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War Powers Resolution: Its Past Record and Future Promise

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WAR POWERS RESOLUTION: ITS PAST RECORD AND FUTURE PROMISE

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I. INTRODUCTION

The Loyola of Los Angeles Law Review is to be commended for sponsoring this symposium on the War Powers Resolution (WPR). November 7, 1983 marked the tenth anniversary of the enactment of the Resolution over the President's veto. The continuing significance of the Resolution was demonstrated by the fact that only six days before that anniversary, the House passed, by a vote of 403-23, a joint resolution invoking the provisions of the War Powers Resolution with respect to United States military action in Grenada.[1]

The sequence of events leading to its formulation, and the political dynamics surrounding its passage have been adequately dealt with elsewhere.[2] Accordingly, the main focus of this article concerns the implementation of the Resolution during its ten year history by the Executive and the Congress.

This discussion of WPR implementation is divided between executive-legislative implementation under the Ford and Carter Administrations, and implementation under the Reagan Administration. The principal reason for this division is that the clearest applications of the Resolution, and the clearest challenges to its effectiveness, have occurred as a result of decisions by the Reagan Administration to commit troops into Lebanon and Grenada. The Ford and Carter Administrations did not engage in such clear-cut military actions on a major scale.

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* Ph. B. 1936, Marquette University; Wisconsin State Senator 1942-48; United States Representative 1948-83. Co-author of the War Powers Resolution, the Honorable Clement J. Zablocki passed away on December 3, 1983, after having approved this article for publication by the Loyola of Los Angeles Law Review.

1. H.R.J. Res. 402, 98th Cong., 1st Sess., 129 CONG. REC. H8933-34 (daily ed. Nov. 1, 1983).

2. *See* STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 97TH CONG., 2D SESS., REPORT ON THE WAR POWERS RESOLUTION: A SPECIAL STUDY OF THE COMMITTEE ON FOREIGN AFFAIRS, 103-10 (Comm. Print 1982) [hereinafter cited as SULLIVAN STUDY].

II. FORD AND CARTER IMPLEMENTATION OF THE WAR POWERS RESOLUTION

The political embarrassment of a veto override and the resistance to share war powers responsibilities that had been virtually conceded to Presidents by Congress after World War II, made the executive branch slow to establish procedures for WPR implementation in the first year after passage. In fact, it was not until October 1974 that the State Department established procedures for compliance. Furthermore, those procedures were established only after a letter to the Secretary of State from the Chairmen of the House Foreign Affairs Committee and the Senate Foreign Relations Committee in July 1974, inquiring as to "what arrangements have been made within the Executive branch to ensure full and timely compliance."[3]

Executive branch implementation was only marginally better during the series of tests of compliance during the 1974-1980 period.[4] A short discussion of these tests follows.

A. Danang Sealift

President Ford's use of United States military aircraft to evacuate American citizens and Vietnamese refugees during the collapse of South Vietnam in the spring of 1975 was the first test of WPR compliance. This test concerned two sections of the War Powers Resolution. First, the sealift tested section 3 which requires the President to consult with Congress in every possible instance before introducing United States Armed Forces into hostilities or into imminent involvement in

3. Letter from Hon. Thomas E. Morgan, Chairman, House Committee on Foreign Affairs and Senator J.W. Fulbright, Chairman, Senate Committee on Foreign Relations, to Henry A. Kissinger, Secretary of State (July 16, 1974), *reprinted in* STAFF OF HOUSE SUBCOMM. ON INT'L SECURITY & SCIENTIFIC AFFAIRS OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 98TH CONG., 1ST SESS., THE WAR POWERS RESOLUTION: RELEVANT DOCUMENTS, CORRESPONDENCE, REPORTS 37 (Comm. Print 1983) [hereinafter cited as RELEVANT DOCUMENTS].

4. For other incidents which raised possible questions among members of Congress concerning WPR applicability, see *infra* notes 5-20 and accompanying text. These incidents include: the unarmed military evacuation of Americans from Cyprus in July 1974, food and military equipment resupply of Cambodia by unarmed military aircraft in the summer of 1974, unarmed reconnaissance flights over Cambodia in late 1974 and early 1975, unarmed military evacuation of Americans from Lebanon in June 1976, the deployment of 300 United States troops under the United Nations flag into the demilitarized zone in Korea after the North Korean attack on United States and South Korean soldiers attempting to cut down a tree in the zone in August 1976, the airlift of military equipment to Zaire in May 1978, and the participation of United States troops in joint military maneuvers with Honduras throughout 1982 and 1983. *See also* SULLIVAN STUDY, *supra* note 2, at 173-77, 221-37.

hostilities.[5] Second, Ford's act concerned section 4 which requires the President to report to Congress whenever 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 (with certain exceptions); and (3) in numbers which substantially enlarge United States armed forces equipped for combat already located in a foreign nation.[6]

The reporting requirement of section 4 is the essential element of the War Powers Resolution. If the President files a report under the first circumstance listed above (section 4(a)(1)), United States troops must be removed within sixty days unless Congress, under section 5(b) of the Resolution, extends their presence by authorization or declaration of war. Through the reporting requirement, Congress thus reserves for itself the exercise of the mandate provided exclusively to Congress by the Constitution on the final decision on committing troops into war.

As such, the Danang sealift represented the first of several initial tests of executive branch compliance with the War Powers Resolution. More importantly, it provided an indication of whether the executive branch would acknowledge the constitutional validity of the Resolution or rely on claims of executive power of the Commander-in-Chief to justify its actions.

Post World War II Presidents have used the phrase "Commander-in-Chief" to justify waging wars without congressional approval. Its usage has also been part of a myth about the constitutional importance of the Commander-in-Chief.

The notion that the President can decide whether or not to seek congressional approval for committing troops is not evident in the Constitution or in the statements of the founding fathers. The fact that executive branch lawyers say there is such evidence does not give it constitutional foundation.

While some of the Founding Fathers were concerned about this issue, James Madison commented that the executive has no right, in any case, to decide whether there is cause for declaring war.[7] Madison added that the power of judging the causes of war rests exclusively with

5. War Powers Resolution of 1973, § 3, 50 U.S.C. § 1542 (1976).

6. *Id.* § 4, 50 U.S.C. § 1543(a).

7. *See, e.g.*, THE FEDERALIST No. 41, 48 (J. Madison) (J. Cooke ed. 1961). In Federalist No. 41, *id.* at 276, Madison implicitly refers to the Federalist Papers of Hamilton in which Hamilton unequivocally states that the legislative branch, not the executive branch, has the

the legislative branch. In short, there is nothing vague or amorphous about who receives the vast bulk of war powers under the Constitution. It is Congress.

Executive branch compliance concerning the Danang sealift was disappointing at best. Rather than seeking Congress' views beforehand, legislative "consultation" involved reporting the President's decisions to various members of Congress, thereby constituting nothing more than after-the-fact information. The executive branch's report to Congress cited the President's authority as Commander-in-Chief as the legal authority under which the sealift was undertaken and the report failed to specifically cite any of the three subsections of section 4 as the basis for the report.[8] This method of compliance, which avoided the triggering of section 5(b), set in motion a pattern of half-hearted executive branch compliance with the War Powers Resolution which has persisted to this day. This attitude has also frustrated the development of a collective judgment by Congress and the President on the decision to commit troops to hostilities or to imminent involvement in hostilities that motivated the authors of the Resolution, and is reflected in section 2(a) of the Resolution.

B. Cambodian Evacuation

The evacuation of Americans and Cambodians from Phnom Penh in April 1975 by United States military aircraft also involved deficient compliance with sections 3 and 4. Consultation once again more accurately resembled information about a decision that had already been taken by the President. Furthermore, attempts by members of the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations to discuss evacuation plans for Phnom Penh in the weeks preceding the actual evacuation were rebuffed by the State Department, ignoring the provisions of section 3.[9] The report to Congress "took note of section 4 of the War Powers Resolution,"[10] disregarding the requirement to report under section 4(a)(1) and avoiding the requirements of that section.

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exclusive power to decide whether the United States should enter a war. *See* THE FEDERALIST No. 24, at 153 (A. Hamilton) (J. Cooke ed. 1961).

8. Report from the President of the United States to the Hon. Carl Albert, Speaker of the House, Compliance with Section 4(a)(2) of the War Powers Resolution (Apr. 4, 1975), *reprinted in* RELEVANT DOCUMENTS, *supra* note 3, at 40-41.

9. *See* SULLIVAN STUDY, *supra* note 2, at 188.

10. PRESIDENT OF THE UNITED STATES, REPORT ON EVACUATION OF UNITED STATES NATIONALS FROM CAMBODIA, H.R. DOC. NO. 105, 94 Cong., 1st Sess. (1975), *reprinted in* RELEVANT DOCUMENTS, *supra* note 3, at 42.

C. *Saigon Evacuation*

The final evacuation of Americans and Vietnamese in Saigon by United States military aircraft in late April 1975 also involved sections 3 and 4. In this instance, consultation was extensive, but took place in the context of President Ford's legislative request submitted earlier in the month for authority to evacuate United States and Vietnamese nationals in the event South Vietnam collapsed, notwithstanding existing legal prohibitions on the use of American forces in Southeast Asia. Congress failed to provide such authority, and President Ford relied on Commander-in-Chief powers to authorize the evacuation. As a result, the failure of Congress to enact special legislative authority seemed to compromise its power in the commission of troops through joint legislative-executive action, thereby undermining full WPR compliance. The report to Congress followed the pattern of the first two reports and only "took note" of section 4. Even the most charitable of congressional observers in 1975 could only give the executive branch mixed marks for its compliance and some regarded it as "questionable in law and unsatisfactory."[11]

D. *Mayaguez Incident*

President Ford's effort to rescue Americans on the United States freighter Mayaguez captured by the Khmer Communist forces in international waters on May 12-15, 1975, raised section 3 and 4 questions. Consultation with Congress occurred after the fact and involved informing about twenty congressional leaders by telephone and briefings for relevant congressional committees.[12] Following past procedure, the report failed to cite any specific parts of section 4 and relied on Commander-in-Chief powers for authority.[13] Nonetheless, the report did take "note of section 4(a)(1)" for the first time, suggesting that congressional authorization for United States military activities in Cambodia would have been required if the operation had lasted more than sixty days.[14]

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11. *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident, 1975: Hearings Before Subcomm. on Int'l Security & Scientific Affairs of the House Comm. on Int'l Relations*, 94th Cong., 1st Sess. 69 (1975) (statement of Senator Jacob Javits, Ranking Minority Member, Senate Foreign Relations Committee) [hereinafter cited as *Compliance Hearings*].

12. For a detailed description of the congressional consultations during the Mayaguez incident, see SULLIVAN STUDY, *supra* note 2, at 208-20.

13. PRESIDENT OF THE UNITED STATES, THE S.S. MAYAGUEZ, S. DOC. NO. 56, 94th Cong., 1st Sess. (1975).

14. *Id.* at 1.

More disturbing, however, was a statement submitted for the record during hearings held in May and June 1975 by the Subcommittee on National Security Policy and Scientific Developments of the House Committee on Foreign Affairs, by Monroe Leigh, the State Department's legal adviser. Leigh, in responding to a congressional inquiry, cited six circumstances in which he claimed that the President had inherent constitutional authority to commit American forces into hostilities other than the three cases specified in section 2(c) of the War Powers Resolution (declaration of war, specific statutory authorization, and national emergency created by an attack upon the United States, its territories, possessions or armed forces).[15] The six circumstances were (1) to rescue American citizens abroad; (2) to rescue foreign nationals where such action directly facilitates the rescue of United States citizens abroad; (3) to protect American Embassies and legations abroad; (4) to suppress civil insurrection in the United States; (5) to implement and administer the terms of an armistice or cease-fire designed to terminate hostilities involving the United States; and (6) to carry out the terms of security commitments contained in treaties.[16]

This expansive definition of presidential authority stood in stark contrast to the tightly drawn definition fo section 2(c). Furthermore, item six directly contradicted section 8(a)(2) of the War Powers Resolution which stated that authority to commit United States troops into hostilities "shall not be inferred from any treaty . . . unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities . . . ."[17] The Leigh memorandum demonstrated that half-hearted compliance with the War Powers Resolution was to be accompanied by an executive branch attitude that inherent constitutional authority enabled the Commander-in-Chief to defy the Resolution's provisions.

E. Iran Hostage Rescue Operation

President Carter's decision to use military force to rescue United States Embassy personnel held hostage in Iran on April 25, 1980, also involved the consultation and reporting provisions of sections 3 and 4. Consultation with Congress in this mission was non-existent; several attempts to obtain information about the rescue operation beforehand

15. Leigh added that the six circumstances were not exhaustive. For the full text of Leigh's statement, see *Compliance Hearings, supra* note 11, at 2-40, 76-101.

16. *Id.*

17. War Powers Resolution of 1973, § 8(a)(2), 50 U.S.C. § 1547(a)(1) (1976).

were rebuffed by the Carter Administration.[18] The report was even less specific than those of the Ford Administration. The Carter Administration merely cited "the reporting provisions of the War Powers Resolution."[19]

More troubling was the legal justification for the President's action. The President's legal adviser, Lloyd Cutler, sent a memorandum to the House and Senate foreign affairs-related committees arguing that the President had no requirement to consult Congress because (1) in the first stages of the operation (the landing in the Iranian desert), no hostilities were involved and the operation was aborted before hostilities began; (2) the President has inherent authority to conduct rescue operations and section 8(d)(1) of the War Powers Resolution provided that nothing in the resolution was intended to alter the President's constitutional authority; and (3) there is reasonable ground to believe that consultation would unreasonably endanger the mission and therefore would endanger exercise of the inherent constitutional authority recognized by section 8(d)(1).[20]

The Cutler memorandum represented perhaps the most serious affront ever exercised against WPR implementation. Instead of accepting the specific exercises of Commander-in-Chief powers cited in section 2(c), the memorandum turned logic on its head by citing the inherent powers of the President as Commander-in-Chief (which the authors of the Resolution never accepted). The memorandum also used section 8(d)(1) to justify the use of inherent executive powers—even to the point of avoiding prior consultation with Congress before committing troops. The logical extreme of the Cutler memorandum echoed the Leigh statement in that the memorandum seemed to argue that inherent constitutional powers enabled the President to ignore the Resolution's requirements altogether.

Furthermore, the Cutler memorandum attempted to narrowly de-

18. Letter from Senator Frank Church, Chairman, Senate Foreign Relations Committee, and Senator Jacob Javits, Ranking Minority Member, Senate Foreign Relations Committee, to Cyrus Vance, Secretary of State (April 24, 1980) (recommending consultation on possible military action to rescue hostages, written the day before the rescue mission). *See* SULLIVAN STUDY, *supra* note 2, at 241-42. Senator Henry Jackson, ranking majority member of the Senate Armed Services Committee, also undertook efforts to obtain information beforehand. *Id.* at 242.

19. PRESIDENT OF THE UNITED STATES, USE OF UNITED STATES ARMED FORCES IN THE ATTEMPTED RESCUE OF HOSTAGES IN IRAN, H.R. DOC. NO. 303, 96TH CONG., 2D SESS. 1 (1980).

20. Legal Opinion of Lloyd Cutler, Counsel to President Carter, War Powers Consultation Relative to the Iran Rescue Mission (May 9, 1980), *reprinted in* RELEVANT DOCUMENTS, *supra* note 3, at 50.

fine "imminent involvement in hostilities" with respect to section 4(a)(1). The landing in Iran was viewed as separate from the effort to rescue the hostages (which was aborted). As a result, the memo did not see the entire operation as clearly including "imminent involvement in hostilities" from the outset. Such definitions and assertions constituted nothing more than calculated efforts to further limit situations in which WRP provisions were relevant.

In short, from a candidate who, in 1976, said he supported the War Powers Resolution, President Carter had come a long way—in the wrong direction.

F. Assessment of Ford-Carter Implementation of the War Powers Resolution

Three major points must be made about the implementation of the War Powers Resolution under the Ford and Carter Administrations.

First, as previously stated, executive branch compliance was half-hearted at best and deliberately evasive at worst. No report was filed pursuant to a specific subsection of section 4. Whatever grudging deference to the Resolution was implied by the fact that both Administrations provided reports which merely "took note of the War Powers Resolution," was more than offset by the thrust of the Leigh and Cutler memoranda. Unfortunately, those two memoranda attempted to claim that inherent presidential powers permitted non-compliance with the law. The Cutler memorandum breached logic completely by gratuitously citing—and erroneously misinterpreting—a provision of the Resolution to support the doctrine of inherent presidential powers in committing troops, a denial emphatically established in the legislative history of the War Powers Resolution.[21]

Second, Congress could have been more determined in its oversight of executive branch compliance. Hearings and briefings fell short of establishing a strong institution-wide consensus on the adequacy of WRP compliance or what procedures should be established to regularize consultations under section 3 and force more specific compliance with the reporting requirements of section 4.

The principal reason for this inadequate oversight lies in the political dynamics surrounding the various tests of compliance. Each case involved the safety of Americans and the military actions were evacuation efforts. Each action was politically popular when it was undertaken, of short duration, and involved objectives which overshadowed

21. RELEVANT DOCUMENTS, *supra* note 3, at 50.

concerns about the supposed technicalities of consultation and reporting under the War Powers Resolution. Achieving congressional consensus on a political strategy for insuring executive compliance with the War Powers Resolution is difficult enough; under circumstances of politically popular short-term rescues of American citizens, it became impossible.

Finally, none of the tests of compliance were of the order of magnitude or duration resembling the Vietnam War, the trauma of which had built the political foundation for passage of the War Powers Resolution. They were elementary and partial trials of the statute's effectiveness. None of the situations had serious foreign policy implications or long-term foreign policy objectives nor did they involve conscious efforts to deploy troops to attain such objectives. Nonetheless, the pattern of unsatisfactory executive branch compliance and somewhat tepid congressional oversight tended to tarnish the credibility of the Resolution. The coming to power of the Reagan Administration and its willingness to use military forces in the Middle East and the Caribbean, however, provided the first real test of the effectiveness of the War Powers Resolution.

III. WAR POWERS IMPLEMENTATION UNDER THE REAGAN ADMINISTRATION

A. Early Challenges

The onset of the Reagan Administration brought on a number of early challenges of WRP implementation and effectiveness. First, President Reagan's dispatch of United States military personnel to El Salvador in March 1981 led some members of Congress to question their possible involvement or imminent involvement in hostilities under the meaning of section 4(a)(1).

The Administration countered the belief that United States military personnel were not equipped or authorized to enter into combat. Special precautions were also being taken to ensure American safety, and personnel would not be permitted to go on patrol with Salvadoran forces. The Administration further stated that Americans would only train Salvadoran forces in areas removed from significant fighting. In addition, after a letter from the Chairman of the House Foreign Affairs Committee in March 1981,[22] the Administration agreed to provide pe-

22. Letter from Hon. Clement J. Zablocki, Chairman, House Committee on Foreign Affairs, to Alexander M. Haig, Secretary of State (March 6, 1981), *reprinted in* RELEVANT DOCUMENTS, *supra* note 3, at 51.

riodic reports on instruction and guidelines governing the activities of United States military personnel in El Salvador and the internal security situation in El Salvador and the activities of United States military personnel.[23] Most members of Congress seemed satisfied that the Administration had acted "carefully to avoid actions that would call the War Powers Resolution into play."[24]

Nonetheless, eleven members of Congress, led by Representative George W. Crockett, Jr., of Michigan, remained convinced of WPR applicability and decided to file suit in the United States District Court for the District of Columbia seeking a declaratory judgment that the defendants' actions violated the War Powers Resolution and a writ of mandamus and/or injunction directing the President to remove United States military personnel from El Salvador.[25] For the first time since the Resolution's passage, the judiciary became involved in its implementation.

The congressional plaintiffs alleged that (1) United States troops had been introduced into hostilities or into situations where imminent involvement in hostilities was clearly indicated by the circumstances, without a declaration of war or statutory authorization by Congress and (2) United States forces had been permitted to remain in El Salvador despite the failure of the President to file a report under section 4(a)(1) and (3) United States forces had been permitted to stay beyond the sixty day period in the absence of congressional action under the provisions of section 5(b).[26]

On October 4, 1982, Judge Green of the District Court of the District of Columbia ruled that a decision by the court would be premature. The district court found that

> the legislative scheme did not contemplate court-ordered withdrawal when no report has been filed, but rather, it leaves open the possibility for a court to order that a report be filed, or alternatively, withdrawal 60 days after a report was filed or required to be filed by a court or Congress.[27]

The district court dismissed the complaint[28] and the court of appeals

23. Letter from Richard Fairbanks, Assistant Secretary of State for Congressional Relations, to Hon. Clement J. Zablocki, Chairman, House Committee on Foreign Affairs (April 6, 1981), *reprinted in* RELEVANT DOCUMENTS of 1983, *supra* note 3, at 52-53.

24. SULLIVAN STUDY, *supra* note 2, at 253.

25. Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983).

26. *Crockett*, 558 F. Supp. at 895-96.

27. *Id.* at 901.

28. *Id.* at 903.

affirmed the district court's decision on the same grounds.[29]

In addition to the controversy over El Salvador, the Reagan Administration has reported to Congress with respect to the War Powers Resolution on two non-controversial actions. First, in March 1982, the President filed a report "consistent with Section 4(a)(2) of the War Powers Resolution,"[30] concerning United States participation in a multinational peacekeeping force in the Sinai to implement the Egyptian-Israeli Treaty and the withdrawal of Israeli forces. Since Congress had already authorized this participation in the fall of 1981, the report engendered little controversy. Second, in August 1983, the President reported "consistent with the War Powers Resolution"[31] that United States military aircraft had been deployed in Sudan to provide reconnaissance and early warning to the Chadian government, which had been fighting a Libyan-backed insurgency. The operation was short-term and generated little controversy in Congress.

In June 1983 another challenge directed at WRP implementation came not from the Reagan Administration but from the Supreme Court. In *Immigration & Naturalization Service v. Chadha*,[32] the United States Supreme Court ruled that a one-house legislative veto was unconstitutional, basing its arguments on the expansive clauses of bicameralism and presentment which seems to cast constitutional doubts on all legislative vetoes.[33]

To some observers, the Court's decision dealt a serious blow to the effective implementation of the War Powers Resolution. Some argued that it voided section 5(c), which had enabled Congress to remove United States Armed Forces from hostilities abroad by concurrent resolution if the forces were deployed without specific statutory authorization declaring war. Since all Presidents have refused to file reports under section 4(a)(1), which triggers the sixty day requirement of section 5(b) for congressional approval, section 5(c) was seen as the ulti-

29. Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam).

30. PRESIDENT OF THE UNITED STATES, PARTICIPATION OF THE UNITED STATES IN THE MULTINATIONAL FORCE AND OBSERVERS (MFO) DEPLOYED IN THE SINAI, H.R. DOC. NO. 158, 97th Cong., 2d Sess. 1 (1982), *reprinted in* RELEVANT DOCUMENTS, *supra* note 3, at 57-59.

31. PRESIDENT OF THE UNITED STATES, USE OF UNITED STATES ARMED FORCES IN LEBANON, H.R. DOC. NO. 230, 97th Cong., 2d Sess. 1 (1982), *reprinted in* RELEVANT DOCUMENTS, *supra* note 3, at 60-61.

32. — U.S. —, 103 S. Ct. 2764 (1983).

33. For an analysis of INS v. Chadha, — U.S. —, 103 S. Ct. 2764 (1983), and its implications on legislative vetoes in foreign policy, see *The United States Supreme Court Decision Concerning the Legislative Veto, 1983: Hearings Before House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. (1983) [hereinafter cited as *Chadha Hearings*].

mate congressional sanction for any military action by a President that was defiantly taken outside the terms of the Resolution.

There are several reasons for believing these concerns are overdrawn and even unfounded. First, the separability clause in section 9 of the Resolution protects the entire Resolution from being affected by the *Chadha* decision, even if section 5(c) has been cast in doubt. The majority decision in *Chadha* also seemed to support the validity and workability of such separability clauses generally.[34]

Second, it is not even clear that the *Chadha* decision is a de facto invalidation of the constitutionality of section 5(c). In testimony before the House Foreign Affairs Committee in July 1983, Professor Eugene Gressman accurately pointed out that

> [i]t is very difficult, if not impossible, to expect that the courts will ever enter into a dispute between the President and the Congress over the procedures or the powers that Congress may or may not delegate to the President in the foreign affairs area.
>
> . . . .
>
> This is a very unique field. Again, I suggest that maybe this is one context where some of the normal legislative procedural rules laid down in *Chadha* might not apply.[35]

Third, under the Constitution, Congress is given the exclusive power to commit troops into hostilities.[36] Congress does not delegate this power to the President in the War Powers Resolution. Thus, since Congress has the exclusive power to commit troops, the outcome of the *Chadha* decision does not affect the concurrent resolution provision of the War Powers Resolution. Use of the concurrent resolution provision in section 5(c) to reverse a troop commitment by a President who has taken such an action without congressional approval need not meet the presentment test of *Chadha*.

Finally, the cooperative spirit of the Resolution on matters of war envisaged by its authors remains a possibility if the executive does not exploit opportunities for its invasion. To its credit, in the aftermath of *Chadha*, the Reagan Administration has pledged full cooperation in abiding by the consultation and reporting provisions of the Resolution. If such pledges are upheld, particularly with respect to section 4(a)(1)

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34. *See* M. ROSENBERG, SUMMARY AND PRELIMINARY ANALYSIS OF *INS v. CHADHA* THE LEGISLATIVE VETO CASE (1983), *reprinted in Chadha Hearings, supra* note 33, at 235-38.

35. *Chadha Hearings, supra* note 33, at 155.

36. U.S. CONST. art. I, § 8, cl. 11-16.

situations, confrontation over section 5(c) may be avoided until such time as a full court test is made.

The full implications of the June 1983 *Chadha* decision for WPR implementation have yet to be realized. For the moment, a position which allows the possibility of minimal effects on section 5(c) is advisable both in terms of congressional prerogatives and executive compliance. In the meantime, the events in Lebanon two months later were to be a far greater challenge to WPR effectiveness.

B. Lebanon and the War Powers Resolution

Direct United States military involvement in Lebanon began in August 1982 when the Reagan Administration agreed to commit American troops to a multilateral peacekeeping force to supervise the evacuation from Beirut of the Palestine Liberation Organization and Syrian forces. The evacuation was successful and the peacekeeping forces were withdrawn on September 10. The September 16-18 Sabra and Shatila refugee camp massacres and the assassination of Lebanese President Bashir Gemayel led the Lebanese government to request reconstitution of the peacekeeping force in order "to establish an environment which will permit the Lebanese Armed Forces to carry out their responsibilities in the Beirut area."[37] The United States agreed to participate and United States Marines returned to Lebanon on September 29.

From the very outset, some members of Congress were highly skeptical of United States military participation in Lebanon. Congressional leaders were especially concerned about a possible long-term commitment to a very difficult mission that seemed ripe for hostilities. With specific reference to the War Powers Resolution, one month before the initial American troop deployment in August, I wrote to the President, stating that the conditions in Beirut "clearly meet the section 4(a)(1) test for reporting under the War Powers Resolution."[38] My article in the *Washington Post* on October 3, 1982, repeated the theme that the situation clearly involved imminent involvement in hostilities and that the President was therefore ignoring the WPR section 4(a)(1) re-

37. Letter from Robert Dillon, United States Ambassador to Lebanon, to Fouad Butrus, Deputy Prime Minister and Minister of Foreign Affairs in Lebanon (Sept. 25, 1982), *quoted in* S. REP. NO. 242, 98th Cong., 1st Sess. 21, *reprinted in* 1983 U.S. CODE CONG. & AD. NEWS 1230, 1247. *See also* H.R.J. Res. 364, 98th Cong., 1st Sess., 129 CONG. REC. H7593 (daily ed. Sept. 28, 1983).

38. Letter from Hon. Clement J. Zablocki, Chairman, House Committee on Foreign Affairs, to President Ronald Reagan (July 6, 1982) (available in the files of the House Committee on Foreign Affairs).

porting requirements.[39]

For the most part, however, unlike concern for the commitment of troops, congressional reaction to the President's compliance with the Resolution muted. Despite some misgivings, most members believed that once in place, the Marines should not be withdrawn hastily by congressional action or inaction under the War Powers Resolution. They also believed that the objectives of helping to restore order and to facilitate a sovereign government in Lebanon were worthy. So long as casualties were not taken, the political pressure for congressional involvement lay dormant.

This situation persisted for several months. In the early months of operation, the peacekeeping forces including United States Marines were perceived positively by most of Lebanon's warring factions.

In March 1983, the situation deteriorated when five Marines were wounded in a terrorist attack. Further deterioration of the peacekeeping purpose occurred throughout the spring and summer, evidenced by (1) the bombing of the United States Embassy in April, (2) the Syrian refusal to accept the May 17 Israeli-Lebanese troop withdrawal agreement, and (3) intensified fighting between the Lebanese Armed Forces and Druze and Amal militias in the Shuf and Alayh districts and at Suq-al-Gharb.

By August 1983 the security situation deteriorated even further. In anticipation of Israeli withdrawals from the Shuf and Alayh districts, fighting between the Druze and Christian militias, and between Druze and Lebanese Armed Forces, resulted in the closing of the Beirut airport where the United States contingent was stationed. Caught in the crossfire and under attack themselves, the United States forces returned fire for the first time on August 28 and following the death of two Marines from the Druze mortar attack.

Two more Marines were killed on September 4, and after the Israeli withdrawal from the Alayh and Shuf that same day, the Lebanese Armed Forces moved into these areas and also occupied Suq-al-Gharb. As attacks on American positions intensified, United States reconnaissance flights and naval gunfire were authorized. United States support to the Lebanese Armed Forces' occupation of Suq-al-Gharb, which overlooked Marine positions, was also authorized.

With these unavoidable actions, the original United States image as impartial peacekeeper was seriously undermined.

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39. Zablocki, *Reagan is Skirting the War Powers Act*, WASH. POST, Oct. 3, 1982, § 2, at 7, col. 2.

With the deaths of the two Marines on August 28, congressional concern quickly intensified and the President's failure to comply with the Resolution one year earlier came back to haunt him. In rapid fashion, the President dispatched White House Chief of Staff James A. Baker to meet with House and Senate leaders in order to gain congressional approval for United States troop deployment in Lebanon.

In the House, during the first two weeks of September, negotiations took place between myself, Baker, White House Counsel Fred Fielding, and the Democratic leadership in the House and senior Democrats and Republicans on the Committee on Foreign Affairs. Initially, Administration officials sought a simple joint resolution supporting the President's actions in Lebanon and made no mention of the War Powers Resolution. The Administration knew there would be tough negotiations and major concessions over the WPR. When Speaker of the House Thomas P. (Tip) O'Neill told the Administration that the House would not approve "another Tonkin Gulf resolution," the Chairman of the House Foreign Affairs Committee insisted that any troop deployment be specifically authorized under the War Powers Resolution.

In mid-September an agreement was reached. A joint resolution, introduced in the House, embodied the terms of the agreement.[40] The keystone of the agreement was the use of the War Powers Resolution to authorize the United States troop presence in Lebanon. Using the unique mechanism of section 5(b), which enables Congress as well as the President to determine when a section 4(a)(1) situation had occurred, Congress determined that the requirements of section 4(a)(1) became operative on August 29. Since section 4(a)(1) was triggered, Congress then authorized the continued participation of United States armed forces in the Multinational Force (MNF) in Lebanon.

The authorization under H.R.J. Res. 364, however, had the following constraints:[41]

(1) a limitation of 1200-1600 troops, with troop activities limited to self-defense except for protective measures (naval, air, and artillery support, and air reconnaissance) to ensure the safety of the MNF;

(2) a bi-monthly report to Congress on all activities and functions of the MNF;

(3) a stipulation that United States participation in the Multinational force shall be authorized for purposes of the War Powers Resolu-

40. H.R.J. Res. 364, 98th Cong., 1st Sess., 129 CONG. REC. H7174 (daily ed. Sept. 28, 1983).

41. H.R.J. Res. 364, 98th Cong., 1st Sess., 129 CONG. REC. H7593, H7595 (daily ed. Sept. 28, 1983).

tion until the end of an eighteen month period (unless Congress extends such authorization), and that such authorization shall terminate sooner if: (A) all foreign forces are withdrawn from Lebanon (unless the President determines and certifies to Congress that continued United States Armed Forces participation is required after such foreign forces withdraw up to the end of the eighteen month period in order to establish Lebanese government control of the Beirut area); or (B) when the United Nations representatives for Lebanon are able to assume the responsibilities for the force; or (C) upon the implementation of other effective security arrangements in the area; or (D) the withdrawal of all other countries from participation in the force;

(4) a provision that nothing in the resolution precludes either the President or Congress from directing the withdrawal of United States forces in Lebanon and that the resolution does not modify, limit or supercede any provision of the War Powers Resolution of the requirement in section 4(a) of the Lebanon Emergency Assistance Act of 1983.[42] That Act requires congressional authorization of any substantial expansion in the number or role of United States armed forces in Lebanon.[43]

Opposition to H.J. Res. 364 centered on the length of its authorization (eighteen months). Efforts to reduce this period were made in both the Committee and the House. But proponents of the Resolution argued (1) that eighteen months were needed to prevent Syria from questioning United States' resolution to maintain troops in Lebanon and waiting out the Marine presence, (2) that the eighteen month authorization insulated the United States participation from election year politics, and (3) that if a new President were elected in 1984, his Administration would have an opportunity to review the situation without time pressure.[44]

The arguments were persuasive. The House, on September 28, approved the resolution by a vote of 270-161.[45] The Senate approved a similar resolution (S.J. Res. 159) by a vote of 54-46.[46] The President signed the measure into Public Law No. 98-119 on October 12, 1983.

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42. Lebanon Emergency Assistance Act of 1983, Pub. L. No. 98-43, 97 Stat. 215 (1983).

43. *Id.* § 4(b).

44. 129 CONG. REC. H7618-23 (daily ed. Sept. 28, 1983).

45. *Id.* at H7623.

46. For a full text of the House and Senate debates on the Lebanon War Powers Resolution, see 129 CONG. REC. S12,911-40 (daily ed. Sept. 26, 1983); 129 CONG. REC. S12,983-13,004 (daily ed. Sept. 27, 1983); 129 CONG. REC. S13,030-66, H7560-7623 (daily ed. Sept. 28, 1983); 129 CONG. REC. S13,125-68 (daily ed. Sept. 29, 1983).

C. *Impact of Lebanon War Powers Resolution*

The passage of the Lebanon War Powers Resolution (LWPR) represented the first formal exercise of the provisions of the War Powers Resolution. Moreover, the fact that President Reagan signed the legislation into law represented an extremely meaningful executive branch acceptance of the War Powers Resolution. While the President's statement at the signing attempted to reclaim Commander-in-Chief powers,[47] the presidential signature speaks for itself and represents a grudging but richer acceptance of the reality of the Resolution that previously had not existed in the executive branch. As such, the Lebanon War Powers Resolution is a significant accomplishment.

In addition, for those who opposed the measure, the Lebanon War Powers Resolution provided a properly ordered legislative platform for opposition to the continued presence of United States troops in Lebanon. Contrary to uninformed criticisms of LWPR as a "blank check to the President," the Resolution (1) limits the functions and numbers of United States troops, how long they may stay (including circumstances under which they may be removed earlier), (2) fully affirms the right of Congress to change its judgments at a later date, and (3) requires further congressional approval for any substantial expansion of United States military activities.

As such, opponents of United States policy in Lebanon find that several constraints on executive action are already in place that would not exist without LWPR and a legislative vehicle for further changes by amendment. Thus, the Lebanon War Powers Resolution represents a balance of executive flexibility and congressional control which strongly reinforces the War Powers Resolution as the best means of achieving what (in section 2) is called "collective judgment" of the legislative and executive branches on the commitment of American troops into hostilities.

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47. In signing the Multinational Force in Lebanon Resolution, the President made the following comment:

> I believe it is, therefore, important for me to state, in signing this resolution, that I do not and cannot cede any of the authority vested in me under the Constitution as President and as Commander in Chief of the United States Armed Forces. Nor should my signing be viewed as any acknowledgement that the President's constitutional authority can be impermissibly infringed by statute, that congressional authorization would be required if and when the period specified in section 5(b) of the War Powers Resolution might be deemed to have been triggered and the period had expired, or that section 6 the Multinational Force in Lebanon Resolution may be interpreted to revise the President's constitutional authority to deploy United States Armed Forces.

President's Statement on Signing S.J. Res. 159 Into Law, 19 WEEKLY COMP. PRES. DOC. 1422-23 (Oct. 12, 1983).

The positive experience of the Lebanon War Powers Resolution created hopes that fuller implementation of the Resolution would soon become a matter of practice in the executive branch. Unfortunately, the United States military action in Grenada severely dashed those hopes.

D. Grenada and the War Powers Resolution

President Reagan's compliance with the War Powers Resolution regarding the invasion of Grenada on October 25, 1983, indicated that old habits within the executive branch about WPR implementation indeed die hard. Section 3 consultation was virtually non-existent as congressional leaders were shuttled to the White House for a briefing after the fact. Once again, the report to Congress was merely "consistent with the War Powers Resolution"[48] and skirted section 4(a)(1) requirements.

The presidential signature of the Lebanon War Powers Resolution could have ushered in a new era of legislative-executive cooperation on the decision to commit troops abroad. Instead, only thirteen days later, the old pattern of evasive executive non-compliance had once again appeared. In this instance, however, congressional oversight was more vigorous than had been the case in tests of compliance under the Ford and Carter Administrations.

While not casting judgment on the foreign policy merits of the Grenadan invasion, both Houses of Congress attempted to trigger the section 4(a)(1) requirements. In the House, the Committee on Foreign Affairs approved by a vote of 33-2, House Joint Resolution 402, which stated "that for purposes of section 5(b) of the War Powers Resolution, the Congress hereby determines that the requirements of section 4(a)(1) of the War Powers Resolution became operative on October 25, 1983, when United States Armed Forces were introduced into Grenada."[49] In the Senate, an identical provision was approved in the form of an amendment to the debt ceiling limitation by Senator Gary Hart.[50]

Unfortunately, the Senate provision was dropped in the House-Senate conference on the debt ceiling legislation and the Senate leader-

48. PRESIDENT OF THE UNITED STATES, A REPORT ON THE DEPLOYMENT OF THE UNITED STATES ARMED FORCES TO GRENADA, H.R. DOC. No. 125, 98th Cong., 1st Sess. 1 (1983).

49. H.R.J. Res. 402, 98th Cong., 1st Sess., 129 CONG. REC. H8697 (daily ed. Oct. 26, 1983). The Resolution was approved by a vote of 403-23. 129 CONG. REC. H8933-34 (daily ed. Nov. 1, 1983).

50. Amend. No. 2462, 129 CONG. REC. S14,849 (daily ed. Oct. 28, 1983). The amendment was adopted by a vote of 64-20. 129 CONG. REC. S14,874-77 (daily ed. Oct. 28, 1983).

ship did not take up the House bill in the waning days of the session before adjournment on November 18. Therefore, the President was not confronted with the prospect of signing or vetoing legislation triggering the section 5(b) requirements of the War Powers Resolution.

Nonetheless, the overwhelming approval of identical provisions by both the House and the Senate clearly seemed to play a major role in the decision of Administration officials to remove United States combat troops from Grenada by December 25, within the sixty day period prescribed by section 5(b) of the War Powers Resolution. The threat of congressional action under the War Powers Resolution if troop withdrawals were not forthcoming demonstrated the effectiveness of the Resolution in forcing collective decisions on troop commitment, even in the face of executive noncompliance.

IV. CONCLUSION—FUTURE COURSE OF WAR POWERS RESOLUTION IMPLEMENTATION

Three important points must be made about the first decade of WPR implementation. First, the predictions that the Resolution would weaken the nation's ability to react to foreign policy crises have been proven unwarranted. In several instances where action to save American lives abroad was required, the President was able to act without undue legal constraints. Even in the case where United States troops were committed for clear foreign policy objectives, as in Lebanon and Grenada, those objectives were pursued within the flexible collective framework established by the Resolution.

Second, the Resolution has served to restore the balance in the rights and responsibilities of the Congress and the President in the decision to commit troops. The executive branch cannot merely run roughshod over the Congress and must factor likely congressional insistence or the Resolution's implementation in its foreign policy formulation, particularly with respect to options involving military action. The Resolution is therefore a meaningful brake on military adventurism and poorly-planned military actions, without serving as a handcuff on *any* decision to commit troops.

Finally, the War Powers Resolution is a political fact of life. It enjoys wide bipartism support and remains unamended and unchallenged in the Congress. Every successive administration regardless of party affiliation has pledged to abide fully by its terms, although, as this article has demonstrated, there has been more non-compliance than compliance. As we enter the second decade of the Resolution, its

evolution into an unquestioned fundamental law of the nation seems certain.

This does not mean some changes in the Resolution's framework may not be desirable at an appropriate political moment. If the executive branch is genuine in its desire to consult the Congress, structures to establish orderly consultation under section 3 could be undertaken by the Congress. Given executive reluctance to comply with section 4(a)(1), the Resolution may well have to be amended to compel the President to specify which subsection of section 4 he is reporting to Congress under, in a given situation. Such an amendment could eliminate clear presidential avoidance of section 4(a)(1) and therein the sixty day requirements of section 5(b).

Such changes, however, would only improve an excellent—and workable—product. The credibility of the War Powers Resolution as a political tool for congressional oversight has never been higher. Furthermore, the experiences of Lebanon and Grenada have shown the executive branch that decisions about clear-cut military deployment will have to involve the legislative branch and that the vehicle for that involvement will be the War Powers Resolution. The intent in section 2(a), that the collective judgment of the Congress and the President apply to the commitment of troops into hostilities or imminent involvement in hostilities is much closer to fulfillment ten years after the Resolution's passage than at its inception. The future points to only greater fulfillment.