial for Lebanon's image as a nation capable of operating as a nation.<sup>11</sup>

A month later the 32d MAU was rotated with the 24th MAU under Colonel Tom Stokes. The mission he received was similar. It called for them to "establish [an] environment which will permit the Lebanese Armed Forces [LAF] to carry out its responsibilities in the Beirut area, and [to] be prepared to protect United States forces and conduct retrograde and withdrawal operations from the area. Stokes quickly realized the potential for mayhem that could result from an innocuous exchange of fire between his Marines and the factional militias that appeared to be returning from the lawless environs of the BIA."<sup>12</sup> Essentially this mission remained throughout the course of the Marine's presence.

But what did the Marine mission really mean, especially to the soldier on the ground? At the tactical level, the forces who are actually the subject of "hostilities," need a clear mission statement. The tactical-level commander must know his commander's intent; the who, what, where, when and why of the mission statement; the forces assigned and rules of engagement. He also expects to perform his mission without close supervision or oversight by a lot of congressmen, staffers, reporters, and other "strap hangers" who happened along every day as in Beirut. The on-scene commander expects that he will be provided timely intelligence that reflects the collective wisdom and

analysis of the intelligence community, and that important pieces of information are not withheld from him. After all, nobody has a need to know like the commander. He also expects that as the situation changes, he will be given appropriate and complete guidance from his chain of command. These men should not be concerned with the War Powers Resolution.<sup>13</sup> They have enough to keep them occupied just worrying about the security and safety of their men.

The United States Embassy in Beirut was gutted in a terrorist attack on April 18, 1983. Sixty-three persons were killed including 17 Americans. By August, the Marine contingent had grown to 1,800 and the Marines had come under increasing artillery and sniper fire, principally from Druze Moslem forces fighting the United States-backed Christian government. The Congress was notified by the President on August 30, 1983 about the deaths of two Marines and fourteen others wounded in Beirut on August 29. "But in his letter, Reagan refused to cite the section of the 1973 War Powers Resolution that would have enabled Congress to force a withdrawal."<sup>14</sup> To do so would be to admit that the Resolution is indeed constitutional, besides it would have signaled our adversaries that all you have to do to get United States Armed Forces out of an area is to create a "hostile environment" by killing a few Marines. The signal to our allies would be even more devastating.

Since enactment of the War Powers Resolution, senior military leaders are increasingly bothered by the provision of the law that would, ipso facto, remove forces from the theater without the Congress having to vote on the issue. According to Captain Roach,

the Unified Commanders, who work directly for the Secretary of Defense and command the assigned combatant forces in their areas of responsibility...worry too much in my view--- about the War Powers Resolution. They worry about it for several reasons. First, they fear that Washington will not accept the most suitable and feasible course of action because of political reluctance or unwillingness to consult with Congress, or to report to Congress and trigger the 60-90 day period (section 4(a)(1)). Indeed, the existence of that trigger, its gun and its effects are the core of the objection of most senior military leadership. That aspect of the War Powers Resolution is viewed in the same light as the Vietnam rules of engagement: preventing the military from accomplishing the mission assigned or contemplated.<sup>15</sup>

Perhaps the hue and cry in Congress would have dissipated with time, but things got worse. Two Marines were killed by rocket fire on September 5, and on September 8, a United States warship fired for the first time on Moslem artillery positions. A confrontation over the issue gained momentum in Congress that wanted a joint resolution for 18 months for the Marines to complete their "presence" mission.<sup>16</sup> But neither the President nor the military wanted to take this approach. General P.X. Kelly told the Congress that "if you vote to keep the Marines in for six months, they'll wait us out, and if you vote for eighteen months, they'll push us out."<sup>17</sup> Two weeks after the vote, they blew the barracks up.<sup>18</sup> "Our military was hamstrung by legislative and other inhibitions," said Secretary of Schultz in his Trilateral Commission speech in April. "The Syrians were not interested in diplomatic compromise so long as the prospect of hegemony was not foreclosed. They could judge from our domestic debate that our staying power was limited."<sup>19</sup>

Once the news of the bombing became known, loud, familiar voices, almost in unison, went up in Congress demanding withdrawal of the Marines, once again showing their lack of solidarity and will in the face of adversity.

Congressman said, "They're serving no useful purpose. If it escalates, we're deeper in the morass, and we've got another Viet Nam on our hands." Senator Hollings calling upon keen powers of hind sight called on the administration to draft a plan to withdraw the Marines within 60 days. "If they've been put there to fight, then there are far too few," he said. "If they've been put there to be killed, there are far too many." Not wanting to lose the opportunity to heap propaganda upon injury, the Soviet newspaper, Pravda observed: "It appears the Viet Nam story begins to repeat itself. The United States is getting drawn deeper into the fighting, while generals get more and more freedom of action."<sup>20</sup>

The Congress and the Department of Defense-commissioned Long Report thoroughly investigated the events surrounding the tragic deaths of the Marines in Beirut. At issue was the vague mission, the adequacy of the security arrangements for the Marines in the face of a "permissive" and "increasingly hostile" environment. Some questioned whether the threat had been adequately assessed and passed along to the commanders on the ground. Some questioned the adequacy of the peace-time rules of engagement that the Marines were using, questioning how it was that adequate measures weren't taken to ensure that soldiers could fire upon a sudden mad man in a yellow truck. Is it possible that more adequate measures were not taken before the joint resolution because somebody didn't want Congress to learn that the area was indeed hostile for fear Congress would start the 60-day clock?

They had their backs to the sea on low ground where they could be fired on from nearby mountains. Their rules of engagement, or guidelines telling them under what circumstances they could fire their weapons, were restrictive. The Marines were forbidden to send out patrols to collect intelligence or protect the con-

tingent. They knew little about the chaotic military and political situation around them and had poor liaison with the Israeli Defense Force, the dominant military power in the area. Perhaps most important, as their mission changed from peacekeeping to assisting the Lebanese government in its struggle to survive, orders under which the Marines operated were not revised to take into account new dangers.<sup>21</sup>

It appears that everybody reacted to the implications of the War Powers Resolution differently. The War Powers Resolution can not be faulted, because it is only a piece of paper. It meant different things to different people. For the President, it didn't apply, and anyway it was unconstitutional. Congressmen, visiting hostile Beirut each day, were more concerned about getting a joint resolution, as provided for in the War Powers Resolution, than they were about their responsibility to "raise and support Armies" and "provide and maintain a Navy." Military leaders, especially senior military leaders up and down the chain of command, failed to understand Beirut for what it was, and make their concerns known before it was too late. Everybody but the troopers were to blame. It was a National failure.

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<sup>1</sup>Eugene Patterson, ed. *U.S. Foreign Policy: The Reagan Imprint* (Washington: Congressional Quarterly, Inc., 1986) p. 99.

<sup>2</sup>Turner, p. 81.

<sup>3</sup>*Ibid.*, p. 82.

<sup>4</sup> *Idem.*

<sup>5</sup>William Spencer, "Middle East: A Yearbook Close-Up" *The World Book Year Book* 1983, p. 405.

<sup>6</sup>*Ibid.*, p. 406.

<sup>7</sup>Turner, p. 83

<sup>8</sup>Eric Hammel, *The Root: The Marines in Beirut, August 1982-February 1994* (San Diego, New York, and London: Harcourt Brace Jovanovich, 1985) p. 38.

<sup>9</sup>Turner, p. 83.

<sup>10</sup>Patterson, p. 100.

<sup>11</sup>Hammel, p. 42.

<sup>12</sup>Ibid., p. 52-53.

<sup>13</sup>Captain J. Ashley Roach, JAGC, USN "A Navy Lawyer's View of the Military's Experience Under the War Powers Resolution," speech given at the the Seventh Annual Seminar of the Center for Law and National Security, School of Law, University of Virginia, Charlottesville, Virginia, Friday, 23 September 1988. p.6.

<sup>14</sup>Patterson, p. 100.

<sup>15</sup>Roach, p. 7.

<sup>16</sup>Patterson, p. 100-101.

<sup>17</sup>Phonecon with General P.X. Kelly, 8 Feb 89.

<sup>18</sup>According to the October 31, 1983 issue of *U.S. News & World Report* which was published 8 days after the bombing, but had gone to press before news of the bombing became known, was the following quote from a radio message between two Moslem militia units. "If we kill 15 more Marines, the rest will leave."

<sup>19</sup>Christopher Madison, "Despite His Complaints, Reagan Going Along with Spirit of War Powers Law," *National Journal*, Vol. 16, No. 20, May 19, 1984, p. 992.

<sup>20</sup>"Nation" *Time Magazine*, 31 October 1983, p.1, Col.3.

<sup>21</sup>Richard Halloran *To Arm A Nation: Rebuilding America's Endangered Defenses* (New York: Macmillan Publishing Co., 1986), p. 136.

## **Chapter Nine: The Grenada Invasion**

It has been said that the War Powers Resolution, and the Budget Impoundment Act of 1974, and others, were all passed in an effort of the Congress to gain control of an "imperial presidency" that essentially began with FDR, but reached its nadir under Presidents Johnson and Nixon. The War Powers Resolution, especially, was an attempt to place some control on "swashbuckling" Presidents, who were too willing to "shoot first and consult with Congress later." The Congress has tried to use the War Powers Resolution as a means to prevent the military from being used as an exponent of presidential swashbuckling. Some would suggest, that the Grenada invasion was typical of the kind of misuse of force that needed to be curbed by Congress. But was it, really? And how effective was the War Powers Resolution in achieving that end?

Grenada is a micro-state in the south eastern Caribbean Sea, approximately 1600 miles from the United States. Its territory covers approximately 133 square miles, which is about twice the size of the District of Columbia with a population of about 110,000.<sup>1</sup>

On October 25, 1983, the United States military invaded Grenada. The invasion seems to have resulted from a rapid series of events that began on October 12, 1983 when a military coup by Deputy Prime Minister Bernard Coard toppled the pro-Marxist regime of Prime Minister Maurice Bishop. On October 19, Bishop and five other officials were murdered by "revolutionary armed forces." That same day, a 16-member Revolutionary Military Council was formed, and headed by Army Commander General Hudson Austin was designated its leader. At the same time, a 24-hour "shoot-on-sight curfew"



was imposed against its citizens. Fearing further instability in the region, and concern about a 9,000-foot airport runway that was being constructed by Cubans at Point Salines, a 1,900-man Marine and Army airborne Ranger invasion was launched. Those forces were joined by 300 troops from Jamaica, Barbados, Dominica, St. Luca, Antigua and St. Vincent. By October 30th, the invasion had been completed, and the island was secured.<sup>2</sup>

The overthrown Bishop regime began in March 1979, after the constitutional government was overthrown by Bishop himself, and his own revolutionaries. His regime suspended all means of self-determination, freedom of the press, and other political freedoms. There was strong evidence of torture of political prisoners and other human rights abuses.<sup>3</sup>

Although the neighboring states of Grenada had virtually no military at all, Bishop embarked on the intensive militarization of Grenada.

By 1983, Grenada had an army of approximately 600 regular Cuban-trained troops and an armed reserve militia of 2,500-2,800, and had active plans to add 12 more battalions. The Bishop regime had concluded at least five secret agreements with the Soviet Union, Cuba, and North Korea for massive shipments of military equipment to Grenada, military training of Grenadians in the Soviet Union and Cuba, and permanent basing of Cuban "military advisors" on Grenada.<sup>4</sup>

By 1983, Cuban advisors held positions in all key government ministries and were integrated in virtually every facet of Grenadian life.

During the period immediately after Bishop's murder, a total breakdown in authority resulted. Jamaica broke relations with Grenada, while other members of the Organization of Eastern Caribbean States (OECS) became increasingly alarmed, and continued to condemn the actions of the Military Council. At a special meeting on October 21, the OECS member states present

decided to take military action against Grenada "to remove what they felt to be an intense security threat to their nations and to establish 'peacekeeping forces in order to restore and maintain law and order in the country.'"<sup>5</sup> Their decision rested on the contingency of persuading the United States to cooperate militarily in the venture.

On October 23, the Governor-General of Grenada, Sir Paul Scoon, decided to request outside support. Before responding to the formal request, President Reagan sent a special envoy, Ambassador Frank McNeil, to consult with the OECS and other regional leaders to verify the immediate nature of the threat to the region.<sup>6</sup>

Ambassador McNeil found these Caribbean leaders unanimous...in their conviction that the deteriorating conditions on Grenada were a threat to the entire region that required immediate and forceful action. They strongly reiterated their appeal for United States assistance....And they insisted that the situation did not bear the possibility of "watchful waiting."<sup>7</sup>

On the evening of October 24, the United States agreed to respond to the appeals from OECS and the Governor General for peacekeeping and humanitarian assistance. After gaining access to the island, United States State Department officials concluded that there was no functioning government organization on the island that could provide protection to either the Americans or the citizens of Grenada. They also concluded that American lives were in jeopardy and that an orderly evacuation was not possible.<sup>8</sup>

On October 25, the OECS peacekeeping mission landed in Grenada. Opposition was primarily encountered by Cuban forces who were already stationed on the island.

More than 40 Cuban military advisers on the scene were reporting to Havana through a Cuban ship stationed immediately off St. George's harbor. As a result of the Cuban decision to op-

pose the OECS peacekeeping mission, more Cubans were killed in the action than Grenadan military. At least one report indicated that Cuban Premier Fidel Castro had ordered the Cuban paramilitary "construction workers" to fight to the death in the face of American assurances of neutrality toward Cuban forces and prompt repatriation. Despite this Cuban-led opposition, the total of fewer than 90 killed on all sides was considerably less than the total of 241 Marines dead in a single terrorist attack in Lebanon two days before the mission.<sup>9</sup>

All public opinion polls suggested that the mission was broadly supported by the Grenadians as well as the American people.

On December 8, President Reagan informed Congress that the United States Marines and Army Rangers that had participated in the mission had been withdrawn. By December 15, 1983, only a few non-combatants remained on the island.<sup>10</sup>

In their search of the island the United States forces found large stockpiles of Cuban and Soviet military equipment and munitions. On October 27, Reagan asserted that Grenada was a "Soviet-Cuban colony being readied as a major military bastion."<sup>11</sup>

Despite its popularity in the polls, the House asserted its prerogatives on November 1, by voting 403 to 23 to invoke the War Powers Resolution. The Senate voted a similar measure a few days later. Congress insisted that troops would have to leave Grenada by December 24---60 days after the invasion---unless Congress approved a longer stay. The Administration contended, as this and other administrations had contended before, that the time limit was an unconstitutional infringement on presidential powers.<sup>12</sup> Briefings for key congressional leaders took place only when the operation was imminent. But the exercise appeared to fit the resolution's definition of an emergency, in which the President was authorized to use troops.

Senator Goldwater, long an opponent of the resolution said on the Senate floor in April 1984, "Soviet-sponsored aggression" in several parts of the world in recent years lends to "the perception of Russian leaders that the United States is so weakened by congressional limitations that we no longer have the ability or will to meet challenges while they are manageable."<sup>13</sup> However, many more of his colleagues expressed a different view: "It's worked fine and it needs to work better," said Dante B. Fascell, chairman of the House Foreign Affairs Committee, who was deeply involved in the passage of the resolution. "Thank God we have it," added another veteran House Democrat who specializes in foreign affairs. "It's a restraining influence on swashbuckling Presidents."<sup>14</sup>

Some in Congress and the media complained that the numbers of military forces committed to Grenada were way out of proportion to the threat. This raises the fear that the War Powers Resolution causes Presidents to over react to a crisis in order to be certain that the crisis is curtailed in less than 60 days. But as one writer put it, Grenada was essentially a "cauterizing operation...suggesting that if a use of force can be quick, effective, almost bloodless, and locally constructive, it will command widespread support or at least not arouse serious continuing divisions."<sup>15</sup> Altogether, Grenada was a quick success, which garnered Reagan much political applause although it strained the limits of what is allowable under international law. It also strained the admiration of some of our closest allies who thought we acted unilaterally, and without just prudence.<sup>16</sup>

However, President Reagan was sensitive to the charge of swashbuckling. His administration imposed a ceiling of 55 United States military advisors in El Salvador as an indirect result of the War Powers Resolution. During *negotiations* with Congress in 1981, it *was agreed* that 55 advisers

*would not trigger the resolution* and thus would not require congressional approval.<sup>17</sup> Similarly, there were allegations that the military did not do everything it could have done in order to properly defend the Marines who were maintaining a "presence" in Beirut. Some have claimed that before the Lebanon Resolution was passed, the administration was afraid that Congress would look with disfavor any actions by the Marines that hinted that their environment was hostile and therefore start the 60-day clock. After the resolution was passed, the Marines never got over the fact that the environment was no longer benign.<sup>18</sup>

The Grenada invasion is not the only action taken by a President that was viewed by Congress as "swashbuckling." Many have labeled President Reagan as a cowboy, and quick to temper diplomacy with the use of military force. On November 2, 1983, the U.N. General Assembly took up the question of Grenada in a resolution sponsored by Nicaragua, Zimbabwe and Guyana, which called for the immediate cessation of fighting on the island and withdrawal of all troops, characterizing the intervention as a "flagrant violation of international law." Debate on the resolution was preempted by a cloture motion introduced by the People's Democratic Republic of Yemen and carried by a vote of 60 to 54, with 24 abstentions.<sup>19</sup>

While the Grenada invasion shows that a President can wage war for a period of at least 60-days, it is also clear that recent Presidents have been overly sensitive to this issue of swashbuckling. There is no evidence that Reagan acted in Grenada prior to the invasion in any fashion other than as the facts suggested---Americans lives were in jeopardy. But, this sensitivity has manifested itself in many other ways as shown by all of the incidents looked at so far---numbers, types, and amounts of people and equipment introduced in an area, such as happened in El Salvador; length of time of

troop involvement in a crisis such as Grenada; sensitivity to the nature of the hostile environment where troops are present and the sensitivity about the signals that certain defensive measures send to Congress; the need for operational security at the expense of coordination among military organizations and congressional leaders who should be consulted when time permits.

The impact that public perceptions play on the congressional mood to implement the War Powers act is discussed later. Grenada was an unqualified success, but it must be realized that the nature of the threat in our world indicates that as long as the War Powers Resolution remains in affect as it is currently written, future Lebanons are more likely than Grenadas.

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<sup>1</sup>Christopher C. Joyner "The United States Action in Grenada: Reflections on the Lawfulness of Invasion," *American Journal of International Law*, Vol 78, No. 1, January 1984, p. 131.

<sup>2</sup>Ibid., p. 131-132.

<sup>3</sup>John N. Moore, "Grenada and the International Double Standard," *American Journal of International Law*, Vol. 78, No. 1, January 1984, p. 145.

<sup>4</sup>Idem.

<sup>5</sup>Ibid., p. 148.

<sup>6</sup>Ibid., p. 149.

<sup>7</sup>Idem.

<sup>8</sup>Idem.

<sup>9</sup>Ibid., p. 151.

<sup>10</sup>Ibid., p. 152.

<sup>11</sup>Nathan A. Haverstock, "Grenada," *The 1984 World Book Yearbook: The Annual Supplement to the World Book Encyclopedia* World Book, Inc., p. 341.

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<sup>12</sup>Frank Cormier, "Congress of the United States," *The World Book Yearbook: The Annual Supplement to the World Book Encyclopedia*, World Book, Inc., p. 265.

<sup>13</sup>Madison, p. 989.

<sup>14</sup>Ibid.

<sup>15</sup>William P. Bundy, "The Relative Importance of Force," *Democracy, Strategy, and Vietnam*, ed. by George K. Osborn, Asa A. Clark IV, Daniel J. Kaufman, Douglas E. Lute (Lexington, Mass.: Lexington Books, 1987), p. 212.

<sup>16</sup>Eldon Kenworthy, "Grenada as Theater," *World Policy Journal*, Vol. I, No. 3, Spring 1984, p. 651.

<sup>17</sup>Ibid., emphasis added.

<sup>18</sup>Source protected by AWC non-attribution policy.

<sup>19</sup>Jeane J. Kirkpatrick, "The U.N. and Grenada: A Speech Never Delivered," *Strategic Review*, United States Strategic Institute, Washington, D.C., Winter 1984, p. 11.

## Chapter Ten: The Raid on Libya

The military has always been sensitive about the issue of operational security (OPSEC). Secrecy is vital for achieving surprise, which is essential if victory is going to be attained. From the point of view of the military, there is a thin line between that information that the public should have in order to get them fervently behind a military action, and the information, which if divulged, would prove devastating to our forces. Where that line is drawn is always the subject of debate, but suffice it to say that sensitive information needs to be protected for reasons of OPSEC. That is one reason why the military has been skittish about how much and when information is given to Congress before military actions occur. The War Powers Resolution stipulates that the President should consult with Congress "in every possible instance." The need for OPSEC makes this an especially delicate proposition. I hope our Congressional leaders would have the same sensitivity as the President, if not for political reasons, at least for the protection of the young men and women who serve their country. But that has not always been so. The raid on Libya shows how such considerations can be politicized when congressional leaders find personal reasons, like an inside stock deal, for taking political advantage of their information.

Beginning at about 7:00 p.m. (EST) on April 14, 1986, an air and naval bombing strike was conducted simultaneously against headquarters of Moammar Quadhafi, terrorist facilities and military installations at Tripoli Military Air Field, Tarabulus Barracks, and Sidi Bilal Terrorist Training Camp inside Libya. The Navy element launched from the *USS Coral Sea* and the *U.S.S. America*, while the Air Force elements launched from the United King-



dom. The targets were carefully chosen, both because of their direct linkage to Libyan support of terrorist activities and for the purpose of minimizing collateral damage and injury to innocent civilians.

The strikes were also conducted under the auspices of the right of self-defense under Article 51 of the United Nations Charter. The attack was designed to deter a similar terrorist attack such as the Libyan-ordered bombing of a discotheque in West Berlin on April 5, which killed an American soldier, a Turkish woman and the wounding of 50 United States Armed Forces personnel and 180 other innocent persons. This terrorist bombing was the last of a long series of terrorist attacks against United States installations, diplomats and citizens carried out with the support and direction of Moammar Quadhafi.<sup>1</sup>

In notifying the congressional leadership of his actions, Ronald Reagan cited his self-defense authority under the Constitution, and his authority as Commander in Chief, acknowledging the requirement of the War Powers Resolution.

But after Reagan consulted (informed) Congress about his actions to attack Libya, and after presenting those congressional leaders with "overwhelming evidence" of Qadhafi's responsibility for the terrorist attacks on the West Berlin disco and elsewhere, Senators Byrd and Pell immediately informed the press at 6:35 p.m., some 45-minutes before Larry Speakes was to announce publicly what was being done. "Those 45 minutes were crucial to our pilots getting out," stressed a White House aid. "Byrd and Pell had to get their headlines, trade off the big story despite national security."<sup>2</sup>

Typically Presidents have expressed concern for operational security for operations that requires a quick response. That was the main concern of Gerald Ford in the *Mayaguez* incident, concern for secrecy for the welfare of the

American forces who were to carry out their mission. But officials of the Reagan administration had alerted the Libyans by talking openly for nearly a week before the strike that a retaliatory strike might be launched. "One official had even told a reporter that the United States had obtained permission from the British government for the Air Force to fly medium-range bombers from bases in Britain to attack Libya."<sup>3</sup> It can not be stated for certain if those reports or the televised remarks from Senators Byrd and Pell tipped the Libyans off or not, but when the aircraft flew over their targets, it was obvious that something had alerted them: "As we went over the beach, all kinds of weapons were fired at us...they came at us with a wide spectrum of surface-to-air missiles, and there was antiaircraft artillery of all kinds."<sup>4</sup>

With or without a War Powers Resolution, Presidents will have to consult with congressional leaders about military operations. The requirements for operational security may not make such discussions timely as evidenced in Grenada, the Iran Hostage crisis, Mayaguez or the raid on Libya, but it is certain the lives of American servicemen and women hinge on absolute secrecy. We should not sacrifice their lives for want of secrecy or need for political recognition.

The raid on Libya was a response to state terrorism. Such response may be legally justifiable under the international law notion of self-defense given three preconditions exist:

1. The target state must be guilty of a prior violation of international law against the claimant state;
2. An attempt by the claimant state to obtain redress or protection by other means must be known to have been made and failed or to be inappropriate or impossible under the circumstances; and

3. The claimant's use of force must be limited to the necessities of the case and proportionate to the wrong done by the state.<sup>5</sup>

"The use of force in self-defense is permissible for the purpose of protecting the security of the state and its essential rights, in particular the rights of territorial integrity and political independence, upon which that security depends."<sup>6</sup>

The U.N. Charter and international law provides for the right to use force in individual or collective self-defense. Ever since the days of James Madison, the United States has acted against armed bands that attacked Americans and then fled, seeking sanctuary in neighboring countries. This principle was applied against Pancho Villa through military operations in Mexico, and by Andrew Jackson's action to stop attacks from Spanish Florida.<sup>7</sup>

The raid on Libya was similar, except that it illustrated the response to force against state-sponsored terrorism. By providing material support to terrorists, groups which attacked U.S. citizens, Libya had engaged in armed aggression against the United States. But the Congress was sensitive to this use of force as an example of undeclared "presidential" war.

In speaking for the administration before the House Committee on Foreign Affairs, Judge Abraham Sofaer, Legal Advisor for the Department of State asked:

"Even though consultation and reporting took place in regard to the April 14th operation against terrorist-related targets in Libya, does the WPR apply to a case where U.S. forces take legitimate action in self-defense of U.S. interests in circumstances in which those forces have not come under direct attack themselves?"

In commenting on the requirements of the resolution of the resolution, he noted that:

"The resolution itself makes clear that the resolution was not intended to alter the constitutional authority of the president. The president has constitutional power, as commander in chief and as the nation's principal authority for the conduct of foreign affairs, to direct and deploy U.S. forces in the exercise of self-defense, including the protection of American citizens from attacks abroad."

The use of military force in combatting international terrorism is an accepted application of international law, even against other states, when it is used in self-defense to protect essential U.S. interests. We will continue to use it prudently but with complete resolution and without hesitation where U.S. lives are at stake and the international obligations owed by other nations are ignored.<sup>8</sup>

Although the terrorist activity of Qadhafi has been temporarily silenced in the wake of the strike against Libya, terrorist activity against Americans continues around the world. As evidence is gathered that points to the source of the terrorism, the military can expect to be used again. But, military force may not be the only option used by the United States, because force often fans the fires of ideology, we must continue to be prepared to execute a wide range of military options. Such options must be calculated with prudence so that we never forget that our response must be proportional to the crime. That way, we will maintain the moral high ground of public opinion, and ensure popular support remains with the President. This, more than anything else will prevent the War Powers Resolution from being triggered.

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<sup>1</sup>Ronald Reagan, Letter to Strom Thurmond, President pro tempore of the Senate, April 16, 1986, explaining the Presidents actions as required by the War Powers Resolution.

<sup>2</sup>"Letter from Washington," Vol. 38, May 9, 1986, p. 15.

<sup>3</sup>Holloran, p. 137.

<sup>4</sup>Ibid., p. 141.

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<sup>5</sup>H. Lawrence Garrett III, DoD General Council, "The Legality of Military Responses to Terrorism," a speech given to Council on Foreign Affairs, University of Texas Law School, Austin, Texas, Oct. 28, 1986 and reprinted in *Defense Issues*, Vol. 2, No. 3, 1987, p. 2.

<sup>6</sup>Idem.

<sup>7</sup>Ibid., p. 3.

<sup>8</sup>Ibid., p. 4.

## Chapter Eleven: The Persian Gulf

Whenever the military becomes overly concerned about the legal impact of their actions vis a vis the War Powers Resolution they tend to develop military options that do not take account of the full, and proportionate use of force. This was true to some extent in Beirut and Honduras. It is always true whenever the military tries to avoid a confrontation with Congress, a matter that I believe should only be the concern of the President. It's another way of saying the military is gun shy in the face of the War Powers Resolution.

But are they really? What has been our response in the Persian Gulf in the face of one of the most terrible wars in this century---the Iran-Iraq war. Has the military been overly sensitive to the War Powers Resolution, or have they merely been prudent masters of the military art?

The Persian Gulf became an active war zone on September 20, 1980 with the advent of the Iran-Iraq war. That war has become one of the bloodiest this century, claiming by some estimates, nearly a million lives. Each year the war has increased the toll on shipping in the Persian Gulf as each side attempts to cripple the economic lifeblood of the other. Both Iran and Iraq declared shipping to be fair game in the conflict in 1984, and since that time over 200 ships have been attacked. The *USS Stark*, however, was the first American ship attacked in the gulf, although Iraq claims that the attack was accidental. It took 37 American lives.<sup>1</sup>

Strategically, the gulf is important because it is bordered by states with nearly 50 percent of the world's known oil reserves. Also, nearly 20 percent

of the of the world's production of crude passes through it daily. Although only 6.8 percent of United States needs flows through the gulf, approximately 54 percent of Japan's oil and 41 percent of Europe's oil originates in the Persian Gulf.<sup>2</sup>

The gulf is vulnerable to disruption of shipping at two three-mile wide channels, located in Omani waters, but within range of Iranian missile and artillery range. Iran is almost completely dependent on tankers to carry its oil exports, while Iraq, which had been shut off from oil shipments after Iran destroyed their Basra complex in the fall of 1980, has opened a pipeline through Turkey in 1982, and another through Saudi Arabia in 1986. As a result, Iraq exported more oil than Iran by the end of 1987.<sup>3</sup>

The Government of Kuwait had become the target of Iran largely because of Kuwait's financial support of Iraq, and because of its willingness to use its territory for trans-shipment of war material. There were at least three occasions of Iranian incursions in Kuwaiti territory, including the shelling of Kuwait from the Iranian-occupied Iraqi Faw Peninsula. Additionally, the Kuwaiti's have been the target of numerous terrorist groups from or influenced by Iran. This led the Kuwaiti's to seek United States protection of ships in their gulf tanker fleet. The Soviets were asked by the Kuwaiti's in February to charter three of their tankers, which the Soviets agreed to do.<sup>4</sup> That action pressured the United States to step up the mechanism to help the Kuwaiti's, in the hope that a greater increase of Soviet influence could be avoided. The United States finally agreed on March 10 to reflag 11 Kuwaiti tankers under United States registry. On April 2, Kuwait accepted the United States offer to reflag the Kuwaiti tankers, after the United States moved the carrier *Kitty Hawk* and its accompanying task force closer to the Arabian

Sea in response to Iran's emplacement of Silkworm missiles along the Strait of Hormuz.

On May 14, the United States proceeded with the reflagging operation. On the 25th, the first Kuwaiti tanker was escorted by the United States Navy to Bahrain.<sup>5</sup> But the reflagging operation did not come without much political debate, because on the 17th of May, the *USS Stark* was damaged by two exocet missiles fired by an Iraqi Mirage F1. Thirty-seven United States Navy crewmen were killed and 21 were wounded. Like the Beirut bombing incident, questions were raised about the United States strategic goals. However, unlike the Marine's "presence" mission in Lebanon, the answers were more comprehensible. The United States has been in the gulf for over forty years and is determined to stay there, for the geopolitical reasons of oil and the responsibility inherent in a superpower to keep the oil lines of communication open. Also, the United States policy has consistently sought to prevent the spread of Soviet influence in the region and to maintain peace and stability in the region for the gulf states. At a May 22 ceremony honoring the *Stark* dead Reagan said: "Peace is at stake here; and so, too, is our nation's security, and our freedom. Were a hostile power to dominate the strategic region and its resources, it would become a choke point for freedom---that of our allies and our own."<sup>6</sup>

But not everybody in America agreed that the United States' role was so important, especially as she acted alone in the region. The attack on the *Stark* brought out a furious debate in Congress about America's role in the gulf. "Why is American treasure and United States blood being expended to safeguard these oil lifelines to Japan and Europe?" demanded Senator James Sasser. On May 21, the Senate voted 91-5 to hold up the escort plan until they were certain that the United States could defend itself against modern



missiles and whether the United States could be inadvertently drawn into war. Many feared that the United States was on a collision course with Iran even though it was Iraq that fired the missile, apparently by accident.<sup>7</sup>

The debate also raised serious questions about whether the Navy could defend itself and whether the rules of engagement are good enough. In response, President Reagan assured his doubters that from now on the United States would shoot first and ask questions later.<sup>8</sup>

In the wake of the attack, some of Reagan's cabinet urged the War Powers Resolution be invoked and official consultations with Congress should begin. Both Chief of Staff Howard Baker and Attorney General Edwin Meese urged the President to invoke the resolution for reasons of "imminent involvement in hostilities. However, Secretary of State Schultz and Defense Secretary Weinberger argued against it. In the end, the President decided that the resolution did not apply.<sup>9</sup>

On the 28th of May President Reagan noted that United States presence in the gulf was vital to the freedom of navigation and was essential to preventing further spread of the Iran-Iraq War. The same day, Congress passed legislation requiring the Secretary of Defense to report to Congress the military steps taken to protect Kuwaiti reflagged tankers. Of course this kind of request is typical of the kind of meddling that has frustrated the military since the end of the Vietnam War, and has served to build a wall of distrust of some senior military leaders and the Congress. Regardless, the Secretary of Defense reported to Congress on 15 June the measures that were taken to provide security.

On July 24, a reflagged Kuwaiti tanker, the *Bridgeton*, hit an Iranian mine 20 miles west of the Iranian island of Farsi. This tanker was one of two Kuwaiti reflagged tankers in the first convoy being escorted through the gulf.

However, the ship sustained only minor damage.<sup>10</sup> Although the Navy was helplessly embarrassed by this event, for nearly two months thereafter, the Navy-guarded tankers moved through the gulf without incident, and the operation was generally regarded throughout the United States as a success.

Meanwhile the tension in Congress mounted against the Reagan Administration policy in the gulf. On August 7, 115 members of Congress filed suit in United States District Court of the District of Columbia to invoke the War Powers Resolution. The suit claimed that United States warships entering the Persian Gulf on July 22 had introduced United States Armed Forces into hostilities and asked the court to order the President to report under the Resolution. The suit became well known and publicized as the *Lowry* case (Michael E. Lowry v. Ronald W. Reagan, Civil No. 87-5426, argued in the United States District Court for the District of Columbia on February 29, 1988).

Key to the plaintiff's accusation was idea that the environment in and around the Persian Gulf was hostile, and therefore the court should cause the President to invoke the War Powers Resolution, requiring a report under section 4a(1), "involvement of armed forces in imminent hostilities." The plaintiffs argued that many of the activities of the military confirmed that hostilities were imminent. This list is typical of the kinds of actions that the military Joint Chiefs typically are concerned about, knowing that members of Congress are looking over their shoulder, ready to seize the initiative and shout foul, or run to the media or courts over a possible violation of their power, and the War Powers Law. Among the confirmatory activities they raised in their lawsuit are the following:

- urgent efforts [by the Navy] to locate and destroy mines, including the ordering into the Gulf of United States minesweeping ships and helicopters and appealing to other nations to send minesweepers to the Gulf;

- the awarding of 'imminent danger' pay pursuant to 37 United States Code, § 310, effective August 25, for an indefinite period of time to approximately 10,000 United States Armed Forces personnel in the gulf and in the Strait of Hormuz at a cost of approximately \$1 million per month;

- ordering, as of early September, at least twenty warships and more than 10,000 United States Armed Forces personnel to the gulf to conduct and support the United States escort operations; and

- ordering that United States warships in the gulf be at a high state of readiness at all times, that all ships be at general quarters, which is the highest condition of battle readiness, when passing through the Strait of Hormuz, and that no announcements be made of the dates and hours of escort operations, in order to protect the safety of United States Armed Forces personnel.

Other examples given were the United States helicopter attack by machine gun and rocket fire on an Iranian Navy ship that was laying mines in the Persian Gulf, and the follow-up Navy seizure of the Iranian ship and the 26 surviving Iranian sailors, including four who were wounded. They cited the fact that this was the third incident of an attack by United States military units in the Gulf since the escort operations had begun on July 22.<sup>11</sup>

In his testimony to Congress, Admiral Crowe expressed his concern about War Powers Act impacts on his business in the formulation of military responses or uses of force:

The War Powers Act has had quite an impact on my business. There is no tactician, no commander now who doesn't get his lawyer alongside of him before he does anything or talks about anything. I don't know that Sun Tsu or Clausewitz would have appreciated that very much. The instance that I have had the most experience with is the Persian Gulf. I know that every time we contemplated anything that we felt was prudent from a

military perspective, part of our calculations, part of our calculus, was the War Powers Resolution.... I would think that it would apply to our adversary as well. He knows that we are not going to conduct armed recon inside of his territorial waters because it would require a notification of the United States Congress. He knows that we are not going after his minesweepers because it would require a notification of the United States Congress. That is not a comfortable situation...and that is what has made me change my mind on the War Powers Resolution.<sup>12</sup>

The *Lowry* case ended when the court decided it did not have jurisdiction to enforce the War Powers Resolution "because of the equitable discretion and political question doctrines. The constitutionality of the War Powers Resolution is not before the Court." The case was dismissed.<sup>13</sup> This case was not unlike other cases where the courts have refused to try to sort out a political question between the Congress and the President, which has been one of the greatest stumbling blocks for those in Congress who believe the courts are their only recourse to force a President's hand on War Powers.

On September 21, 1987, United States helicopters fired at an Iranian ship reportedly dropping mines in the Persian Gulf. When Navy SEALs boarded the vessel, they found ten mines similar to those that damaged the *Bridgeton*. After that incident, the President sent Congress a report on the self-defense actions taken by United States forces.

The Persian Gulf mission shows that the U.S. military will sometimes not take actions that it perceives as being prudent because the military doesn't want to get itself involved in a confrontation with the powerful committees of Congress. In his testimony to Congress, Admiral Crowe said reconnaissance missions and mine sweeping inside Iranian territorial waters or over Iranian-occupied territory were among operations rejected by senior defense officials because of the War Powers Resolution.<sup>14</sup>

Admiral Crowe admitted that there were other missions, which he declined to describe in open hearings, that had to be scrubbed on the advice of attorneys, "tempering what was the wisest course."<sup>15</sup> These missions are avoided because they would have required reporting to Congress and the ensuing heated public debate may have forced a withdrawal of U.S. forces, which the military didn't want to risk.

Even Frank Carlucci said the law had "never inhibited the President from persuing goals," but it "has surely had an impact on how military forces are used." He said that informing Congress of the intention to use military forces puts the U.S. at a disadvantage, costing the military the element of surprise or requiring military commanders to have to plan for short-term missions because of uncertainty about whether lawmakers will allow the deployment to continue.<sup>16</sup>

Frank Carlucci also said that in the Persian Gulf and elsewhere, the War Powers Resolution had other possible deleterious effects. Aware that any escalation by the military would cause a major debate in Congress, the enemy is tempted to make "lightening strikes" in order to inflict American casualties, creating an outrage in Congress, with the result that the military would either be embarrassed or forced to be pulled from the region. Additionally, our allies who were providing support in the region may hold out their support until they were sure that the Congress had firmly decided what to do.<sup>17</sup> Such effects from the War Powers Resolution not only effects the military, but also significantly diminishes the ability of the President to conduct foreign policy. It certainly undermines the ability of the country to achieve national objectives, by constraining the ability of the military to enforce the policy objectives of the United States.

<sup>1</sup>U.S. Congress, Senate, "Persian Gulf and the War Powers Resolution," 100th Congress, 1st Session, 10 July 1987, *Congressional Record* Report 100-106, from the Committee on Foreign Relations, p. 1-2.

<sup>2</sup>Idem.

<sup>3</sup>Idem.

<sup>4</sup>Ibid., p. 3.

<sup>5</sup>"Persian Gulf Situation," *Congressional Digest*, December 1987, p. 293.

<sup>6</sup>Peter Range with Robert Kaylor, Maureen Santini, Robert A. Manning, Dennin Mulin, Joseph Shapiro, and Andy Plattner in Washington and John Barnes in Jerusalem, "The Tragic Cost fo Commitment," *U.S. News & World Report*, June 1, 1987, p. 16.

<sup>7</sup>Ibid., p. 17.

<sup>8</sup>Ibid., p. 18.

<sup>9</sup>Lamar, Jacob V. Jr., "Why Did This Happen?" *Time*, June 1, 1987, p. 18.

<sup>10</sup>"Persian Gulf Situation," p. 293.

<sup>11</sup>Ammended Complaint for Declaratory and Injunctive Relief, filed in U.S. District Court for the District of Columbia on 29 September 1987, p.10. Found in "War Powers Resolution background materials with regard to the presence of U.S. Forces in the Persian Gulf."

<sup>12</sup>Crowe, p.28.

<sup>13</sup>George H. Revercomb, Judge, United States District Court for the District of Columbia, Lowry v. Reagan, "Memorandum of Opinion," C.A. No. 87-2196, filed December 18, 1987, p. 20.

<sup>14</sup>Rick Maze, "Crowe Slams War Powers Act as too Inhibiting in a Crisis," *Army Times*, 17 October 1988, p. 42, Col. 1.

<sup>15</sup>Idem.

<sup>16</sup>Idem.

<sup>17</sup>Idem.

## **Chapter Twelve: Ethical Issues for the Military**

Does the military constrain military options out of fear of what signal might be sent to the Congress? The operation in Grenada shows that military force will be used when needed to protect the vital interests of the United States. The President and the Joint Chiefs of Staff knew the operation would be a short venture. They also knew Congress would raise the issue of War Powers, so the President submitted a report required by the Resolution. The JCS developed several courses of action for the conduct of the operation. Forces used in "Urgent Fury" were chosen on the basis of a military analysis of the mission, enemy capability and the kinds of forces that would be required. It was important that those forces used be readily available and combat ready.

In Grenada, the military was not looking over its shoulder when preparing their plan. Their mission was indeed urgent and they spared no effort to minimize the kinds of troops or equipment needed for the invasion. There would be no equivocation about "imminent hostilities," or forces that were "equipped for combat," once the operation became known to the Congress, the press and the American people. Neither the President nor the military cared about the War Powers Resolution, because the Grenada operation had to be done. The Caribbean basin is a vital interest in that any instability in the region which could create the risk of war would be seen as a threat to the security of the United States. Also, the Cubans in Grenada were a threat to the security to the stability of the other friendly governments in the region, which the United States has sworn to aid in combatting insurgencies, subversion, state-sponsored terrorism, and the

international trafficking of illicit drugs. Since the War Powers Resolution was probably unconstitutional anyway, there was no need to let it get in the way of an actual crisis like Grenada. Whatever the confrontational outcome between the President and Congress, the military would not have to operate with one hand tied behind its back. It would be allowed to accomplish its mission without Congressional oversight.

The military selected the forces it needed to accomplish the mission and minimize American and Grenadan civilian casualties, and it is interesting that the military was criticized for doing that. Some said that the military used more force than was needed, and they justified their argument by comparing our response in Grenada with the British response in the Falkland Islands. We used seven battalion equivalents against a force of 700, the British use eight battalion equivalents against a force of 11,000 Argentines. But it is inappropriate to compare Grenada to the Falkland Islands given the difference in the military and political objectives, mission, enemy, troops available, terrain, time available and rules of engagement.

Another issue lurking behind the charge of using so many forces is the idea that the military response was neither restrained nor proportional to the threat on Grenada. The truth is the military intelligence about the threat was not good. Besides, it was felt that the safety of the force argued for more, not fewer troops.

The ethical argument goes like this: the mission of the military is to preserve the peace. In fact, the logo in front of the Army War College entrance, written in bronze is Elihu Root's words, "not to promote war, but to preserve peace." So, one of the virtues of senior military officers is the promotion of peace in preference to war. This virtue generates the need to emphasize the virtue of restraint. Since society gives the military a monopoly



on the use of military weapons, it is incumbent upon them to exercise the greatest restraint whenever those weapons or forces are used. That restraint is also expected and required when carrying out the tasks assigned to the military by the President. Restraint is inherent in the very notion of just war and the attendant rules of warfare. It means the military will use the minimum force required to accomplish its mission, because lack of restraint could unleash consequences that are totally undesirable, such as a counter-response from the Soviet Union. The greater one's power, the greater one's obligation of restraint, at whatever level of war a nation engages. It also implies that a nation owes it to its fighting forces to ensure they can accomplish their mission, and do so by exercising the greatest amount of restraint possible, exposing them to danger only when and to the degree necessary.<sup>1</sup>

It is generally true, but not always, that greater the ratio of force sizes, the greater the amount of firepower and destructive capability will be needed by a smaller force in order to overcome a larger force. Now there are probably hundreds of examples in history where smaller forces, by necessity, attacked a larger force and defeated him. But where no such necessity exists, is it prudent? The Army teaches that as a minimum the attacker should outnumber the defender by a ratio of six to one. Sun Tsu would argue for ten to one odds. Also, smaller forces by necessity cannot exercise restraint as well as a larger force, because to do so would cause certain destruction. Therefore, smaller forces tend to be much more indiscriminate and unrestrained in the use of their weapons of destruction, generating maximum firepower possible from all available sources, without due regard to the consequences of his firepower. This results in unnecessary injury and death to the civilian population.

It should also be noted that where force ratios are overwhelmingly in favor of the larger force, the larger force will be more likely to exercise restraint. At least they would not be inclined to use more force than prudence or safety would allow. Large forces are also less likely to take unnecessary risks. They tend to be less bold than smaller forces, but the sheer dominance of numbers would give comfort to its soldiers. By the sheer dominance of his size, he is better able to engage the enemy with the discrete and accurate fires. Also, against overwhelming numbers of troops, the enemy is more likely to surrender. So superior numbers permit mission accomplishment without prolonging the fight. It may not have been totally efficient to use so many forces, but it certainly was not unethical. But it would have been unethical to expose troops to danger for want of the budgetary and military force wherewithal to ensure the enemy was sufficiently overcome. It is better to err on the side of too many forces, than too few.

But, the Iranian-hostage crisis was different. In that operation, President Carter viewed it as a rescue mission, not an invasion. As such, he thought it fell outside the boundary of the War Powers Resolution, although there were many in Congress who disagreed. It was a difficult rescue operation, conducted in the heart of a hostile city, hundreds of miles from any support. This was a special operation in a not-so-classic sense, so the forces had to be elite. Therefore, the Army chose the Delta Force, which had been training for such a mission for months, before the actual failed attempt ever occurred.

The rules for planning special operations, do not conform exactly like conventional operations. For one thing, intelligence needs must be precise, and excruciatingly detailed. The most minor omission can result in

catastrophic failure, especially when the force used is small and highly specialized. This particular mission was a high-risk operation, to say the least---it was distinguished by enormous uncertainty. Intelligence questions, worked out after months of information gathering often begged more questions than answers. But that is often the nature of special operations. The more you know, the more you know you don't know, so the process goes on. For this particular mission, there were just too many variables, and too many constraints. Besides months of tough, precision training, success would depend on a lot of luck---something the Delta Force didn't have.

However, this kind of mission begs many questions. Did we conduct a "rescue mission," instead of an all-out invasion by a larger force, because we were afraid somebody might make an issue over the War Powers Resolution? Was Grenada a success because we "learned our lesson" in the Iranian desert? Likewise, did we sub-optimize our options in Beirut before the Marine barracks were blown up, and what about the rules of engagement that were in effect at the time the *U.S.S. Stark* was hit in the Persian Gulf; had that operation been satisficed, too? The answer to all of these questions is: probably not. The evidence just doesn't support such a hideous claim.

But---there is evidence that when we do want to introduce forces into an area that might require them to stay longer than 60 or 90 days, and the environment is "benign," or we want to introduce equipment that we think might protect those forces, or give them the capability to defend themselves if the environment changes, then yes, we sometimes do satisfice those needs.

To counter subversion by 4,000 leftist guerillas in El Salvador in 1981, the Reagan administration sent in 20 more military advisors, bringing the total to 54. Anticipating an uproar, the administration made sure that the advisors were called "trainers," and predictably, a loud outcry in both the

press and the Congress ensued. In cities across the United States, opponents of American aid to El Salvador's military-civilian junta laid plans for teach-ins, marches, vigils, and hunger strikes. It all had a familiar ring:

Said Democratic Senator John Glenn of Ohio: "I'm not against sending in arms. I get flags up about sending our people in." Said Representative Jonathan Bingham of New York after attending a briefing by Haig: "It reminded me very much of the meetings I had with General William Westmorland over Viet Nam. We start out with a few advisers and they turn into combat advisers and then into ground troops."<sup>2</sup>

In a related article, *Time Magazine* wrote:

Sending U.S. advisors into the field was considered very risky; the death of an American soldier in a skirmish with the guerrillas would clearly escalate protests that the U.S. was getting mired in another Viet Nam....The final decision was made at the highest level, with Haig and Defense Secretary Casper Weinberger actively involved. The plan: to station a limited number of American "trainers" in provincial garrisons with the Salvadoran military. They would be prevented from straying far from protected enclaves by what one top official called "the most strict operational guidelines that could be devised."<sup>3</sup>

The 54 American military advisors was called "by far the most controversial element in the \$25 million U.S. military aid package."<sup>4</sup> These advisors were mostly technicians and pilots whose job it was to teach the Salvadorans how to use and maintain their newly purchased U.S. military equipment. The men were under orders to steer clear of combat, and are assigned only to bases outside the fighting areas. But the Green Berets who were training the Salvadorans on tactics said they felt hamstrung by the tight security that protects them against combat casualties or assassination. They would have preferred to observe their students in the field, rather than depend on second-hand reports."<sup>5</sup>

This is not a case of American soldiers who were sent in to fight without being either properly equipped, or like the Marines, sent in to perform a vague mission they were not trained to support. This is the case of an elite group of soldiers, specially trained like the Delta force to accomplish a highly specialized mission---a mission that was central to the accomplishment of the President's foreign policy in Central America. It was a mission that was hamstrung because of a Congress that feared the political consequences, and because the Administration feared a media backlash would occur if serious injury or death happened to an American soldier. It was a mission where the military was handcuffed, either under orders from the Secretary of the Department of State or Defense, or the senior military commanders, who were responsible for the conduct of the operation. It is understandable that senior military commanders were sensitive to the potential for political fallout if anything "went wrong."

As part of a covert effort against the Sandanistas, the Reagan Administration attempted to stop the flow of arms shipments from Nicaragua to the insurgents in El Salvador. Since there was some concern in the Administration that some of those arms were coming in by sea, the Administration directed the Navy to help El Salvador and Honduras interdict the arms shipments. In that instance, too, some "politicians have objected to the use of the Navy because it directly involves American Sailors and risks American casualties."<sup>6</sup>

These examples demonstrate that the constraints imposed on American forces makes political sense. But does it make ethical and moral sense? The legitimacy of U.S. foreign policy should not be measured by the likelihood of American casualties. Rather it should be measured whether the means to

bring about that policy are morally acceptable, and achievable, given the resources committed to the policy.

Since the mission of the military is to preserve the peace, it should never become an advocate for the use of force, because once the military does that, it loses objectivity and begins to step into the political arena, an arena that ought to be left to the civilian control. The military should have as its first obligation, the peaceful resolution of a policy, using only the minimum amount of force needed to accomplish the mission, and that position should be articulated strongly to those in civilian control. That doesn't mean, like a lot of people suppose, that when diplomacy fails, the problem should, *a priori*, be handed over to the military. It means foreign policy---diplomacy and military means---must be applied together, if the military option is going to be applied at all. This implies that sometimes the military will do nothing more than hold on to its options, while waiting for diplomacy to work. At other times, it means fighting, with the certainty that American casualties will occur. But, I contend that in those instances when force is used, casualties, will be far fewer when military options have been developed through careful, unpoliticized analysis that takes into account all of the factors of mission, enemy strengths, weaknesses and capabilities, the terrain, time available, and the troops or forces needed to accomplish the mission. The military should never sign up for anything less, because it would be ethically and morally wrong to do so. Otherwise, it would be better if the military was not used at all.

But then the issue arises that there will always be political constraints--that there will always be times when the military will be asked to sacrifice the accomplishment of a mission in order to satisfy certain political sectors of Congress.

While it is true that such constraints will continue to plague the military, it is my belief that it is the duty of senior military leaders to understand how many times we have failed because we acted too late, with too little force because we constrained ourselves unnecessarily for political reasons. No, it is the duty of the military to make an estimate of the impact of any constraints, and make those estimates known to all who make or establish policy. We have a moral obligation to the men and women who serve our armed forces to explain to our civilian counterpart, what the inherent risks, costs, and dangers are in any military operation, especially when we are asked to do something we know is unwise.

It is the commander's responsibility to translate missions assigned into action, and it is the commander who ensures that those actions are morally, ethically, and militarily sufficient. It is his responsibility to ensure the movement, support, protection of forces, coordination, and command and control meets the needs of a carefully planned operation.

At the highest levels, when a crisis is determined to exist by the National Command Authority, the Joint Chiefs of Staff issue a warning order to the appropriate unified or specified commander---one of the "warfighting CINCS." These warning orders generally give the CINC enough information to begin to make an estimate of the situation and an analysis of what forces will be needed to accomplish the mission. After analyzing all of his courses of action, he selects the option that appears most feasible, suitable, acceptable and logistically supportable. Acceptability means: are the risks worth the costs? It should never mean, does the course of action pass "War Powers muster." But, in reality, that is not always what happens. After the commander has developed all feasible courses of action,

It is at this point that War Powers considerations naturally come into play. Some courses of action may well be rejected as not being feasible within the time limits imposed by the Resolution, or as not being acceptable since they would provoke an undesired War Powers controversy.

After passing War Powers muster, each course of action retained for further consideration is separately analyzed against each enemy capability, and the outcomes expected in each case are estimated. In a crisis, the CINC will frequently be asked to provide several courses of action from which the NCA can choose. War Powers thus play a role in the screening of courses of action presented to the NCA for decision.<sup>7</sup>

This is the kind of process that prevents the military from accomplishing its mission. It is the seed from which defeat in detail can occur. It is a trap in which the military should never play a part, for all the reasons that I have already mentioned. Senior military commanders should not concern themselves about the acceptability or unacceptability of their courses of action to the NCA or Congress for passing "war powers muster" until all of the facts and analyses have been presented to the National Command Authority. The senior commander need only be able to look himself in the mirror and ask himself, can it be supported on the basis of all the intelligence facts that were available when the plan was devised.

A lot of people don't realize it, but in Washington, there is a small group of lawyers who deal with the War Powers Resolution every time an operation is contemplated. They are the Legal and Legislative Assistant to the Chairman of the Joint Chiefs of Staff, the General Counsel of the Department of Defense, the Legal Advisor to the Secretary of State, the Attorney General and the White House Counsel. A system has been set up where these lawyers review for War Powers applicability, all warning orders and deployment orders issues by the Joint Chiefs of Staff. The JCS lawyer makes his views known to the DoD General Counsel. If he determines War Powers applies, he



may call for an inter-agency discussion that includes the other legal advisors. Together, they develop a recommendation to the President concerning Congressional consultation and reporting requirements.<sup>8</sup>

I have it on good authority, that often times consideration of military options are scuttled before they ever get to the inter-agency discussion level because some lawyer said in effect, "we can't do that."

Similarly, the reports to Congress over the past four years, none of which have referred to section 4(a)(1), but all of which have been submitted in the spirit of the legislation, have been initially prepared by the Chairman's lawyer on the basis of facts reported by the CINC concerned.

Yet the concern persists within the military, perhaps out of an overabundance of caution by those schooled to obey the law, or perhaps because the War Powers Resolution does restrain the use of military forces in situations of uncertain duration. *Some are inhibited from calling a spade a spade; mission and ROE formulation are adversely affected.*<sup>9</sup>

So should the military listen to the lawyers? The answer is emphatically yes, but ours must be an ethical, logical, and rational response, based not on the vagaries of law or politics, but on the basis only of sound military analysis.

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<sup>1</sup>Richard T. DeGeorge, "A Code of Ethics for Officers," in *Military Ethics: Reflections on Principles—the Profession of Arms, Military Leadership, Ethical Practices War and Morality, Educating the Citizen-soldier* (Washington, D.C.: National Defense University Press, 1987), pp. 16-20.

<sup>2</sup>James Kelly, "Playing for High Stakes," *Time*, March 16, 1981, p. 10.

<sup>3</sup>David H. Kennerly "How a Policy Was Born," *Time*, March 16, 1981, p. 15.

<sup>4</sup>"El Salvador: Low Profile: Green Berets Defend Their Role," *Time*, May 4, 1981, p. 41.

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<sup>5</sup>Ibid.

<sup>6</sup>"Sending in the Navy," *America*, May 12, 1984, p. 350

<sup>7</sup>Roach, p.4-5. Note: in fairness to the author, he was describing what usually happens in the development of a course of action, not what should happen.

<sup>8</sup>Ibid., p. 9-10.

<sup>9</sup>Ibid., p. 10-11.

## **Chapter Thirteen: Immediate Impacts on the Military**

The War Powers Resolution contributes to a number of conditions that place the military in a tough position. Two of these are traps or pitfalls, which the military needs to recognize and avoid. I call them the "benign environment trap," and the "benign forces trap." In each of these, our forces are unnecessarily constrained, while our adversaries are afforded huge advantages. The third condition is one of operational security or OPSEC. All of these I have alluded to before.

### **The Benign Environment Trap**

At the tactical level, the impact of the War Powers Resolution is the most subtle and probably the most dangerous to troops on the ground when a situation occurs where ground troops have been committed and the mission is one of "peacekeeping." However, the seeds of impact are planted at the strategic level.

In this situation, the President has not reported to Congress because, 1) he believes the law is unconstitutional, and 2) the conditions or environment of hostilities is not specifically stated in the law. I like to refer to this condition as the "benign environment trap," best illustrated by the example of the Marines at Beirut.

The Marines went into Beirut thinking that their "presence" would serve as a deterrent to any expanded conflict, and that ultimately the Syrians and Israeli's would withdraw, leaving the Lebanese government and armed forces to gain strength and to police up the other factions without outside interference. Neither the military nor the Reagan Administration

thought the Marines would become the object of discontent if they were able to demonstrate their neutrality.

This "vision of neutrality" prevented the Marines from conducting operations in the same manner that the French and Italians were conducting them in their areas---with force and purpose. Because we were "neutral," we allowed a permissive environment to occur at the BIA, as well as the Marine barracks. We did not take the necessary security measures that were needed to ensure our forces were protected from terrorists, snipers, and hostile indirect fire. In fact, it took special approval at the highest levels for the Marines to get permission to return indirect fire in kind. For the sake of the safety of the Marines, we didn't want to be thought of as co-belligerents with the Lebanese forces, which was different from the concern raised by the War Powers Resolution. The two are related, however. If the Marines were viewed co-belligerents by the adversaries of the Lebanese Armed Forces as, they would have to defend themselves with force, thereby demonstrating to all that Beirut was indeed hostile. This would have fanned the fears of many in Congress and the media that America was becoming embroiled in "another Vietnam," and that perception had to be avoided above all.

Eventually the heated debate surrounding the War Powers Resolution resulted in a joint resolution that gave Congressional sanction for the Marine presence. Clinging to the belief that we were neutral, we remained unprepared for a terrorist attack until a terrorist bomb, which resulted in the death of 241 Americans made us face the reality that we weren't doing enough to protect our forces, whatever the perceptions of neutrality, co-belligerency, or the environment.

By not calling a spade a spade, and by not analyzing or believing the intelligence we had, the military became an unwitting partner to three

crimes---one, the administration's crime of directing the military to perform a mission that had no definable military objectives (ends); two, the military for not developing the necessary military strategic concepts (ways) for conducting the conflict in Lebanon; and three, the Administration, the military, and the Congress for ducking the responsibility of ensuring that the Marines had the proper military resources (means) to carry out the strategy. Altogether, we had no strategy in Beirut, so therefore we lacked strategic direction. Also, we were lulled into thinking that the environment was benign, and we had no mechanism for changing our modus operandi when it became obvious that the environment was changing. Certainly the shelling of the Marines by Druze artillery should have clued us in that our strategy was seriously flawed.

Finally, I believe that at Beirut, the War Powers Resolution stood in the way of developing a coherent military strategy. If a coherent strategy had been developed, where the ends, ways, and means were fully thought out, justified, and identified, it would have been "dead on arrival in Congress," and we probably wouldn't have been able to get the Marines into Lebanon in the first place without a fight with Congress and an unsympathetic and uninformed media.

But in a much broader sense, the term "hostilities" is far too broad to cover all of the environmental contingencies in which a commander-in-chief must be able to react in order to conduct foreign policy. There are many environments that I can conceive of that are not benign and should not be interpreted to fall within the context of "hostilities," as set forth in the War Powers Resolution. Any time the military is introduced into an area as a show of force, where third parties are engaged in conflict is one example. Any time the military is used to interdict the supplies of a third country,

who is supporting the insurgency of a country whose security is vital to the security of the United States is another. And there are literally thousands of examples one could imagine that did not live up to the context of "hostilities" in the War Powers Resolution. But the President and the military must have the flexibility to meet any of these challenges when they are enforcing America's foreign policy. The military, especially, must be able to use its initiative to parry the actions of its would be adversaries without worrying about War Powers.

The "benign environment trap" also finds itself manifested in the rules of engagement (ROE) that the military uses. Approved by the government at the highest levels, ROE are directives that the military uses, that establishes the circumstances and limitations under which its own naval, ground, and air forces will initiate and/or continue combat engagement with enemy forces. "In peacetime, ROE reflects significant legal, political, diplomatic, and military restrictions on the employment of military forces. In wartime, ROE permit a wider range of uses of military force, but still are used to ensure that force is employed toward the achievement of desired political goals.<sup>1</sup> Typically ROE are impossible to write if the strategic ends, and the means for achieving those ends are not well understood. But even in the best of circumstances, ROE are often not understood by the people who need to use them---the soldiers, sailors, airmen, and marines who man their weapons systems wherever they serve. The situation of the Marines in Beirut is especially illustrative.

The mindset of the Marines in Beirut was they were performing a peacetime mission. This was reinforced by the fact that they were operating under "peacetime rules of engagement." It was their understanding they were not to take sides in hostilities. Part of the reason for the use of

peacetime rules, however, had nothing to do with their mission in Beirut. Marine commanders were concerned about the safety of the sentinels, as there had already been several accidental weapons discharges---a training and leadership problem at the junior leader level. The Marines kept their loaded ammunition magazines in their ammo pouches, which was affixed to their web belts. Their rules of engagement also had other constraints, but the upshot is that the ROE helped reinforce the mindset that protection of the force was secondary to the need for protection of the Marines from accidentally shooting each other. The Marines had the right of self defense, but with terrorism a threat, our forces needed to respond to hostile intent, not just hostile acts. Unfortunately, this mindset provided a perfect opportunity for a terrorist bent on "killing a few Marines."

In Beirut the vision of a "benign environment" produced a peacetime ROE, which led to the Marines' inability to respond to a terrorist attack. I believe if senior commanders were not concerned about War Powers in the first place, and took seriously the importance of training the Marines to handle their weapons properly, there would be no need for peacetime ROE. Our forces would know to shoot first and ask questions later, and so would everybody else. There would be no "permissive environment" and it would be difficult for our adversaries to pull off a successful terrorist attack. "One can see the relevance of this issue and the difficulties in handling it, especially in a nuclear-armed world where accidental war could be catastrophic. Deployed forces need ROE's to decrease that danger,"<sup>2</sup> and the ROE must be designed to secure the force from the threat, not each other.

### **The Benign Forces Trap**

After the Japanese experience at Pearl Harbor, the obvious lesson for any would-be adversary is to avoid another Pearl Harbor at all cost. Given the resources, wealth, and alliances of this country, no enemy could rationally conclude they could defeat the United States in war when Americans are united in their resolve to fight and win.

On the other hand, the great lesson of the Vietnam War is that American will can be manipulated by an unwitting American media if it can be shown to them that American strategic purpose is misplaced, immoral, or both. That is the danger of an uninformed media, especially the television medium, which is so influential to the American public. The American media is the place where our would-be adversaries will try to win the hearts and minds of Americans. During the Vietnam War years, some of the print, and most of the television network broadcast media became convinced that the war in Vietnam was wrong. Eventually, the case they presented on the television evening news night after night became the perception of "reality." As the perception took on a universal appeal, the "doves" in Congress gained political influence. That combined with Watergate silenced moderates in Congress who eventually voted in support of string of legislation, that weakened the power of the "imperial" presidency. This fear of presidential imperialism continues to this day.

It is interesting that this charge of imperialism actually began with Lenin, who said in effect that imperialism enabled capitalists to forestall the social revolution in the highly developed countries by throwing crumbs to the workers in the form of better salaries, better conditions of work, and reforms of various sorts, all earned at the expense of those countries exploited by imperialism. He expounded this theory because he needed an explanation of why capitalism was gaining strength in the world, instead of



crumbling under a class struggle between proletariats and capitalists as Marx and Engles had predicted.

Imperialism...repressed the normal revolutionary impulse in the highly developed countries. Lenin reasoned, therefore, that the strategy to overcome imperialism, which he considered to be the highest stage of capitalism, had to be changed. Before the Communists could move on the highly advanced countries themselves, the colonial source of additional income first had to be destroyed. As a means of hitting the capitalists at their most vulnerable point---the colonies---Lenin advocated wars of colonial liberation, agitating in the underdeveloped areas and promotion of nationalism.<sup>3</sup>

Since then, Soviet propaganda has labeled all capitalist, but especially American political, economic, and military mechanisms or adventures as "imperialist." It took on special significance during the cold war, but was used most vehemently by Communist propagandists during the Vietnam War. The charge of imperialism then came to be associated with presidents Johnson and Nixon because of the enormous power they wielded during the prosecution of that war, powers I might add that were intended by our Founding Fathers.

I have already shown how this perception of an "imperial presidency" led to the War Powers Resolution, which was enacted as a reaction to President Nixon and Watergate and the prolonged involvement of the United States in the Vietnam War. It should be stated again that the most dangerous provision of that resolution is that by the Congress doing nothing, the President would have to withdraw forces after 60 or 90 days unless the Congress passed other legislation or declared war.

That means unless the military can achieve a quick victory, his potential to fight a protracted war is benign. That is the trap. Under the War

Powers Resolution, our military is a benign force because our would-be adversaries know our forces can be made impotent by Congress triggering the War Powers Act. Short of a declaration of war, they know our forces are constrained by the provisions of the War Powers Resolution, especially when the duration of our involvement is uncertain. The benign trap was definitely manifested in Beirut and the fall of Saigon. In his testimony to Congress in September 1988, Defense Secretary Carlucci describes the dilemma:

Congressional enthusiasts of the War Powers Resolution, of course, do not describe it as I just have. [That the excessive concentration of power in the presidency was to blame for the controversial embroilment in Vietnam.] They cite the desirability of having the the President draw upon congressional wisdom as he decides whether to commit U.S. military forces abroad. They also point to the benefit to our Nation's foreign policy of having the American people, through their representatives in Congress, endorse a military operation initiated by the President.

I don't differ with these objectives. I support them.

The problem with the War Powers Resolution is that it supports neither. Instead of encouraging the President to seek out the views of Congress, it fosters an atmosphere of confrontation by purporting to deny him his constitutional authority, as Commander in Chief of the Armed Forces, after 60 to 90 days of military operations. Instead of showing the world the will of the American people, the War Powers Resolution could, according to its terms, implement itself without a single vote being cast in the Congress.

This latter flaw, as much as the unconstitutionality of the War Powers Resolution, is offensive to our military establishment and seems particularly out of step with the times.

Public preoccupations have changed since 1973. Today, the accent on Government is on accountability, competence, and efficiency, and the immense war powers responsibility places a premium on all three of these.

Accountability is a basic concomitant of war powers. No President can evade full responsibility for the risks and consequences of employing U.S. military force, nor has any

president, from Roosevelt through Truman, through Kennedy, Johnson, Nixon, and Carter, abdicated responsibility...

Yet, for 60 or 90 days, or longer, the War Powers Resolution would leave in suspense the question of whether a military deployment was authorized.

Think about the factors upon which success of a military operation may depend: High morale of our forces; high confidence in our resolve on the part of our allies; and most of all, the perception on the part of our adversaries that the United States has the willpower, the means, and the intention to achieve our goals, despite their resistance...

The 60-day deadline, extendible to 90 days, is the feature of the War Powers Resolution that is most debilitating to the pursuit of strategic success in an exigent situation. The very notion of setting deadlines, however short or lengthy, plants seeds of doubt in the minds of our own forces as to whether their acts of courage are backed up by their own Nation. It plants seeds of doubt in the minds of our allies as to whether they should join in our military operational efforts or wait to see whether war powers disagreements in Washington will unravel the President's approach to a problem abroad.

Deadlines constrain our military planners from fashioning an optimal response to the threat. One wonders whether President Kennedy would have regarded a naval blockade as a viable option in the Cuban missile crisis had the war powers deadlines and reporting requirements been in existence.

Kennedy's misgivings would have nothing to do with the Congress. Obviously, all Americans rallied around the President at that time. Rather, he would have had to concern himself with Khrushchev's perceptions about the War Powers Resolution.<sup>4</sup>

I think the Fall of Saigon and Beirut demonstrated why a President cannot admit that a theater of operations is hostile, even when it is, because to do so is to fall victim to the benign forces trap. Of course the Persian Gulf was hostile, and were it not for the presence of the U.S. Navy and the navies of the other nations who participated, the Iran-Iraq War would have spread to the Gulf and closed it down to all commercial shipping. The economic impact on Europe and Japan would have been significant.

The reporting requirements can produce incentives for a President to obfuscate on what the true situation is, as I think probably happened in the gulf, and even to prevent useful consultation or discussions with the Congress because of fear over triggering the Resolution.

If the Resolution is triggered, the President then has an incentive to get the action completed within 60 or 90 days, regardless of the natural pacing of whatever the issue is, and an opponent against whom the deployment is being made has an incentive, (a) to trigger the Act, and then, (b) to try to stall for 60 or 90 days to see whether the United States will have to pull out...

But if being Commander in Chief has any meaning at all, it must include the ability to move troops.

The Resolution does not claim that the President cannot deploy military forces. Indeed, the President can, in fact, fight a war for 60 days under the terms of the War Powers Act.

But if the President has the power to deploy forces, and it seems clear that he does under his authority as Commander in Chief, how can he possibly be required to withdraw those forces by congressional inaction? That, incidentally, is not the most bold, courageous way for the Congress to face an important national issue.<sup>5</sup>

The Persian Gulf has been a vital interest to our country for over forty years. Suppose the President had declared the Gulf hostile and submitted his report. Wouldn't it be ludicrous to expect him to pull our forces out after 60 or 90 days? Give up on one of America's vital interests without so much as a single vote from Congress? Yet, that is what some members of Congress want. It also illustrates why the War Powers Resolution is a bad law, and why foreign affairs should not be run by "535 secretaries of state." It also illustrates why it behoves the President to ignore that law whenever America's vital or critical interests are at stake.

### **OPSEC, Time and Urgency**

The raid on Libya and the Iran-Hostage crisis illustrates best the necessity for operational security, while the *Mayaguez* incident demonstrates

the need for the President to act with dispatch in a crisis. In all three instances the concern surrounds the problem of consultation with Congress and the need for secrecy. It was certainly the intent of the founding fathers that the President consult with Congress, but it was never their intent that consultations take precedence over prudence. The immediacy of a crisis does not always lend itself to a full and timely discussion of a military operation. Sometimes the safety of our forces demands a full disclosure of military operations not be given until after the immediate danger to our forces has passed.

...you forfeit the advantage of tactical surprise by determining whether hostilities are imminent.

Second, your planning is very different if you realize that you are going to have to pull out in 60 days, unless the Congress votes to keep you in. You are turning the Joint Chiefs into political experts that have to go up and take soundings on the Hill and say "Well, how do we develop our military plan?"<sup>6</sup>

The Grenada invasion and the *Mayaguez* incident shows that public popularity of a military operation negates all talk by Congress of imposing war powers constraints. In the Grenada operation, the President's legal basis for conducting it was rather thin. However, both operations restored American faith in the military and American prestige at home, something the United States needed after loosing face in Vietnam. They both demonstrate the importance of military success---winning the fight. Military success produces American, which even the Congress will not challenge.

<sup>1</sup>Captain J. Ashley Roach, JAGC, US Navy, "Rules of Engagement" *Naval War College Review*, Naval War College Press, Jan-Feb 1983 as found in *U.S. Army War College Selected Readings, Course 3*, p. 147.

<sup>2</sup>Frederick H. Hartman and Robert I. Wendzel, *Defending America's Security*, Washington, Pergamon-Brassey's International Defense Publishers, Inc., 1988.

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<sup>3</sup>Victor H. Cohen "Communist Philosophy," Prepared for the Air War College Associate Programs, Air University, Maxwell Air Force Base, Alabama, May 1975, p. 9.

<sup>4</sup>Frank Carlucci III, "The War Power after 200 Years: Congress and the President at a Constitutional Impasse," *Hearings before the Special Subcommittee on War Powers of the Committee on Foreign Relations, United States Senate, One Hundredth Congress, Second Session, 23 September 1988*, pp. 247-249.

<sup>5</sup>General Brent Scowcroft (USAF-RET.), statement found in "The War Power After 200 Years: Congress and the President at a Constitutional Impasse," *Hearings before the Special Subcommittee on War Powers of the Committee on Foreign Relations, United States Senate, One Hundredth Congress, Second Session, 7 September 1988*, pp. 118-119.

<sup>6</sup>Carlucci, p. 256.

## **Chapter Fourteen: Conclusion---What The Military Response Should Be**

The War Powers Resolution has been the subject of much debate, and it appears that the debate will continue for years to come. However, recently there has been some movement in Congress to change the law in order to remove the unconstitutional provisions. Like the writers of the Constitution, who realized that under the Articles of Confederation the conduct of foreign affairs was a disaster,<sup>1</sup> the Congress today appears willing to revisit the War Powers Resolution. However, it is hard to say whether it could ever be revised given the political make up of the House and Senate of the 101st Congress. But, they have every right to revise or revoke it:

Of course the military cannot become involved in the political fray about the question of constitutionality. There is no question that the writers of the Constitution intended the President to consult, where practical, all questions of foreign policy, and especially those questions that involve the use of force. The Congress has a right to know, and it is in the interest of the military for the Congress to be involved in the process. After all, it is the Congress who is responsible for resourcing the armed forces as well as paying for the cost of military operations. Certainly, the military would expect the Congress to vote over a President's veto, to cut off any funds for military operations that the Congress didn't agree.

But the military must ensure military operations are backed by sound military strategy that supports the nation's vital interests. Senior military leaders should feel free to speak out on issues that relate to our Nation's vital interests, and national and military objectives. I think too often our strategy has been bankrupt of any coherency. Our strategy has not always been

linked or articulated in how it supports our national objectives, as some of the examples of our military operations mentioned in the preceding chapters illustrates. For its part, the military can help provide coherence to the foreign affairs of the Nation by speaking out and writing about the issues, both within the administration and without.

The military is a legitimate part of society that as an institution has something to say to all of society's members, and as such, it is an institution to which people should listen.<sup>2</sup> This suggests the military should think critically about our Nation's foreign policy, and never be afraid question our interests and strategic objectives. The military should never feel obligated to share a foolish consistency towards our foreign policy unless we want to be accused of being the "hobgoblins of little minds, adored by little statesmen and philosophers and devines," who cannot think.

Unfortunately this idea is not universally shared by many persons in and out of the military. There are some who argue that the military should always speak with one voice. They fear that too many opinions will confuse the media and the Congress and make it difficult to secure needed programs at budget time. And there are others who believe the military should not speak at all. At heart is the question of civilian control of the military, and the fear that military expertise will take precedence over the civilian leadership. Such is the logic of frail egos.

I believe it is vital to the national interest that senior military leaders not become part of a military institutionalized "group think." Senior military leaders hold specialized views that must be expressed if the country is going to benefit from the full dimensions of the democratic process. Senior military leaders have developed expert opinions in a wide range of foreign policy areas that have been developed through years of experience. They should be



expected to express their ideas when asked by the administration, the Congress or the press. They should express their ideas even if they aren't asked, not because it is their inherent right, but because it is their inherent duty.

I suppose for some senior military leaders, there will be times when their duty position and personal opinions will be in conflict. In that case, his conscience will have to be his guide. Whether to reflect his personal opinion, or the policy of the administration for whom he speaks will sometimes be difficult. However, if that officer chooses to speak out against official policy, he must be prepared to resign his post willingly, and accept a lesser post elsewhere, or retire. In any case, that officer should be free from discipline and censure, otherwise, a dangerous muzzle would be strapped over the mouth of the entire military, which would be entirely detrimental to the Nation's interest.

The old expression that "nothing succeeds like success" applies well to the military. I am reminded of the military success in TET 1968. We won that fight, but that was not the perception of the media, and so the armed forces lost a lot of credibility. Part of the reason why TET was viewed by some as a failure was because our strategy was a failure, and that was obvious to every novice who saw how we were conducting the war. And the military blamed the press, and not our strategy.

But, for all the criticism leveled against the press, and much of it was deserved, the press should not be blamed for the failure in Vietnam, or any of the resulting "anti-imperial" presidential legislation. We should recognize the press stands as part of the checks and balances to the dangers or ideas expressed by the military, the three branches of government, or any person or institution that would threaten the Constitution or American freedoms.

The press, like the Navy guaranteeing the freedom of navigation in international waters in the Persian Gulf, exists in part to guarantee the freedoms of the First Amendment to the Constitution.

Admittedly, some of the press reports are uninformed, and sometimes they border on the irresponsible, but regardless, they are part of the arena, and the military is going to have to learn how to work with them. "If there is utility in having the media criticize the military, there is utility in having the military reply because the back-and-forth discussion should yield information and give perspective to all those involved in the decision making process, and, thereby, helps them to make sound decisions."<sup>3</sup> Military leaders should feel free to engage the press any time, any where, about any subject that isn't legitimately a national security secret. This will only serve to make a greater understanding between the press and the military, and make our institutions more democratic.

That the 60-day provision of the War Powers Resolution has never been triggered is more a tribute to the press, than the collective wisdom of the Congress, or the ineffectiveness of the law. For it was through the press that public opinion generated the pressure on the Congress to stay out of the way of the President. The *Mayaguez* incident and the Grenada invasion were overwhelmingly supported by the American people, so much so, that virtually all presidential criticism and calls by individual congressmen to trigger the War Powers Resolution were immediately squelched. This public support for the President was garnered from public opinion polls, formed by attitudes of people exposed to the media accounts of those adventures. In fact, one of the few instances the press ever worked to President Carter's advantage, was during the Iran-hostage crisis, even after it was known how miserably the rescue attempt had failed. Although public frustration was directed

at the military for faulty planning, the operation turned the heat away from the President, who was praised in the media and the Congress for finally doing something.

In spite of the praise Reagan eventually got in the press for the Grenada operation, the Administration and the military was criticized for blocking the press opportunities in the first stages of the operation. Ultimately, most members of the press accepted the military's explanation that the need for tactical surprise necessitated the media blackout. A smaller share of the media was concerned, however, that the blackout was caused by the military bent on preventing the kind of press criticism that characterized much of the television news reporting of the latter years of the Vietnam war. Still, it is hard not to believe that "selected media people ought to be allowed on the scene as soon as possible. More than that, it is hard to believe that any really major operation could not find a niche for at least some media people where they would not get in the way,"<sup>4</sup> nor be in a position to blow the military's tactical surprise.

So, it is the responsibility of the military to learn to work with the media, only because if left to the media alone, they will never learn to work together at all. Senior military leaders must play a part in this bonding process by talking to the press willingly, and taking the time to explain the purpose of our operations in sufficient detail that the press can get the story right. Senior leaders, who are generally reluctant to take risk with the press, must be willing to go on record with them and answer questions, present their personal views on issues, and tell how military objectives as well as our critical and vital interests are being safe-guarded in the world.

In order to do that, our senior military leaders need to become better informed about the strategic logic of our operations, and they need to be-

come sensitive to the needs of the junior officers and non-commissioned officers subordinate to them, who often cannot "see the forest for the trees" because they are mired in the tactical details of military operations. These young leaders are often the Nation's only spokespersons in remote corners of the world. They are often the only people who can speak to the local populace for the military and the Administration about foreign policy, and American resolve, commitment, and intentions. They need to know the logic of our strategic policy. Senior military leaders, then, must get the word out. They should also permit themselves to be interviewed in the media on foreign policy issues, and they should write assiduously in military or defense-related professional journals.

In his book, The Key to Failure: Laos and the Vietnam War, the author, Norman B. Hannah says that the "moral purpose of a just war can be corrupted by ineffective means [ways]."<sup>5</sup> By that he means our strategic concept, if indeed we had one in Vietnam, was all wrong. He goes on to say that a government that commits its manhood to war has a moral obligation to be effective. This requires an effective correlation between ends and means [ways].<sup>6</sup> When public perceptions cannot see the relationship between ends and means, they will not support war, and that war will be viewed as immoral. The result is that the enemy need only outlast us in order to prevail. Like the North Vietnamese, he can loose every tactical battle, and still win the war. Hannah makes the point that the result of war will reflect the means chosen:

- Great causes require great means.
- Small means achieve small ends.
- Uncertain means achieve uncertain ends.
- Our incremental means in Indochina achieved incremental failure.<sup>7</sup>

Alas, if we are ever to prevent another Vietnam, the military must not let the war-making process begin without a sound strategic vision of our vital interest and our strategic and military objectives. For tactical success to bear fruit, it must be grown on a fertile foundation of national and military strategy. That means our national strategy must be creative. The military should not rely just on the old saws that were developed ten to twenty years ago. We must take the initiative to see that the political, economic, and psychological powers of the nation are tied together with the armed forces during peace and war. Ends, ways, and means must be fully thought out and articulated in one strategic vision by the military and those in civilian control. Of course this must be done as part of the process to bring the Congress and the American people on board. Without them, this nation must never engage in another major conflict. Where old ways still measure up, of course they must be retained; where they fail to meet the demands of a modern world, they should be discarded for better ways to meet new challenges.

Such challenges, however, are not always new. International terrorism, air and sea piracy, the spread of totalitarianism, narcotics, and isolated acts of aggression will continue to be levied against Americans around the globe. We will be forever protecting the international right of freedom of the seas. And we will always be reacting to aggression against Americans abroad. If we don't, who will?

In spite of all that has been said before, it must now be stated that our Nation's military will never be successful if it does not share a common strategic vision for its forces, with a mutual understanding how each of the services augments or compliments each other among the myriad of missions that each must perform together. We are past the time when we could draw

ourselves up into our own comfortable and parochial cocoons, hoping that our individual design of the future would sprout wings. Instead, all military leaders will have to work together towards a singleness of purpose, and a common vision for the future of the armed forces. We will have to work jointly and combined with our allies. Not because the Goldwaters-Nichols law dictates that is what we should do, but because that's the only way our military was ever successful in the international world. We are going to have to learn how to subordinate our budget self-interest for the good of the other services, as well as the good of the nation. We will also have to learn to speak about those issues that transcend the services, like the issue of the need for strategic sea and air lift and the military use of space. These are national issues requiring national priority and resolution. They require much political discussion, but the military must be a part of that process, because no one alone can properly advise the Administration and the Congress, and the people about these issues.

Finally, there is little doubt that the War Powers Resolution impacts on the military in a thousand different ways, many which were not ever mentioned in this work. While most of the impacts I illustrated were relatively minor, they did have many strategic impacts as seen in the examples of military use in the preceding chapters. Unfortunately, where the War Powers Resolution has impacted at the tactical level, our forces have paid for it in blood.

That the Resolution is unconstitutional cannot be denied, and it is my conclusion that it should be abolished immediately. However, that mandate must be balanced with the times. It is evident that the Congress is not satisfied by the use of the power of the purse alone to affect foreign policy or "presidential adventurism." Ever wary of military commitments, a legacy of

the Vietnam experience that is not going to go away soon, the Congress is intent on being a co-determinant of foreign policy. They want to be part of the decision-making process in the use of the military, particularly those decisions that beget troop deployments. It is a sad commentary on the trust between the Executive and Legislative branches that many of the elements of the War Powers Resolution will remain in some form for a long time to come. But the challenge for all of the armed forces will be the same---senior military leaders will have to learn to operate in a constrained environment, without compromising strategic coherence in military planning operations, or the safety and welfare of the soldiers, sailors, airmen, and Marine men and women who serve our armed forces everywhere.

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<sup>1</sup>Robert F. Turner, "Restoring the 'Rule of Law': Reflections on the War Powers Resolution at Fifteen," Prepared testimony before the Special Subcommittee on War Powers Senate Committee on Foreign Relations, 29 September 1988, p. 88.

<sup>2</sup>Elfstrom, p. 91.

<sup>3</sup>Ibid., p. 94.

<sup>4</sup>Ibid., p. 95.

<sup>5</sup>Norman B. Hannah, *The Key to Failure: Laos and the Vietnam War*, (Lanham, New York, London: Madison Books, 1987), p. 304. Note: his use of the word means differs from me. By means, he means strategic concepts, the same notion I use for ways. He does that because he is writing about the relationship of ends to means in military and government policy. In this work ends corresponds to objectives; ways to strategic concepts; and means to resources.

<sup>6</sup>Ibid., p. 305.

<sup>7</sup>Idem.

## APPENDIX A

### TEXT OF THE WAR POWERS RESOLUTION OF 1973. PUBLIC LAW 93-148

Public Law 93-148  
93rd Congress, H.J. Res. 542  
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 force in hostilities or in such situations.

Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws 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 or 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 the 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 the 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 the 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 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 the 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 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 the United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operation 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 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 circumstance 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.

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