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# The War Powers Resolution: Intent Implementation and Impact

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## ABSTRACT

In 1973, the US Congress passed Public Law 98-103, otherwise known as the War Powers Resolution. It was the intent of the Congress at that time to reverse the trend of what they felt was the erosion of their powers delegated under the Constitution to declare war. Between 1974 and 1992, US forces were committed overseas at least thirty-nine times. With few exceptions, the War Powers Resolution played only a minor role in deciding those actions. In essence, the War Powers Resolution has not had any substantial impact on the decision to use force.

The purpose of this paper is to discuss the intent of the War Powers Resolution, how it has been implemented since it was passed in 1973, and what impact it has had on the struggle between the Executive and Legislative branches in deciding the issue of war and peace for the United States.

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## SECTION 1 INTRODUCTION

The decision for a country to go to war is, perhaps, the most significant decision that any country can make. In a democracy, this decision to commit a nation's resources, both material and human, is meant to be entrusted to the collective wisdom of all the leaders, acting on behalf of the wishes of the majority. It is not a decision to be made lightly, nor is the responsibility meant to be taken outside the founding principles of our democracy.

In the Constitution of the United States, the power to declare war is specifically delegated to the Congress. As part of the separation of powers, the authority as Commander-in-Chief is also specifically delegated to the President. The clear intent of the founders of our nation was that this responsibility be shared, and not taken lightly. They envisioned that such power would be used reasonably and rationally. They entrusted to their posterity, a nation of laws set forth in the Constitution that would clearly establish the authority of the three branches of government. Nothing could have been clearer or more succinctly stated.

In fact, the application of the power to declare war, to activate the military might of the democracy, could not have been less certain. After nearly 200 years, Congress felt it necessary to codify the power to declare war and commit forces overseas in the War Powers Resolution to correct what they interpreted as an erosion of their power in this area.

The purpose of this paper is to discuss why in 1973 the Congress felt it necessary to pass a law on a matter so specifically delegated to them in the Constitution. Further, I explore how the power in this Resolution has been used in the 20 years since its passage. In the end I will discuss my own conclusions and make recommendations as to how the War Powers Resolution may be improved.

The discussion of the historical perspective of the power to declare war draws heavily on the writings by Senators Jacob Javits and Thomas Eagleton. This is intentional for two reasons. First, their writings were the most complete and applicable that this writer could find. Secondly, and more

significantly, they represent the unique perspective from two Congressmen who co-sponsored (with others) the War Powers Resolution in 1973, and both openly admitted the historical acquiescence of their predecessors in the war powers area.

This history, through 1973 to the present, is used to illustrate how war powers have been affected by the War Powers Resolution. It is significant in that it plainly demonstrates the ineffectiveness of well-intended legislation and how the conflict between the Executive and Legislative Branches has continued unabated in spite of the Resolution.

Attempts to improve this process have not been successfully applied, nor have any amendments to the Resolution been passed. Given the uncertainty of the post-Cold War period, this condition is not only dangerous but unacceptable. Recommendations for change are laid out in section 6, and some final conclusions are discussed in the final section.

## **SECTION 2 HISTORICAL PERSPECTIVE**

### **FOUNDING FATHERS INTENT**

In the legal world, intent plays a major role in proving or disproving legal arguments. The crime is often determined by the intent of the assailant. For this same reason, it is useful to examine the intent of the two major parties in the war powers issue. Not the Executive and the Legislative branches, but rather our founding fathers and then the drafters of the War Powers Resolution to see how they intended the decision for war or peace to be made.

James Madison, James Wilson, and other delegates to the Constitutional Convention in Philadelphia had experienced tyranny at its worst. Our Revolution had been fought for the freedom from the arbitrary rule of one man -- the King of England. Their solution to this tyranny was manifested in a carefully designed separation of powers spelled out -- in sufficient detail they thought -- so that there would be little or no ambiguity over who exercised what powers under the Constitution. Forty-five years before

Clausewitz would pronounce his people-government-army "remarkable trinity" theory, the constitution of the United States incorporated this concept into law (1).

### Congress.

With respect to war, Congress was given the preeminent position. Congress, to the founders, had always been intended to be the more deliberative branch of government, "the body most likely to reflect all opinions, argue all options, raise all objections" as Senator Thomas Eagleton so aptly described it (2). Congress was also the branch of government vested not only with specified powers, but with the residual authority "to make all laws necessary..." (Article I, Section 8). War was intended to be an orderly process in which deliberation would be given full play. Once war was declared, the combined power of the legislative and executive branches would see it through. As James Madison writes:

"In no part of the Constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not the executive department.... War is in fact the true means of executive aggrandizement" (3).

### The Executive.

The authority of the executive in the Constitution was also by design. The authority to initiate action in national security and foreign policy matters was delegated to the Executive Branch with broad power and discretion. As Commander-in-Chief, the President could lead and direct the armies and navies. With the consent of the Senate, he may make treaties and appoint ambassadors. Alexander Hamilton, writing in Federalist 69, argues that the power of Congress to declare war is not a limit on the authority of the President to order military action. The powers are separate and distinct – precisely as the founders intended. The wording in the Constitution was even changed in the final drafts to give Congress the authority to "declare" war instead of "make" war. The concern of the drafters was that the President might fail to take action to repel invasion (primarily by the British in those times) and that Congress would be prevented from meeting (4). Thus evolved the concept of the Executive acting with limited use



of force to protect Americans. As we'll see, the application of this power over 200 years will evolve greatly from merely "repelling invasions".

### **WHO IS MORE LIKELY TO GET US INTO WAR?**

On the eve of the commencement of combat operations in the Persian Gulf in 1990, President Bush repeated the often quoted fact that the US has been involved in some 200 uses of military force, but that we have had only had five declared wars (5). This, according to Senator Jacob Javits, one of the primary sponsors of the War Powers Resolution, is a clear indication that Presidents are more likely to take independent action in the use of force. In his book, *Who Makes War*, Javits argues convincingly that from the earliest days of our republic, Presidents usurped the war making power of Congress. Of the five Presidents who formally asked for, and received, declarations of war from Congress, only one (Madison) showed true deference to Congress. The other four took "questionable actions leading to war" (6).

To the serious student of American history, I recommend the books by Javits, Eagleton and Summers cited in the bibliography. A detailed recounting of wars over the 200 years is beyond the scope of this paper. My purpose is only to describe in general terms what the proponents of the War Powers Resolution considered to be a long history of Presidential usurpation of their powers and an equally long history of congressional acquiescence as the President waged war around the world. The true significance is to clearly show that it was not just the Gulf of Tonkin Resolution, nor the Vietnam war that gave birth to the War Powers Resolution.

### **War in the Nineteenth Century**

With the exception of the Civil War, our conflicts in the 19th century were primarily motivated by greed for expansion. When Adams faced a war decision with France in 1801, he deferred to the Congress, possibly the first and last time this happened in deference to the Constitution (7). Even when

Madison sought a declaration of war in 1812, he deferred to Congress for reasons of political expediency. He was being pressured by Henry Clay and other frontier congressman who eyed Canada for expansion. Polk, on the other hand, openly advocated war with Mexico in 1846 for the same reason -- land for expansion and in an attempt to evict Spain from Florida. When his messengers were allegedly attacked while returning from a meeting with the Mexicans, Polk seized the opportunity to get his declaration. The attack on the messengers became what Pam Holt refers to as "Polk's Gulf of Tonkin Resolution" (8).

**The Civil War.** Lincoln's seizure of almost dictatorial power at the outset of the Civil War marks the first significant watershed in the shifting of war powers from Congress to the President. It is probably more accurate to say that the war was really a rebellion, in which Lincoln had an obligation to insure that the law of the land was "faithfully executed", and that the US was actually attacked at Ft Sumter. However, his actions, however well justified, were taken without Congress's approval or advice and were considered by many to be extreme. In the three months before Congress could convene after the attack, he would mobilize the militia, blockade southern ports, obligate \$2 million for ships, suspend the right of habeas corpus, and activate the draft. Later, the Supreme Court would uphold Lincoln's actions in the *Prize Cases* (1863). Congress acquiesced by not challenging a single measure (9).

### Wars in the Twentieth Century

**The Spanish American War.** The Spanish-American War of 1898 not only carried conflict into the 20th century, but also carried forward the trend of usurpation and acquiescence. McKinley was led into the war by public opinion and a Congress motivated by expansionist fever and encouraged by journalists such as William Randolph Hearst. No meaningful debates or deliberations were held. This misguided motivation "triggered the diminution of its (Congress's) own power"(10).

Teddy Roosevelt would continue this trend in Panama (1901, 1903), the Dominican Republic and Haiti (1903), and Cuba (1906). Taft took further unilateral action in Nicaragua (1912), as did Wilson

in Mexico (1914), Haiti (1915), and again in the Dominican Republic (1916). "By 1920, Congress had become so accustomed to thinking of the Caribbean as an American lake, that it ceased to pass judgement on Presidential action in that area"(11).

**World War I.** Even in declared wars, Presidential and Congressional actions were sometimes questionable. By the time Wilson asked for a declaration of war with Germany in April, 1917, few dissenting votes would be heard, and many were turned out of office the following year (12). That spoke for how much the President had seized the initiative and led us into war, while openly advocating peace. Wilson, under the Lever Act (1915) and Overman Act (1916) had wrestled, or been given, near absolute power to take the nation to war. Under the latter act, he was actually given legislative powers to reorganize the government -- a power delegated to Congress in the Constitution.

**World War II.** Likewise, FDR took or was given enormous powers relative to war. Between 1933 and 1939, he used "emergency powers" thirty-nine times to justify actions taken without congressional approval. His Lend-Lease Program of 1940-41 was only one of dozens of instances that illustrate the erosion of congressional authority. Congress would never substantially challenge these actions. By the time the Japanese bombed Pearl Harbor, FDR's usurpation of power exceeded even that of Lincoln or Wilson.

**Korea.** In June 1950, Truman responded to a UN call for assistance to repel the North Korean invasion of the South. Truman ordered American air, land and sea forces to respond, without consulting Congress. To justify his actions, he pointed to the UN Charter and his authority as Commander-in-Chief. The political significance of Korea for our purposes is that, despite overwhelming Congressional and public support, Truman never chose to request a declaration of war. Even when the Supreme Court signalled that his claim of authority was beyond legal boundaries in the *Youngstown Sheet and Tube Co.* case (1952) (13) (to be discussed in more detail in section 5), Congress did not make any attempt to regain any of its position (14).

## THE GULF OF TONKIN RESOLUTION AND THE VIETNAM WAR

Lyndon Johnson served on the Foreign Relations Committee during the Korean War and knew first hand the problems of involving the nation in a war. He hesitated to involve the US in the war in Indochina without a strong reason to do so.

Johnson would get his reason and justification in 1964 when a US destroyer, the *USS Maddox*, was attacked in the Gulf of Tonkin off the coast of Vietnam by North Vietnamese gunboats. Johnson promptly went to Congress and got a resolution allowing him to "take all necessary action to repel any armed attack against the forces of the US and to prevent further attack." Years later the validity of this attack would be called into question, but for now Johnson had more than the justification that he wanted - he had a blank check to wage war (15).

The legality of the Vietnam war may have been questionable before the Gulf of Tonkin Resolution, and certainly after it was repealed in 1971. However, for the intervening seven years, it was the legal sense of the Congress that the President had unlimited authority to conduct the war. Even after it was repealed, Congress continued appropriations for a time. Only by taking decisive actions and curtailing all funds to support military actions in South East Asia, did Congress force the war to really come to an end.

## HISTORICAL CONCLUSIONS

For the most part, the American wars were an outcome of presidential policies in the making, in which Congress played only a minor role. Nineteenth century wars were relatively minor affairs, but significant for the trend they started. The 20th century opened on a declining trend and continued unabated for 70 years until the US found itself embroiled in the most divisive, bitterly fought conflict -- at home and abroad -- in our history. Senator Javits contends that the erosion of congressional powers started gradually before Lincoln, and that his actions accelerated the pace. Senator Eagleton agrees that in the 1970's we were at the same point, but that McKinley and later FDR marked the watersheds. What

is important is that there is a clear trail through history of presidential usurpation and congressional acquiescence in the power to make war. For various reasons the President made decisions, directed action and issued orders not clearly within his Constitutional powers. Congress, for its part, remained passive or even encouraged the President. It legislated away its powers in some cases, or continued appropriations in others to finance actions which it hadn't authorized.

Against this background, the war in Vietnam unfolded. The unsettled political situation gave rise to an even more turbulent domestic scene. With the intent of the founding fathers clearly sidetracked, Congress began the long road back to reclaiming some of the powers it felt it had surrendered over a 183 year period.

### **SECTION 3 ENACTMENT OF THE WAR POWERS RESOLUTION**

#### **EARLY EFFORTS TO PASS A WAR POWERS RESOLUTION**

To say the Vietnam war was the most divisive period in our history may be somewhat melodramatic. It may not compare with the Revolution or the Civil War, but it was a political milestone in that it had some very significant and long lasting impacts on our society.

#### **The Political Climate.**

When Richard Nixon was elected in 1968, political opposition to the war in Vietnam was at its peak. The images of the violent anti-war demonstrations at the Democratic National Convention in Chicago in July were still very vivid. In June 1969, the first Senate Resolution was adopted calling for negotiations to end the war. There was no comparable action in the House of Representatives, so the action died at the end of the session. However, it was a precursor of what was to come.

In April 1970, Nixon ordered US forces to cross the Cambodian border to attack North Vietnamese forces operating out of sanctuaries there. Nixon relied on his authority as Commander-in-Chief, never

mentioning the Gulf of Tonkin Resolution. The public outcry of this escalation in the war was displayed in the streets and on college campuses around the country. The protests grew increasingly violent -- the most dramatic being the shooting deaths of the students at Kent State.

### **Legislative Action.**

A flurry of new legislation was introduced in both houses over the next 15 months. The references by Eagleton, Javits and Lehman provide greater insight into the political wrangling that surrounded these actions. These works are strongly recommended for further insight into the politics and the intensity of the times. So intense were the pressures on the besieged White House (both literally and figuratively), that Nixon was forced to announce the withdrawal of the troops from Cambodia within a week of introducing them. On June 22, Senator Robert Dole (Kansas) surprisingly introduced legislation to repeal the Gulf of Tonkin Resolution. Nixon, through Dole's action, hoped to regain the initiative on war powers and reassert his authority to act based on his power as Commander-in-Chief (16).

### **THE TIDE TURNS IN FAVOR OF PASSAGE**

Nixon's re-election in 1972 provided only a brief respite from the pressures of the war. In his campaign, Nixon had repeatedly called for an end to the war "with peace and honor".

Between 1970 and 1973, 117 new members of the House were elected, many on anti-war platforms (17). Even more significant was the unravelling of the details of the Watergate break-in that would be Nixon's downfall. Three weeks before the vote on the Resolution in 1973, Nixon ordered Attorney General Elliot Richardson to fire the Watergate Special Prosecutor Archibald Cox. Richardson refused, as did his Deputy, William Ruckelshaus. Both resigned in protest. Indignation in Congress over the "Saturday Night Massacre" further eroded Nixon's support against the resolution. On October 6, the Yom Kippur War broke out in Israel. Nixon placed US forces on high alert and ordered US Air Force cargo planes to fly resupply missions -- without Congressional approval. Fear grew that the US would

become involved in another war (18).

### **CONGRESS PASSES THE WAR POWERS RESOLUTION**

The outcome in the Senate (75-20) was never in doubt when the final draft of the resolution came to the floor in October. In the House, the measure passed 244-170, 32 votes shy of the two-thirds majority needed to override Nixon's promised veto. His veto on October 24 only served to energize the Congress. In light of the mounting criticism over the Watergate tapes and the "Saturday Night Massacre", Congress overrode the veto on November 7, 75-18 in the Senate and by 3 votes -- 274-135 -- in the House (19).

Ironically, senators like Thomas Eagleton and John Culver (20) and others opposed the resolution for very different reasons than did Nixon. They were in opposition because it gave **too much power** to the President. The War Powers Resolution, writes Eagleton, gives the President 90 days to wage war. It does not assure the collective judgement of Congress and the President is applied (21).

### **NOTABLE PROVISIONS OF THE WAR POWERS RESOLUTION**

The War Powers Resolution passed in November, 1973, was "one of the most significant attempts to modify Presidential initiative in national security policy", according to Edward S. Corwin, a noted authority on the Constitution and Presidential powers (22). The main provisions of the Resolution merit discussion in order to more clearly understand their significance.

#### **Section 3 Consultation**

Section 3 calls on the President to consult with Congress "in every possible instance" before introducing US forces into hostilities or situations where hostilities are imminent. Over the past 20 years this section has been held to widely varying interpretations. Although there is no definition of "consult" in the Resolution, debates during the passage of the Resolution indicate that it was meant to be more than merely briefing or informing (23). In reality, what has occurred most often is that no consultation is held, or that some leaders in Congress are briefed on the details of an operation. Senator Sam Nunn was

in a Washington restaurant when he was informed that President Bush was ordering 150,000 more troops to the Persian Gulf in November, 1990. Later he would remark, "I was informed, I was not consulted. There is a difference between being informed after a decision has been made and getting our views before one is made" (24).

The issue of consultations or briefings surfaced on several other occasions, such as the evacuations of Saigon and Phnom Penh (1975), the Mayaguez incident (1975), the Zaire airlift (1978), and the Panama Invasion (1989). Only in the instances of the Multi-National Force in the Sinai (1982), the US retaliation attack on the oil platforms (1987) and the initial deployment of US forces to the Persian Gulf (1990), can it truly be said that consultations, including consideration of congressional opinions, took place before action was taken. (See Appendix A for a detailed listing of each instance).

"Who" should be consulted is also absent from the Resolution. Several proposals have been introduced to define the parties to consultations. The more meaningful of these proposals seek to include the majority and minority leaders of both Houses, and representatives from the Armed Services, Foreign Relations and Intelligence Committees of both Houses. This would constitute a group of approximately 18 individuals. Such efforts to form this "Permanent Consultative Group" to meet with the President (not just his aides) in a timely and regular fashion date as far back as 1988. To date, none have found their way into lasting legislation (25).

#### **Section 4 Reporting**

More frequently observed than actually complied with is the provision which calls for a written report from the President to the President Pro Tempore and the Speaker of the House within 48 hours of certain action. These actions specified are when US forces are introduced: 1) into "situations where imminent hostilities are clearly indicated" (section 4(a)(1)), 2) into foreign territory "equipped for combat", except for supply or training missions (section 4(a)(2)), or, 3) in numbers that "substantially enlarge US forces equipped for combat" already present (section 4(a)(3)). Only when a report is submitted under section



4(a)(1) (hostilities) does the 60 day time limit apply.

Of the 39 instances when US forces have been committed overseas from 1974 through 1992 (see Appendix A), sixteen have had one or more reports filed on them. Only one cited imminent hostilities (Mayaguez, 1975) and only one cited the "equipped for combat" section (Multi-National Observers in the Sinai, 1982). In the latter case, the use of forces had been previously authorized for peace-keeping purposes by public law (26). All other reports have been worded "taking note of the War Powers Resolution" (President Ford's favorite wording), or "consistent with the War Powers Resolution" (Presidents Reagan and Bush). Presidents Nixon and Carter never filed a report under the War Powers Resolution. The wording and submission of reports takes on special meaning and comes to the heart of part of the potentially conflicting issues.

The reporting provision is "the most substantive" portion of the Resolution, according to Charles Rostow, Special Assistant to Presidents Reagan and Bush and Legal Advisor to the National Security Council from 1987 to 1993. In that it does not limit the authority of the President, this clause is not constitutionally contestable. Presidents, however, have carefully avoided citing a specific paragraph in their reports for two reasons. First, such citation would constitute acknowledgement of the substance of the Resolution, and thus the resolution itself. Without specifying paragraphs, it further sends a signal of disapproval of the law. Secondly, and more importantly, citation of the hostilities paragraph (4(a)(1)), would automatically start the 60 day clock for the removal of forces unless Congress authorizes their retention. The main concern there, according to Rostow, is that it would encourage enemy forces either to engage our forces to start the clock, or once the clock is started, enemy forces would withdraw temporarily until US forces were themselves withdrawn (27). The latter case was seen during our Cambodia incursion in 1970. Had this scenario unfolded in the Persian Gulf in 1990 and the 60 day clock started, Iraqi forces might still occupy Kuwait.

Reporting "consistent with the War Powers Act" without citing specific paragraphs serves several

useful purposes. First, it gives the appearance of compliance to meet the legal requirements. Should there be a legal challenge to the President, he will have complied with the letter of the law, "because it is on the books" (28). Secondly, it does serve to inform the Congress of action taken. Thirdly, as a precursor to a request for a declaration of war or a peace treaty, it serves to justify US actions at that time. Lastly, it serves to inform the US public and our allies for the reason action has been taken. Although none of these reasons were intended by the law, it has also served these purposes.

### **Section 5 Congressional Action**

Section 5 contains most of the constitutionally questionable provisions. This is the section that contains the requirement to withdraw forces after 60 days if they were introduced under conditions of hostility or imminent hostilities. There is a provision for a 30 day extension if the President certifies that additional time is needed out of "unavoidable necessity".

The objections to this section stem from the requirement of the President to withdraw forces in the face of Congressional inaction, and in contradiction to his authority as commander-in-chief. Many claim that this constitutes a "legislative veto" over his delegated power. This issue will be discussed in more detail in section 5 when dealing with constitutional issues.

### **Section 8 Interpretation of Joint Resolution**

This section contains some of the most ambiguous wording of the Resolution. Section 8(d)(1) states that "Nothing in this Joint Resolution is intended to alter the constitutional authority of the Congress or the President...." Interpretation of this section by both Nathan and Rostow (29) is that this provision could render the entire Resolution invalid because it is a contradiction in that it does in fact limit the President's authority as commander-in-chief. This section will also be discussed in more detail under constitutional issues in section 5.

## **CONCLUSIONS ON THE ENACTMENT OF THE RESOLUTION**

Enactment of the War Powers Resolution was as much an indictment of President Nixon as it was the Vietnam war or the war-making powers themselves. Overriding the veto by three votes after eight previous attempts, given the political climate of the times, is hardly an overwhelming consensus that Congress thought the system was broken, or that they wanted any role in trying to fix it.

Whatever the circumstances, Congress did codify their interpretations of war-making. Although it specifically addresses consultation and reporting, it does not reflect the preciseness that is needed to completely correct the deficiencies as seen by its drafters (Javits, Eagleton, et al). In fact, Eagleton would argue that it exacerbates the problem because it gives the President power that he did not rightfully have before.

However flawed the Resolution may be, it is the law of the land. The proof of the utility of the law is seen in how it is applied, in what it has allowed and what it has prevented. The value of the law is seen in how it is respected, or how it is flaunted.

### **SECTION 4 WAR POWERS RESOLUTION IN CONFLICTS SINCE 1973**

It was clearly the intent of Congress when it passed the War Powers Resolution in 1973 that it be a full partner in the decision as to when, where and why US forces were introduced abroad. As the statement by Senator Eagleton concerning giving the President too much authority indicates, the Resolution had not even passed before there were serious questions concerning its adequacy. In vetoing the Resolution, President Nixon predicted that it would "give every future Congress the ability to handcuff future Presidents merely by doing nothing" (30). To what extent Presidents have been handcuffed, and to what extent Congress has become the full partner speaks directly to the adequacy of the War Powers Resolution.

## **PRESIDENTIAL COMPLIANCE**

Appendix A details thirty-nine instances where US forces have been committed overseas that have been, or could have been reported under the War Powers Resolution. The list starts with the evacuation of US citizens in Cyprus in 1974, and ends with the introduction of US forces in Somalia at the end of 1992. Rather than recount the details of each incident, it is more meaningful to analyze the trends that these 39 instances represent. Each instance is referenced in the appendix to facilitate further research. In addition to the specific references, the writings by Lehman and Summers, as well as both writings by Turner cited in the bibliography are recommended.

### **Presidents Nixon and Ford**

Ironically, the first incident that could have invoked the War Powers Resolution (but did not) was under President Nixon, but not in South East Asia. In the evacuation of Cyprus (1974), US forces were deemed to be performing a humanitarian mission away from the zone of hostilities and not armed for combat. No report was submitted and no consultations were held. Congress was mute on the entire incident. Over the remaining 20 years, six such evacuations would take place, three under President Ford in the South East Asia area. All three were "briefed" to congressional leaders and reported "taking note of the War Powers Resolution". Ford also submitted the only report to specifically cite section 4(a)(1), during the Mayaguez incident in May 1975. Armed forces equipped for combat and expecting hostilities were deployed to rescue an illegally seized US ship and crew. The starting of the 60 day time limit, however, was a moot point. The report was not even submitted until the operation was over! Also under the Ford Administration, section 4(a)(3) was used to justify non-reporting when the President ordered additional air and naval forces to alert status during the Korean tree-cutting incident (1976). Relative to the forces already in Korea, the additional forces placed on alert were not deemed to have "substantially enlarged" those forces already in Korea. Although consultations were held, no report was submitted. Congress objected verbally, but it took no other action.

The evacuation of Saigon provides an excellent illustration of the need for immediate action on behalf of the President, and the opposing concern for just deliberations on behalf of the Congress. The situation in South Vietnam, in fact in all of South East Asia, rapidly deteriorated in March-April 1975. President Ford had already evacuated Phnom Penh (Cambodia) and DaNang. Ford asked Congress for additional aid and authorization to use forces for 60 days to defend Saigon. The Senate approved such a resolution on April 25, the House delayed further debate until May 1. Frustrated and facing increasing military pressure to act, Ford ordered the evacuation of Saigon on April 28, including the use of "whatever action necessary to safeguard American lives." He reported to Congress "taking note of section 4 of the War Powers Resolution" on April 30. Although he technically violated the Resolution, and other limitations on funds and the use of US forces for military action in Vietnam, the operation was successful, therefore Congress "had little disposition to quibble" (31). The point is, that even with strong evidence that action is needed, the deliberations of Congress don't always meet the operational necessity. The President must, and did, make the appropriate decision and take the necessary action, making the concern for technical compliance a secondary consideration.

### President Carter

Under President Carter, only two instances are noted, both contributing to the interpretation of the Resolution. In the Zaire airlift of foreign troops (1978), the air-lifters (US Air Force) were not armed for combat and they didn't approach the hostile area. As in the Cyprus evacuation, relative distance to the area of hostilities was defined by the President to preclude reporting. In the abortive attempt to rescue the Iranian hostages (1980), prior consultations were not undertaken in order to insure security of the operation, and when it was canceled short of its objective, no report was deemed necessary. Carter's interpretation of the Resolution, his considerations of the reporting and consultation provisions, is consistent with his predecessors and his successors. Given that he was the only Democratic President

in this 20 year period where the Democrats controlled the Congress, it is evident that politics play no role in compliance. Party affiliation takes a back seat to the perspective from the Oval Office in dealings with Congress.

### President Reagan

The administration of Ronald Reagan saw the greatest number of events -- twenty -- over an eight year period; seventeen involved incidents in the Middle East. Reagan consulted with Congress twice, over the Multi-National Observers in the Sinai (1982) (because a public law was needed to support a UN commitment), and once over retaliation for attacks on US forces in the Persian Gulf. This is not as dire a score as it may appear. It must be taken into account that nine of Reagan's reports were after-the-fact reports detailing American actions in self-defense after being attacked.

In confirmation hearings as Secretary of State-designate, Alexander Haig vowed that the Reagan Administration "will live by the letter and the spirit of the law" in regard to the War Powers Resolution. Thus he was the first administration official to specifically acknowledge the legitimacy of congressional termination of an undeclared war since the Resolution became law (32). Reagan's performance indicates that this was no more true for his administration than for any prior or since. Reagan ordered Marines into Lebanon on two occasions, deployed AWACS aircraft to Egypt and Chad, ordered US aircraft to force down a civilian airliner to seize hijackers in the "Achille Lauro" incident, bombed Libya and invaded Grenada. In none of these cases were consultations conducted prior to action being taken, and on only four occasions did he report to Congress "consistent with the War Powers Resolution." One additional report was submitted in the case of the Marines in Beirut, but it was done citing a public law that Congress passed which invoked the War Powers Resolution after two Marines were killed in 1983.

Reagan's immense popularity as President, his decisiveness in taking action, and the way in which each incident was played out before the public, all served to place Congress in a defensive position.

Their protestations over specific actions fell on deaf ears in the public and the White House. In the case of the Marines in Beirut, Congress reacted only after the two Marines were killed, then they passed Public Law 98-119 authorizing them to remain in Lebanon for 18 months!

In the case of Grenada, President Reagan reported the same day the invasion commenced without citing section 4(a)(1). The House approved a resolution on November 1, calling for the War Powers to be operative October 25 (the day the landings began). The Senate attempted a similar action in the form of an amendment attached to an increase in the debt ceiling, but the bill was defeated. The session adjourned without it being reconsidered (33). No other Congressional action regarding the War Powers was taken over Grenada.

### President Bush

The Bush Administration, not surprisingly, followed the lead of the Reagan Administration in War Powers. In eight instances, Bush would, or could have reported. He chose not to report or consult in three instances (Philippines, Liberia, or Sierra Leone). In the instance of Panama, Bush did brief congressional leaders before action commenced, but after the decision was made and orders had been issued to military forces. Congress did little to object to the use of forces in Panama. The strain between the two countries could hardly have taken anyone by surprise. A few weeks prior to the invasion the US missed a chance to aid an abortive coup against President Noriega, and only five days prior, the Panamanian National Assembly declared "that a state of war existed between the Republic of Panama and the United States". Congress was not in session at the time of the invasion and there were no calls to reconvene. When they did come back into session a month later, they managed to pass a concurrent resolution on February 7, supporting the President's action -- thirty-five days after forces began to withdraw from Panama. Overwhelming popular support, an attempt to consult with Congress and withdrawal within 60 days, gave Congress no room to claim foul (34).

## The Persian Gulf

The largest mobilization and commitment of US forces since World War II provides another illustration of the workings of the war-making machinery, with a few new wrinkles.

When Iraq invaded Kuwait on August 2, 1990, President Bush immediately vowed "that this will not stand". He deployed the first troops on August 8, and reported "consistent with the War Powers Resolution" after consulting with congressional leaders. The invasion, and our deployment, were hardly a secret to anyone, hourly updates were provided courtesy of CNN and most other networks since the invasion started. The commitment of forces was done to deter further aggression and in order to allow time for economic sanctions to work. Therefore, reasoned President Bush, hostilities were not imminent, thus no 60 day time limit started. When he committed 150,000 additional troops in November, hostilities were still not imminent.

In the meantime, Bush worked directly with the United Nations and pushed for UN Security Council Resolution 678 (November 29, 1990) calling for Iraq to leave Kuwait. Armed with this Resolution, and without mention of the War Powers Resolution, on January 8, 1991, Bush asked Congress for a resolution supporting all necessary means to implement UN Resolution 678. On January 12, Congress passed Public Law 102-1, giving their full support. On January 18, Bush reported "consistent with the War Powers Resolution" that he had directed offensive combat operations against the Iraqis. Operations were suspended on February 28. At no time did Congress invoke the War Powers Resolution, nor did Bush report other than "consistent with" it. The UN Resolution and the public law were used to justify our largest use of armed force since World War II (35).

## Somalia

The final military action of the Bush administration covered under this report is the use of US forces in Somalia, again under UN auspices. UN Resolution 767 (July 27, 1992) called for all members to



provide emergency air lifts of food for humanitarian purposes to Somalia. In August the Congress passed S.Con. Res 132 urging the President to work with the UN and the US began flights on August 28. In December, the President deemed it necessary to insert ground forces to facilitate food distribution and protect lives and supplies. Although this is clearly a humanitarian mission, the President saw fit to report on December 19, 1992, detailing the use of forces equipped for combat -- that combat being necessary to provide the needed security (36).

### CONCLUSION ON COMPLIANCE

Neither the track record of the Executive or the Legislative Branch speaks very highly of the strength of the War Powers Resolution. Only two reports that cite specific paragraphs have been submitted and only one that would trigger the 60 day time limit has been offered. This in spite of the many conflicts we have seen in the past twenty years. Consultations have been replaced by briefings, but no serious efforts have been sustained to solicit congressional opinions, much less their advice. Presidents appear to have been unrestrained in their use of forces over a wide variety of instances throughout the world, and do so without regard to political persuasion. Congress, for its part, is unable or unwilling to take actions to reverse the trend. Only in the instance of the Persian Gulf and El Salvador has Congress sought judicial action (to be described in the next section) and without much success. **It can only be surmised that both parties are content with the status quo**, accepting Presidential leadership and initiative in committing forces and allowing Congress to remain a spectator on the sidelines. This being true then, wherein lies the conflict between the two branches of government?

## **SECTION 5 WAR POWERS AS A SOURCE OF CONFLICT**

### SEPARATION OF POWERS

As discussed in the opening paragraphs of this paper, the founding fathers intentionally delegated

separate powers to the Executive and Legislative Branches in order to divest the authority of both. In 1926, Justice Brandeis, writing in *Myers v. US*, stated "The doctrine of the separation of powers was adopted... not to promote efficiency, but to preclude the exercise of arbitrary power" (37). Corwin goes even further, in a generally recognized opinion, stating that under the delegated powers theory, silence on the part of the Constitution amounts to a **denial** of power (38). Thus, wherein the Constitution vests the power of Congress to declare war, it leaves no authority for the President to do so -- implicitly or explicitly.

Each war has seen the powers of Congress-willingly ceded to the Executive Branch. In fact, as we have seen, even uses of US forces overseas in instances short of a declared war have also contributed to this erosion of power. Congress surrendered its powers to Lincoln in the Civil War, to Wilson in World War I, and to FDR in World War II. It took a largely unpopular war, opposed by a majority of Americans, for the Congress to begin to wrestle back its powers in this area. The conflict arises not in the formal declaring of war, but in the gray area between the authority of the two branches in measures short of a declared war. This area is ill-defined and claimed by both branches. Only in instances where one or the other clearly usurps authority not delegated can a ruling be made. This was clearly demonstrated in the *Youngstown Sheet & Tube Co. v. Sawyer* (Steel Seizure Case) (1952) wherein President Truman preempted legal action by the Congress by ordering the seizure of a steel mill in the interest of national security. The Supreme Court overruled the seizure holding that the President had no authority to act simply because Congress had not used its authority (39).

### CONSTITUTIONALITY

The question of constitutionality of the War Powers Resolution provides a classic academic test of the conflict between the Executive and Legislative Branches. Delegated powers of the President as Commander-in-Chief, to make treaties and conduct foreign affairs, directly conflicts with the authority of Congress to declare war (as opposed to make war, as it was originally worded).

### Section 3

Several previously discussed aspects of the Resolution are of questionable constitutionality. Section 3, requiring consultation before introduction of forces, runs counter to the President's authority to commit forces under his vested authority as commander-in-chief. Any challenge against a President's action as being outside the War Powers Resolution citing violation of section 3 would probably be dismissed. "Consultation" has no legal meaning in the Resolution or Constitution, although the previously discussed intent that surfaced during the debate on the Resolution clearly indicates that Congress certainly intended more than mere briefings. As an imprecise word, failure to comply with intent would not be held to be a violation of the law. Secondly, the "in every possible instance" clause leaves to the President the determination of whether consultations are possible -- a very convenient loophole (40).

### Section 5

Section 5, also previously discussed in some detail, holds that forces may be committed for no more than 60 days unless Congress specifically authorizes them to remain. In the **absence of congressional action** the President's authority is overruled, constituting a "legislative veto" over his delegated powers. The legislative veto was held to be unconstitutional in 1983 in the Supreme Court ruling in *Immigration and Naturalization Service v. Chadha*. This section also holds that, at any time, Congress may direct the President to remove forces by passage of a concurrent resolution. A concurrent resolution circumvents the procedures laid out in Article I of the Constitution requiring that all laws passed be submitted to the President (the presentment clause). Thus, a challenge to the War Powers Resolution under this provision would hold it to be declared unconstitutional (41).

### Section 8

Lastly, section 8 adds about as much ambiguity to the constitutional question on the Resolution as

the two previously cited sections. Section 8(a)(1) states that the use of forces can not be inferred from any provision of law, to include Appropriations Acts, unless they state that the introduction of forces is specifically authorized. In other words, even if Congress authorizes funds for military action, it can not be inferred that the appropriation is authorizing military action. Section 8(d)(1) goes on to state that nothing in the Resolution is intended to "alter the Constitutional authority of the Congress or the President". One reading of this provision would indicate that it places the War Powers Resolution in a secondary position to the constitutional authority of the President as Commander-in-chief, and therefore not applicable if he cites that authority for taking military action. Another reading, by John Ely writing in the Columbia Law Review, is that section 8(d)(1) absolves the President from reporting, if such a report would result in the 60 day time limit being invoked and Congress withdrawing forces that he deployed acting as commander-in-chief. The fact that the report would be the instigation for the countering of his authority renders the reporting requirement invalid (42).

If all these concerns are valid -- of what real value is the Resolution?

### **JUDICIAL CHALLENGES**

The War Powers Resolution has yet to be challenged in any court -- let alone the Supreme Court. Inasmuch as the Supreme Court does not render advisory opinions, and no case having standing before the Court has arisen, the discussion of constitutionality is academic at this point. However, there are several court cases that are useful for discussion to frame some of the issues.

In November 1990, Congressman Ronald Dellums and 52 other congressman brought suit against President Bush over the use of offensive action against Iraq. Judge Harold Greene dismissed the suit, holding that the issue was not "ripe" for judicial resolution. A majority of the Congress had not sought relief (thus denying that Dellums and group had standing by themselves) and because Bush had not shown a commitment to the use of force over sanctions at that time (December 1990) (43). Another case decided in 1981 was dismissed on similar grounds. A suit against President Reagan by a group of

congressmen contended that his aid to the government of El Salvador violated the War Powers Resolution. Holding that there was no injury to the Congress, as a majority did not seek relief, the case was dismissed (44).

The courts have also consistently refused to entertain arguments over what they consider to be political questions. As recently as 1968, in *Flast V. Cohen* (45), the Court held that political questions are better answered by the political branches. This precedent was also cited in the dismissal in the case of an Army reservist who sought an injunction from serving in the Persian Gulf in 1990, contending that President Bush had exceeded his authority to order him to serve. US District Court Judge Royce Lamberth dismissed the case on the grounds that it was a political issue (46).

#### **THE WAR POWERS RESOLUTION AS AN EXECUTIVE CONSTRAINT**

There is no evidence that the War Powers Resolution has constrained the President in any way from introducing US forces as he sees fit. The 39 instances where forces have been committed were in no way diluted, shortened or jeopardized by any limitations imposed by the Resolution simply because the limitations were never made operative in any instance where it mattered.

This brings to question instances where forces may have been used, but weren't -- what some would call the battles not fought. There do not appear to have been any. According to Charles Rostow, during his six years in the White House (1987-1993) the War Powers Resolution was an afterthought. "We pay a President \$200,000 a year to make the right decision. He makes them based on the facts. The War Powers Resolution is an afterthought of the staff, not a consideration of the President" (47).

If the War Powers Resolution is not a restraint on the President in the use of forces, then what might be?

#### **ALTERNATIVE CONSTRAINTS ON THE EXECUTIVE**

Lehman contends that the power of the purse "is Congress's ultimate power to have the final say in

military affairs" (48). Just as past Congresses have signaled their unwillingness to cut off funding for forces controlled by the President, so too can Congress control any unbridled use of Executive authority in the future.

Likewise, Congress has the power to restrict specific actions by amendment or resolution. Prohibitions against the use of force in South East Asia, usually, but not necessarily, tied to appropriations contributed in a large degree to the winding down of US involvement there in 1973. The Boland Amendment, first passed in 1982, likewise prohibited the use of any expenditures in support of the Contras in Nicaragua. It was this amendment that was at the heart of the Iran-Contra controversy (49). Such measures have the power of law and can be more precise and directed with specific intent to address specific instances, rather than be broad in nature such as the War Powers Resolution.

Finally, Congress has the power to play the last hand -- it may impeach the President. While this may be considered a radical measure -- and indeed it is -- were the President inclined to openly violate the War Powers Resolution, Congress would be obligated to consider charges against him.

Regardless of political persuasion or good intentions, unless ruled unconstitutional by the Supreme Court, the War Powers Resolution is on the books as the law of the land. The President is therefore legally bound to see that all the laws -- this one included -- are faithfully executed (50).

### **CONCLUSIONS ON EXECUTIVE-LEGISLATIVE CONFLICT**

Although the War Powers Resolution is seen by some (Eagleton, Culver, et al) as vesting too much power in the President, the question of constitutionality rests more over the issues of legislative veto and constraint of delegated powers. A ruling based upon the Resolution as written would most likely find parts of it to be unconstitutional. In reality, its application has not constrained the Executive from exercising his powers.

The application of the law reflects de facto disregard on behalf of both branches. Where any conflicts have arisen, Congress has acquiesced to the Executive, much the same as it did before the Resolution was

passed. In view of this disregard, is there any value to leaving the Resolution on the books as presently written? Whether or not the Resolution should be amended, or simply repealed warrants further consideration.

## **SECTION 6 STATUS QUO, REPEAL OR AMEND ?**

### **THE NEED FOR ACTION**

The War Powers Resolution doesn't seem to be making the difference that the Congress had intended. Congress will continue to be frustrated about not being included in the decisions to make war or peace, because Presidents have not used the Resolution to make them full partners in the process. If Presidents have felt any constraint because of the Resolution, their deliberate actions to consider it any more than a nuisance has more than compensated for any constraint. What options then, lie ahead for the War Powers Resolution?

### **STATUS QUO**

The tendency and practice by the Presidents over the last 20 years has been to accept the Resolution as is and to work with it as best as possible. Granted, we haven't become immersed in another Vietnam, but then again, the opportunity has not presented itself in any conditions nearly resembling the Vietnam situation. Besides the Resolution itself, the legacy of Vietnam in terms of developing and growing better leaders -- both political and military -- who value the political objectives absent in Vietnam may have as much to say about our performance as does the written law. As these generations of leaders pass on, the hard-learned lessons will pass with them. This may be seen already when we have elected our first President in recent memory who has had no military experience, nor any experience in national politics or foreign policy. Challenges in foreign policy may not be as clearly presented as in the past. Bosnia may become the Vietnam of the future. If so, the War Powers Resolution as written and practiced is

inadequate to handle the situation. The status quo is, therefore, unacceptable.

### **REPEAL THE RESOLUTION**

An option of repealing the Resolution as unworkable is even more dangerous than accepting the status quo. Repealing it would not only leave no mechanism for deciding war or peace as the founding fathers intended, but it would admit that the separation of powers and sharing of the decision-making process doesn't work. Worse yet, it says that we don't even want to try to resolve the problem, thus giving in to the political realities of gridlock. For all the faulty safeguards contained in the Resolution, 200 years of history in war-making clearly shows that not having such legislation is certainly not the preferred answer.

### **AMENDING THE RESOLUTION**

An irony of the War Powers Resolution as presently written and practiced, is that had it been in effect in the 1960's it would not have prevented the Vietnam War. Forces would have still been able to be introduced under the provisions of the SEATO Treaty in accordance with section 2(c)(2) (which permits the President to introduce forces to hostilities or areas of imminent hostilities pursuant to specific statutory authorization, of which the SEATO Treaty qualifies). There was sufficient consultation about the use of forces in Vietnam, both prior to, during , and after the Gulf of Tonkin Resolution. It took until 1973 for the Congress to muster sufficient votes to cut off funds for military actions in Vietnam --in spite of the strong anti-war movement. Therefore, passage of a concurrent resolution to force withdrawal of forces could not have been expected. The law as written inadequately deals with the conditions that gave birth to its passage.

### **AREAS THAT DESERVE ATTENTION**

The following specific modifications to the War Powers Resolution will render it more viable and more applicable to future situations. Congress should take the lead to amend the War Powers Resolution



accordingly.

### **Reporting.**

- Require specific reference to a section 4 sub-paragraph when submitting any reports. An additional subsection citing actions taken in self defense should be added to account for reporting under these conditions.
- Require periodic meeting (recommended interval at least every 30 days) between Congressional leaders and the President once any report is submitted, even if submitted "consistent with" the War Powers Resolution or similarly indirect wording.
- Reports should include anticipated duration of operations, rules of engagement, and conditions of conflict termination. Congress should be concerned if these elements are not stated at the outset of any use of force .
- Allow for classified reports to be transmitted in order to safeguard the elements stated above, or for any other reason to safeguard US forces. When a classified report is submitted, a summation report should be submitted that is releasable to the public.

### **Consultation**

- Define consultation to include opinions from the members of Congress consulted. Require a consensus report from Congress back to the President within 24 hours. This will allow and require the Congress to go on record with the consensus of their collective judgement.
- Designate a "Permanent Consultative Group" along the lines discussed in Section 3.

### **Congressional Action**

- Change section 5(b) to require Congress to approve or disapprove the retention of US forces once reported by the President. In the absence of congressional direction to withdraw forces, they may remain at the pleasure of the President, except under conditions where Congress is prevented from meeting during that 60 day period due to a national emergency. Thus, inaction by Congress would suspend the 60 day clock, eliminating a principle argument against the Resolution. In this instance, an automatic extension of 60 days is granted. The decision of the President to retain forces or to invoke the 60 day automatic extension must be reported to the Congress within 48 hours of the decision as called for in section 4.

### **Concurrent Resolution**

- Change section 5(c) to require that a joint resolution be required to direct the President to withdraw forces. The joint Resolution would have to be submitted to the

President for his signature or veto. If vetoed, then a two-thirds majority is required to override his veto. This reinstates the presentment clause to make valid Congressional action and Presidential veto.

### **CONCLUSION ON THE STATUS QUO, REPEALING OR AMENDING**

Amending the present War Powers Resolution is the only conceivable option to insure the separation of powers and sustain our ability to make rational decisions in the making of war or peace. The recommendations presented above are not all-encompassing, but they do address and remedy the most significant weaknesses of the present Resolution. In addition, they should be acceptable to both the Congress and the President in an honest effort to improve the entire decision-making process.

### **SECTION 7 FINAL CONCLUSIONS**

The 93d Congress had every reason to be concerned in 1973 about the erosion of its authority and its place in the decision-making over war and peace. Before the War Powers Resolution was passed, each succeeding conflict saw more authority usurped by the President and more acquiescence by the Congress. It took as divisive and bitter a conflict as Vietnam for Congress to reverse the trend of surrender.

The War Powers Resolution represents a mechanism to fulfill the intent of our founding fathers. This intent was that the decision to go to war is a shared decision -- that no single person or body of persons could make that decision or shoulder that responsibility. Once the decision was made, it was likewise the responsibility of the two branches to see it through to whatever end: the President as commander-in-chief, the Congress by regulating the "militia", the army and the navy and appropriating the funds. The decision to enter the war doesn't stop the responsibility of either party. Openness in the process is critical to the success of the process. Secret dealings, covert operations -- by either branch --- was to be avoided. It was such dealings that entangled us in many of our conflicts of the 19th century as much as it did in the Iran-Contra fiasco.

Nor was the Executive to be handcuffed in the rapid exercise of his authority either. In 1787 the

defense of the new nation against the British was of primary concern. Today technology demands rapid response in a crisis situation, or we all chance suffering the consequences. The War Powers Resolution was not intended to preclude Executive action in evacuating citizens abroad or in defense of US forces in trouble spots. It was intended to prevent us from becoming involved in another Vietnam, where political objectives were vague and not reasoned out, and military intent was even less so. That we haven't entered into another Vietnam is more a credit to our civilian and military leaders of today. It is they who learned the lessons of Vietnam and still have them in their minds. What has kept us from another Vietnam is the greater lesson we learned -- that political objectives drive military options and to use military power as a last resort -- not first-- and to use it judiciously. These lessons are all crafted into an art by a generation raised and molded by the Vietnam experience. The War Powers Resolution hasn't failed us yet, but neither has a situation arisen to fully test its application. Our present leaders won't serve forever. We are already seeing officers eligible for general and flag ranks who have no Vietnam experience. Neither can we count on our luck and circumstances to keep Vietnam-like situations from entering our foreign policy purview.

Our current dilemma over our involvement in Bosnia has again given rise to concerns over the War Powers Resolution. The slowness with which we have moved to become involved gives credence to our concern for becoming entangled without clear objectives. It has also renewed discussions over the adequacy or inadequacy of the War Powers Resolution under such circumstances. Senator Joseph Biden (D-Del.), senior member of the Senate Foreign Relations Committee, may introduce legislation this term that addresses many of the shortcomings of the War Powers Resolution. He originally introduced his proposals in 1988, without further action being taken on them (51). He now feels that this current situation may present the proper backdrop against which to raise the issue. Such proposals are significant and deserve the attention of the Congress and the President.

The intent of the War Powers Resolution is commendable and necessary. The present law needs

amending to become acceptable to the Executive and workable to the Congress. A workable War Powers Resolution will make Presidential usurpation less possible and Congressional acquiescence unforgivable. Under the Clinton Administration, with a more friendly Congress, such amendments are more likely to pass than perhaps at any time in the twenty year life of the Resolution. The lessons of history recounted here and in the recommended readings can be repeated. How we handle them will be the real test.

In the debate over the War Powers Resolution in 1972, constitutional scholar Alexander Bikel wrote:

"There is no assurance of wisdom in Congress, and no such assurance in the presidency, on domestic problems or foreign. The only assurance there is lies in process, in the duty to explain, justify and persuade, to define the national interest by evoking it and thus to act by consent. Singly, either the President or Congress can fall into bad errors, of commission or omission. So they can together, too, but that is somewhat less likely, and in any event, they are all we've got" (52).

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42. Ely, "Suppose Congress Wanted A War Powers Resolution That Worked," 1392.

43. Nathan, "Curbing the Distress of War," 618.

44. Case cited is *Crocket v. Reagan*, 720 F.2d 1355 (1981). For further discussion see Nathan, "Curbing the Distress of War," 618.

45. Case cited is *Flast v. Cohen*, 88 S.Ct 1942 (1968). For discussion see Velvel, *Undecided War and Civil Disobedience*, 125.

46. Case cited is *Ange v. Bush* (DDC Dec 13, 1990). For further discussion see Velvel, *Undecided War and Civil Disobedience*, 125.

47. Rostow, interview with the author.

48. Lehman, *Making War*, 268.

49. Lehman, *Making War*, 269, and Velvel, *Undecided War and Civil Disobedience*, 258.

50. Corwin, *The President: Office and Powers*. 353.

## SECTION 7

51. Biden, "The War Powers at a Constitutional Impasse." and Carroll J. Doherty, "The Reluctant Warriors." *Congressional Quarterly Weekly Report*. (Feb. 13, 1993) 322.
52. Culver, "The War Powers Resolution," 241.



# APPENDIX A: INSTANCES OF U.S. FORCES COMMITTED OVERSEAS 1974-1992

INCIDENT (PRESIDENT)	DATE(S)	CONGRESS CONSULTED	WRITTEN NOTIFICATION	WAR POWERS CITED	ISSUE (REFERENCE:PAGE)
Evacuation of U. S. Citizens in Cyprus (Nixon)	22 Jul 74	No	No	No	U. S. Forces not in "hostile zone" Humanitarian mission U. S. Forces unarmed (1:173-174)
Cambodian Resupply Missions (Nixon)	Jun 74- Apr 75	No	No	No	GAO: "No imminent hostilities" (1:175)
Recon Flights Over Cambodia (Ford)	Aug 74- Feb 75	No	No	No	No clear potential for conflict To trigger reporting requirements (1:176)
Danang Sealift (Ford)	Mar-Apr 75	No (in recess)	Apr 4, 75	"Taking note of WPR"	First Report to Congress No specific paragraph (2:12)
Evacuation of Phnom Penh (Ford)	Apr 12, 75	Apr 12, 75 Briefed	Apr 12, 75	"Taking note of Section 4"	General plan briefed to selected congressional leaders. No opinions solicited. (1:188)
Evacuation of Saigon (Ford)	Apr 28-29, 75	Apr 29, 75 Briefed	Apr 30, 75	"Taking note of WPR"	Congressional leaders briefed and refused opinion. (1:190)
Mayaguez Incident (Ford)	May 12-15, 75	May 13-14, 75 Phone Calls by Aides	May 15, 75	"Taking note of Section 4(a)(1)"	Fourth report in six weeks Only report to cite paragraph in WPR operation over before report submitted. (2:81)
Lebanon Evacuation (Ford)	Jun 20, 76 Jul 27, 76	No	No	No	No consultation needed Hostilities not imminent Humanitarian mission (1:224)
Korean Tree Cutting (Ford)	Aug 27, 76	"Vigorous informal consultations"	No	No	Substantial numbers not introduced. Widespread popularity (1:226)

INCIDENT (PRESIDENT)	DATE(S)	CONGRESS CONSULTED	WRITTEN NOTIFICATION	WAR POWERS CITED	ISSUE (REFERENCE:PAGE)
Zaire Airlift (Carter)	May 19-27, 78	"Informal"	No	No	Lift of Foreign Troops U.S. "Not equipped for combat" Not within 100 miles of hostilities Congress accepted executive interpretation (1:234)
Iran Hostage Rescue (Carter)	Apr 24-25, 80	No	Apr 26, 80	No	Cited constitutional authority No hostilities imminent because operation cancelled. Prior consult endangered success. (1:246)
El Salvador Assistance (Reagan)	Mar, 81	No	No	No	Increased advisors From 40 to 76 Considered significant by Congress Hostilities Imminent (1:249)
Gulf of Sidra (Reagan)	Aug 19, 81	No	No	No	Single incident. Defensive action by U.S. aircraft.
Multinational Observation in Sinai (Reagan)	Mar 19, 82	Yes	Mar 19, 82	Yes Para 4(a)(2)	Authorized by PL 97-132 Armed for combat Congress authorized for peacekeeping (3:57)
Lebanon Landings (Reagan)	Aug 25, 82	No	Aug 24, 82	No	Cited constitutional authority. "Non-combatant mission Withdrawn in 30 days (3:60)
Lebanon Landings (Reagan)	Sep 29, 82	No	Sep 29, 82	"Consistent with WPR"	No paragraph cited. "No expectation of hostilities" (3:62)
Honduras (Reagan)	1983	No	No	No	Use of training forces Prolonged over 19 months (4:12)
AWACS to Egypt (Reagan)	Mar 18, 83	No	No	No	AWACS deployed after Libyan bombing incident (4:12)
AWACS to Chad (Reagan)	Aug 7, 83	No	Aug 8, 83	"Consistent with WPR"	Cited constitutional authority. "Desire to keep congress informed" (4:64)
Marines in Beirut (Reagan)	Same Deployment As Sep 29, 82	Congress Declared WPR Operative	Aug 30, 83	Reported in accordance with PL 98-119	Congress declared WPR operative Aug 29, 83 after two Marines were killed. Passed PL 98-119 authorizing deployment for 18 months. (4:65)

INCIDENT (PRESIDENT)	DATE(S)	CONGRESS CONSULTED	WRITTEN NOTIFICATION	WAR POWERS CITED	ISSUE (REFERENCE:PAGE)
Grenada Invasion (Reagan)	Oct 25, 83	No	Oct 25, 83	"Consistent with WPR"	Cited constitutional authority Congress passed Joint Res 402 supporting. (3:88)
Achille Lauro Incident (Reagan)	Oct 10, 85	No	No	No	USN pilots force down Egyptian aircraft; Capture hijackers No Congressional response (4:64)
Freedom of Navigation Exercises Gulf of Sidra (Reagan)	Mar 24-25, 86	No	Mar 26, 86	No	U.S. Forces acted in self defense Cited constitutional authority "In accordance with my desire to keep Congress informed" WPR not mentioned (3:88)
Libya Bombing (Reagan)	Apr 14, 86	No	Apr 16, 86	"Consistent with WPR"	Cited constitutional authority (3:90)
Attack on USS Stark in Persian Gulf (Reagan)	May 17, 87	No	May 20, 87	No	Sec State letter after attack on US Vessel. (3:91)
U.S. Engagement of Iranian Mine Layer (Reagan)	Sep 21, 87	No	Sep 23, 87	No	Declared self defense in accordance with UN Charter, Article 51 (3:102)
Iranian Attack on USMIDFOR for Aircraft (Reagan)	Oct 8, 87	No	Oct 10, 87	"Consistent with WPR"	Defense actions in accordance with UN Charter, Article 51 (3:102)
U.S. Attack on Oil Platform (Reagan)	Oct 19, 87	Yes	Oct 20, 87	"Consistent with WPR"	Response to Attacks on U.S. Vessels on 8 and 15 October. Congressional Leaders briefed. Cited Constitutional Authority. (3:99)
Mine attack on USS Roberts (Reagan)	Apr 14, 88	No	Apr 19, 88	"Consistent with WPR"	Unprovoked mine attack at sea Retaliation on Iranian targets in self defense under UN Charter Article 51 (3:107)
USS Vincennes downs Iranian Aircraft (Reagan)	Jul 3, 88	No	Jul 4, 88	No	Accidental downing--Acting in self defense. Reported "To keep Congress informed" (4:11)
Iranian Attack on US Helos (Reagan)	Jul 12, 88	No	Jul 14, 88	No	Unprovoked attack Reported "To keep Congress informed" (4:12)

INCIDENT (PRESIDENT)	DATE(S)	CONGRESS CONSULTED	WRITTEN NOTIFICATION	WAR POWERS CITED	ISSUE (REFERENCE:PAGE)
US Assistance in Philippines (Bush)	Dec 2, 89	No	Dec 2, 89	No	Combat Air Patrols during coup Reported "To keep Congress informed" (4:12)
Panama (Bush)	Dec 20, 89	Yes	Dec 21, 89	"Consistent with WPR"	No specific paragraph cited. Briefed Congressional leaders after decision, before action. Very popular action with public and Congress. Feb 7, 90 H. Con. Res 262 supported action. (4:9)
Evacuation of Liberia (Bush)	Aug 6, 90	No	Aug 6, 90	No	Evacuation of U.S. Citizens (4:12)
Persian Gulf War Deployment (Bush)	Aug 8, 90 ----- Nov 8, 90	Yes ----- No	Aug 9, 90 ----- Nov 16, 90	"Consistent with WPR" ----- No	"Hostilities not imminent." Initial deployment (4:5) ----- Continuation of deployment of Aug 8, 90. Additional 150,000 troops deployed. "Hostilities not imminent." (4:5)
Combat Operations Against Iraq (Bush)	Jan 16, 91	Yes	Jan 16, 91	"Consistent with WPR"	PL 102-1 (Jan 12, 91) authorized President "All necessary means to implement UN Resolution 678. Operations suspended Feb 28, 91. (4:5).
Evacuation from Sierra Leone (Bush)	May 3, 92	No	No	No	Non combat evacuation (4:13)
Somalia Relief (Bush)	Aug 28, 92	Yes	No	No	UN Resolution 767 (Jul 27, 92) calling for emergency airlift of food. S. Con. Res 132 (Aug 14, 92) expressed support. U.S. begins airlift Aug 28, 92 (4:3)
Ground Troops to Somalia (Bush)	Dec 19, 92	Yes	Yes	Yes	Humanitarian mission. Report submitted because troops equipped for combat. (5)

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2. Holt, Pam M. *The War Powers Resolution* (Washington, D.C.: American Enterprise Institute, 1978).
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4. Ellen C. Collier, *War Powers Resolution: Presidential Compliance* (Washington, D.C.: Congressional Research Service, 9 Nov. 1992).
5. Charles N. Rostow, interview with author, Washington, D.C., 6 Jan. 1993.

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