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## THE WAR POWERS RESOLUTION IN THE AGE OF TERRORISM

J. BRIAN ATWOOD\*

### INTRODUCTION

This analysis of the origins and the functioning of the War Powers Resolution is a product of research and personal experience in both Congress and the Executive Branch. I had the great privilege of working with Senator Thomas F. Eagleton (D-Mo.) from 1972 to 1977, a period when war powers and the Vietnam War were at the top of his and the country's national security agenda. The Senator was a leader in the Senate on war powers, and one of the original co-sponsors of the legislation, along with Senators Jacob Javits (R.-N.Y.) and John Stennis (D.-Miss.). Senator Eagleton's book, *War and Presidential Power: A Chronicle of Congressional Surrender*, fully explains his position on the constitutional issue and chronicles his efforts to promote a war powers bill that was consistent with the Constitution of the United States.<sup>1</sup>

I returned to the Executive Branch in 1977 and assumed responsibility for managing relations with Congress for the State Department. That experience gave me a unique exposure to the attitudes and techniques employed by executive branch policymakers and their legal counsels as they sought to interpret—and frequently avoid—the requirements of the War Powers Resolution.

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1. See THOMAS F. EAGLETON, *WAR AND PRESIDENTIAL POWER: A CHRONICLE OF CONGRESSIONAL SURRENDER* (1974).

This article concludes that the War Powers Resolution has failed to recreate balance in our system on issues of war and peace, that it has produced perversions in internal executive branch decision-making and that its key consultation provision has been easily avoided because Congress has failed to organize itself in such a way as to make consultations unavoidable, secure, and meaningful.

In an era when the predominant security threat comes from non-state actors—international terrorists—the Executive Branch has retained the legal and political initiative and dominates the debate over the use of force. Arguably, one consequence is that the option of engaging in conflict, especially in the face of terrorist threats, is far more attractive than less dangerous and more effective alternatives.

### I. THE WAR POWERS RESOLUTION AND THE CONSTITUTION

The War Powers Resolution of 1973 was inspired by congressional frustration over an unpopular war. The Vietnam engagement evolved from a military advisory mission in the early 1960s to a hot war in 1964, when Vietnamese naval vessels allegedly attacked American ships in the Gulf of Tonkin.<sup>2</sup> President Lyndon Johnson asked Congress “to join in affirming the national determination that all such attacks will be met. . . .”<sup>3</sup> With little debate and even less opposition, the Southeast Asia Resolution (popularly known as the Gulf of Tonkin Resolution) was passed and became law.<sup>4</sup>

Principal authors of the Tonkin Resolution later argued that it was not their intention to authorize a wider war.<sup>5</sup> Still, the Executive Branch cited this authority in escalating the Vietnam conflict exponentially, starting with the landing of Marines in Vietnam in 1965.<sup>6</sup> In 1967, Senator Clifford Case of New Jersey argued that President Johnson had “misused the Tonkin Gulf Resolution. . . . [And] that he has done it by relying on the exact language of the resolution, rather than upon the spirit in which we moved together in a particular emergency.”<sup>7</sup> Case went on to say that “what we [the Congress]

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2. John H. Messing, *American Actions in Vietnam: Justifiable in International Law?*, 19 STAN. L. REV. 1307, 1316–17 (1967).

3. 110 CONG. REC. 18,237 (1964) (message from President Lyndon B. Johnson, The Situation in Southeast Asia).

4. Joint Resolution of Congress, Pub. L. No. 88-408, 78 Stat. 384, H.J. Res. 1145 (1964).

5. 113 CONG. REC. 26,722 (1967) (statement of Sen. Case).

6. MICHAEL BESCHLOSS, *REACHING FOR GLORY: LYNDON B. JOHNSON’S SECRET WHITE HOUSE TAPES 1964–1965* (2001); EAGLETON, *supra* note 1, at 109 (noting that the Gulf Tonkin Resolution authorized the executive branch to justify a major incursion in Southeast Asia); Jack Shulimson et al., *U.S. Marines in Vietnam: The Landing and the Buildup, 1965*, 67 J. OF AM. HIST. 200 (1980).

7. 113 CONG. REC. 26,722 (1967) (statement of Sen. Case).

were doing when we adopted the resolution was showing unity at a time of emergency.”<sup>8</sup>

Case, a Republican who later became one of the authors of an amendment to end combat activity in Indochina,<sup>9</sup> was reflecting a common concern over the dynamic that tends to overwhelm more deliberative processes when a president declares that it is time to take military action. Professor John T. Rourke, in his book *Presidential Wars and American Democracy: Rally 'Round the Chief*, described this dynamic well:

Sometimes the urge to achieve unity is so strong that any degree of dissent comes under suspicion. . . . [E]very war spawns patriotic zealots who accuse war dissenters of sympathizing with, or even aiding and abetting, the enemy. The press is also restrained, and the public willingly accepts the argument that information will assist the enemy.<sup>10</sup>

A peace agreement was signed in 1973, and American POWs were released from Hanoi prisons. (The war officially ended with the Paris Peace Accords on January 27, 1973, but complete American withdrawal did not occur until the Fall of Saigon on April 30, 1975).<sup>11</sup> The Johnson and Nixon administrations justified the engagement in combat on the basis of the Tonkin Resolution until it was repealed by Congress in 1970.<sup>12</sup> Thereafter, their justification was based on the grounds that the Congress passed appropriations bills funding the war and that the Commander in Chief had the constitutional authority to pursue his military goals.<sup>13</sup> Combat activity continued even after the POWs were released in Cambodia and Laos, on their borders with Vietnam.<sup>14</sup> Then, in May 1973, Senator Eagleton introduced an amendment to an appropriations bill stating that no money in the present bill “or heretofore appropriated under any other act” may be used for combat activity in Indochina.<sup>15</sup> This amendment passed both houses and was then vetoed by

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8. *Id.*

9. 119 CONG. REC. 15,436 (1973) (statements of Sens. Case and Church).

10. JOHN T. ROURKE, *PRESIDENTIAL WARS AND AMERICAN DEMOCRACY: RALLY 'ROUND THE CHIEF* 8 (1993).

11. U.S. Department of State, *Ending the Vietnam War, 1973–1975*, available at <http://www.state.gov/r/pa/ho/time/dr/17411.htm>; *Fall of Saigon (1975)*, BBC NEWS, [http://news.bbc.co.uk/2/shared/spl/hi/asia\\_pac/05/vietnam\\_war/html/fall\\_of\\_saigon.stm](http://news.bbc.co.uk/2/shared/spl/hi/asia_pac/05/vietnam_war/html/fall_of_saigon.stm).

12. Cooper-Church Amendment, Pub. L. No. 91-652 (Jan. 5, 1971). A revised Cooper-Church Amendment, Public Law 91-652, passed both houses of Congress on December 22, 1970, and was enacted on January 5, 1971. See EAGLETON, *supra* note 1, at 109 (noting that the Gulf Tonkin Resolution authorized the Executive Branch to justify a major incursion in Southeast Asia); *Id.* at 117 (noting the 1970 repeal of the Gulf Tonkin Resolution).

13. Cooper-Church Amendment, Pub. L. No. 91-652, 84 Stat. 1942 (1971); ROURKE, *supra* note 10, at 103.

14. *Fall of Saigon (1975)*, *supra* note 11.

15. EAGLETON, *supra* note 1, at 160.

President Nixon.<sup>16</sup> Finally, a compromise—the Fulbright Amendment, named for the then-chairman of the Senate Foreign Relations Committee—was reached, allowing for forty-five more days of bombing and then terminating the war once and for all.<sup>17</sup>

It was against this background of presidential initiative and congressional frustration that members of Congress and legal scholars began to explore the Founders' intentions in distributing the Constitution's war powers to the two branches of government. Congress's war powers initiative was meant to recapture its powers for future situations. It was not proposed as a means to end the Vietnam War, but it was heavily influenced by Congress's ineffectiveness in its effort to convince the Executive to reverse course in that war.

## II. THE FOUNDERS' INTENT: OVERTAKEN BY POLITICS

Congress was on firm constitutional ground in seeking to legislate in the war powers area. The bias reflected in the Founders' debates over this issue was overwhelmingly in Congress's favor.<sup>18</sup> Senator Eagleton and his Senate co-sponsors focused on modern contingencies the nation faced and sought to update the delegation of authority to the President in emergency situations. Their bill defined the limited emergency situations wherein the President would be authorized to act to "repel sudden attacks."<sup>19</sup> The minutes of the deliberations at the Federal Convention of 1787 reflect a motion made by James Madison and Eldridge Gerry to insert "declare," striking out "make" war, leaving to the Executive the power to "repel sudden attacks."<sup>20</sup> Sudden attacks in 1787 were seen as limited to the territory of the United States.<sup>21</sup> The Senate sponsors saw the need to extend the scope of these emergency powers to defend U.S. forces stationed abroad and to rescue U.S. citizens if all other means to protect them had been exhausted.<sup>22</sup> In *all* other cases, the President would be required to seek the prior approval of Congress.<sup>23</sup>

The authors of the Senate bill cited the Constitution's "necessary and proper" clause as justification for legislating in this area. This clause, Article I,

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16. *Id.* at 173.

17. *See* Fulbright Amendment to Second Appropriations Act, Pub. L. No. 93-50, § 307, 87 Stat. 129 (1973).

18. *See* THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 318-19 (Max Farand, ed., Yale University Press Vol. II 1937).

19. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555, H.R.J. Res. 93d Cong. (1973).

20. THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 18.

21. *See id.*

22. *See* War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555, H.R.J. Res. 93d Cong. (1973).

23. *See id.*

Section 8, Clause 18, invites the two branches “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . .”<sup>24</sup> The power to “declare war” was an explicit “foregoing power.”<sup>25</sup>

What emerged from the House-Senate conference committee seemed to turn the Constitution on its head in Senator Eagleton’s view. A non-binding “purpose and policy” section asserted that presidents could only introduce forces “into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances” pursuant to “(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”<sup>26</sup> However, this language was hortatory and non-binding. The binding provisions, in fact, contradicted the “purpose and policy” section, by conceding the right (House proponents would use the word “reality”) of presidents to initiate military action *without* prior approval.

This led Senator Eagleton, in an act of considerable courage, to oppose the legislation he had helped initiate, and then when the conference report passed, to support President Nixon’s veto.<sup>27</sup> He was joined by very few of his Democratic colleagues, who saw the War Powers Resolution as a good opportunity to override a veto and send a message to an unpopular President, Richard M. Nixon.<sup>28</sup> Eagleton said later:

We in Congress were frustrated with our failure to override eight successive Presidential vetoes, and, considering the tremendous pressures then created by the Watergate scandal, it is understandable how this Congress overrode President Nixon’s war power veto. *The irony, of course, is that we were actually expanding, not limiting Presidential war-making power.*<sup>29</sup>

That, of course, is not how President Nixon and his legal advisors saw it. In his veto message to Congress, the President used sweeping language to condemn the resolution as unconstitutional. “House Joint Resolution 542 (the War Powers Resolution) would attempt to take away, by a mere legislative act, authorities which the [P]resident has properly exercised under the Constitution for almost 200 years,” the statement asserted.<sup>30</sup> The message focused on

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24. U.S. CONST. art. I, § 8, cl. 18.

25. *Id.*

26. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555, H.R.J. Res, 93d Cong. (1973).

27. EAGLETON, *supra* note 1, at 206.

28. *See id.* at 212–20.

29. *A Review of the Operation and Effectiveness of the War Powers Resolution: Hearings before the S. Comm. on Foreign Relations*, 95th Cong. 4–5 (1977) (emphasis added). The War Powers Resolution became law on November 7, 1973, after both houses of Congress overrode President Nixon’s veto.

30. Veto of the War Powers Resolution, PUB. PAPERS 893 (Oct. 24, 1973).

provisions that would “automatically cut off certain authorities after sixty days unless the Congress extended them.”<sup>31</sup> It also protested a provision (Section 5(c)) allowing Congress to terminate engagement in hostilities by a concurrent resolution, “an action which does not normally have the force of law, since it denies the President his constitutional role in approving legislation.”<sup>32</sup>

What was perhaps more remarkable about the veto message was its *endorsement* of Section 3, which “calls for consultations with the Congress before and during the involvement of the United States forces in hostilities abroad.”<sup>33</sup> The Nixon statement called for “regularized consultations with the Congress in an even wider range of circumstances.”<sup>34</sup> This call for consultations was repeated over the years. The State Department legal advisor during the Carter administration, for example, urged Congress to create “efficient machinery for conducting those consultations.”<sup>35</sup>

The Nixon veto statement and future executive branch communications have asserted that the sixty-day cut-off provision (which can be extended to ninety days with a presidential waiver) is unconstitutional in that it is automatic and requires no subsequent legislation.<sup>36</sup> Defenders of the provision state that Congress must be involved in making the initial decision to go to war and that an automatic cut-off by concurrent resolution preserves Congress’s explicit power over war. (A claim that an automatic cut-off provision is unconstitutional is unrealistically broad and would pick up many “sunset” provisions terminating legislative mandates on a date certain.)<sup>37</sup> A subsequent Supreme Court decision, *INS v. Chadha* struck down the legislative veto and may have given the Executive Branch’s argument more credibility.<sup>38</sup> Even though *Chadha*’s rationale applied to legislation giving Congress the power to overturn presidential action in certain areas (such as arms sales) and did not deal with war powers, per se, the clear sentiment of the Court was to preserve the Executive’s final role in approving or vetoing legislation.<sup>39</sup>

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31. *Id.*

32. *Id.*

33. *Id.* at 895.

34. *Id.*

35. *A Review of the Operation and Effectiveness of the War Powers Resolution*, *supra* note 12, at 189.

36. Veto of the War Powers Resolution, *supra* note 30, at 894.

37. E-mail from Michael Glennon, Professor, Fletcher School of Law and Diplomacy of Tufts University, to J. Brian Atwood, Dean, University of Minnesota’s Humphrey Institute of Public Affairs (Aug. 21, 2007, 12:26:44 CST) (on file with author).

38. 462 U.S. 917, 951–60 (1983); JACOB K. JAVITS, *THE PRESIDENT’S WAR POWERS: FROM THE FEDERALISTS TO REAGAN 2* (Demetrios Caraley ed., Academy of Political Science 1984).

39. JAVITS, *supra* note 38, at 2–3. This point continues to be debated among legal scholars, but it is the view of Professor Glennon that *Chadha* invalidates Section 5(c), the concurrent resolution cut-off provision. Glennon, *supra* note 37.

The provision of the War Powers Resolution that triggers the sixty-to ninety-day clock is Section 4(a)(1), a requirement to report to Congress within forty-eight hours the circumstances and the authorities used to deploy U.S. forces into hostile situations.<sup>40</sup> Reports have been sent to Congress over the years, but they have been very brief and contained no information that was not already in the public domain.<sup>41</sup> Often the reports did not cite Section 4(a)(1) explicitly in an apparent effort to avoid the cut-off trigger.<sup>42</sup>

We are left then with President Nixon's sweeping assertion that the resolution is unconstitutional in its entirety<sup>43</sup> and Senator Eagleton's more legitimate complaint that the delegation of authority to the President to initiate the use of force without prior approval usurps Congress's power to "declare war."<sup>44</sup> Most provisions in the resolution, however, are not controversial and clearly do not raise issues of constitutionality.

Anticipating that the Executive Branch would claim that certain provisions were unconstitutional, Congress inserted a "separability clause" at the very end of the resolution. This section states: "If any provision of this joint resolution or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby."<sup>45</sup> This clause and the explicit reference to Congress's power "to declare war"<sup>46</sup> in the constitution when combined with the invitation of the "necessary and proper"<sup>47</sup> clause to legislate, gives considerable standing to many of the provisions of the resolution. Despite the Judicial Branch's traditional reluctance to resolve political disputes between the other two branches over war powers, until recently executive branch lawyers have proceeded with utmost caution in advising presidents of their legal obligations in this area.

It is important to note that while the automatic cut-off provisions in Section 5 of the resolution have been presented to the courts, the judiciary traditionally has either refused to give standing to the plaintiffs or has declared the issue to be "political" and a matter to be resolved between the other

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40. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555, H.R.J. Res. 93d Cong. (1973).

41. See Michael Rubner, *Antiterrorism and the Withering of the 1973 War Powers Resolution*, 102, POL. SCI. Q. 193, 201-02 (1987).

42. *Id.*

43. Veto of the War Powers Resolution, *supra* note 30.

44. EAGLETON, *supra*, note 1, at 208.

45. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555, 559, H.R.J. Res. 93d Cong. (1973).

46. U.S. CONST. art. I, § 8, cl. 11.

47. U.S. CONST. art. I, § 8, cl. 18.



branches.<sup>48</sup> Within the Executive Branch, however, much attention has been given to the consultation and reporting provisions. As I testified in 1986 before the House Foreign Affairs Committee, “[I]t is with the knowledge that these provisions have the full weight of the law that succeeding administrations have constructed elaborate rationalizations to avoid their force.”<sup>49</sup>

Executive branch legal advisors must constantly wind their way through Scylla and Charybdis, the mythological monsters on either side of the narrow strait traversed by Ulysses. On the one side is concern over yielding any of the constitutional territory claimed by a succession of presidents. On the other is the knowledge that the consultation and reporting requirements are legally binding and that it is a lawyer’s obligation to assure that one’s client respects the law.

There is a deep concern in the Executive Branch that any concession to Congress on war powers will create a precedent that could erode presidential powers. Administrations take seriously legal historian Edwin Corwin’s description of the Constitution as “an invitation to struggle.”<sup>50</sup> This is especially true in areas of foreign policy and national security. As Crenson and Ginsberg observed, “Over the course of more than two centuries . . . successive American presidents, beginning with George Washington, have labored diligently to make their office the dominant force in American foreign and security policy and to subordinate Congress’s role in the realm.”<sup>51</sup>

The issue for administration legal advisors, as they privately have described it to me, is the automatic cut off provisions in Section 5. While they challenge these as unconstitutional, they do not wish to bring on a court test, however unlikely. Nor do they wish to see a clash of wills that could lead Congress to use its power of the purse to end a combat operation. Thus, the argument goes, Section 4(a)(1), the reporting clause that triggers the cut-off provisions, must never be explicitly cited unless the military operation already

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48. Glennon, *supra* note 37. Professor Glennon points out that 245 House Members challenged the 1988 operation to escort Kuwaiti ships during the Gulf War. The 245 Members contended that a 4(a)(1) report was required on the date the operation commenced and that the sixty-day clock was triggered. The D.C. District Court, in *Lowry v. Reagan*, 676 F. Supp. 333, 334 (D.D.C. 1987), affirmed, No. 87-5426 (D.C. Cir. Oct. 117, 1988), dismissed the request for a declaratory judgment as non-justiciable the D.C. Circuit affirmed. This case is discussed in detail in Professor Glennon’s book, *Constitutional Diplomacy*.

49. *War Powers, Libya, and State-Sponsored Terrorism: Hearings Before the Subcomm. on Arms Control, International Security, and Science of the Comm. on Foreign Affairs*, 99th Cong. 62 (1986) (statement of J. Brian Atwood, Dir. of the National Democratic Institute).

50. MATTHEW CRENSON & BENJAMIN GINSBERG, *PRESIDENTIAL POWER: UNCHECKED AND UNBALANCED* 215 (2007).

51. *Id.*

has been terminated. In fact, it only was cited once, after the attack on Cambodia, *after* the Mayaguez incident of 1975.<sup>52</sup>

Concern about triggering the cut-off provisions also influences internal executive branch deliberations over whether or when it is necessary to consult with Congress under Section 3. Administration legal advisors see the consultation provision as a slippery slope. Its conditions for consultation, especially the requirement to consult in “situations where imminent involvement in hostilities is *clearly indicated by the circumstances*,” could trigger the reporting requirement which, in turn, triggers Section 5.<sup>53</sup>

How, then, to develop a rationale to avoid consultations? In cases where a choice is made not to consult under Section 3 or to report under Section 4(a)(1) a legal case is built by the Justice Department in coordination with State, Defense, and White House counsels. Over the years, these cases have grown more and more imaginative. Some of the more sensitive of these opinions have never been shared with Congress, as they are considered privileged communications. Yet, they form the internal case histories, available to future executive branch lawyers as important precedents.<sup>54</sup>

In 1981, the Reagan administration decided to test Libya’s claim that the Gulf of Sidra was within its territorial waters.<sup>55</sup> The United States insisted that the gulf was in international waters.<sup>56</sup> The U.S. Navy had transited those waters during the Carter administration, but only after informing the Qaddafi government that their intentions were peaceful.<sup>57</sup> The Reagan administration had no intention of informing Libya, and they had to assume that their actions might be provocative.<sup>58</sup> Was this a situation where “imminent involvement in hostilities” could be “clearly indicated by the circumstances?”

Consulting Congress under the War Powers Resolution in this case might well have revealed an intent to provoke. Instead, the legal advisors developed a “probability-of-conflict” rationale.<sup>59</sup> If the Pentagon determined that the likelihood of combat was fifty percent or more, then—and only then—would

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52. Cyrus R. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79, 89–90 (1984).

53. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555, H.R.J. Res. 93d Cong. (1973) (emphasis added).

54. *War Powers*, *supra* note 49, at 63.

55. Anne Bardin, *Costal State’s Jurisdiction Over Foreign Vessels*, 14 PACE INT’L L. REV. 27, 69 (2002).

56. *Id.*

57. See Yehuda Z. Blum, *The Gulf of Sidra Incident*, 80 AM. J. OF INT’L L. 668, 669, 673 n.21 (1986).

58. See *id.* at 673, 673 n.21.

59. Louis Henkin et al., *War Powers and the Responsibility of Congress*, 82 AM. SOC’Y INT’L L. PROC. 1, 14 (1988) (various speakers, including Brian Atwood, participated in a panel discussion convened in the Senate Foreign Relations Hearing Room).

Congress have to be consulted in advance.<sup>60</sup> The fifty percent probability threshold was run through in various computer-generated scenarios and never reached.<sup>61</sup> Congress was not consulted.<sup>62</sup>

According to a State Department legal advisor who participated in the deliberations, a more serious issue arose when the Navy requested a change in the “rules of engagement” (ROE) prior to the Gulf of Sidra exercise.<sup>63</sup> ROEs are standing orders to the military command issued by the Joint Chiefs of Staff. They are fashioned to take circumstances into consideration, e.g., the probability of hostilities. The Navy requested the change from peacetime ROE to enable its pilots to fire on Libyan planes when they “locked on” to U.S. aircraft with their radar systems, thus indicating they were targeting our planes.<sup>64</sup> This request was denied when the lawyers pointed out that such a change in the ROE would demonstrate that the administration knew in advance that the hostilities clearly were indicated by the circumstances.<sup>65</sup> This change would have rendered the “probability of conflict” construct unusable and would have made a failure to consult Congress difficult to rationalize.<sup>66</sup> One can only assume that the margin of risk involved was small and acceptable. Navy pilots shot down two aircraft *after* the Libyans had launched air-to-air missiles at them.<sup>67</sup>

The Long Commission, established to investigate the October 23, 1983, terrorist attack in which 241 U.S. Marines were killed in Lebanon, concluded *ex post facto* that peacetime ROE in that situation *were* an unacceptable margin of risk.<sup>68</sup> The Commission was highly critical of the chain of command for its failure to adjust the ROE to accommodate to a more hostile environment.<sup>69</sup> The Commission Report stated that the Marines were under orders “not to engage in combat” and that they were to use “normal . . . peacetime ROE.”<sup>70</sup> The Report went on to say that “for any ROE to be effective, they should incorporate definitions of hostile intent and hostile action

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60. *Id.*

61. *See id.*

62. *Id.*

63. *Id.*

64. Henkin, *supra*, note 59.

65. *Id.*

66. *Id.*

67. *See War Powers, supra* note 49, at 64.

68. UNITED STATES COMMISSION ON BEIRUT, DEP’T OF DEFENSE, REPORT OF THE DOD COMMISSION ON BEIRUT INTERNATIONAL AIRPORT TERRORIST ACT, OCTOBER 23, 1983, 32–33, 47–48 (1983) [hereinafter LONG COMMISSION].

69. *Id.* at 48, 51

70. *Id.* at 45.

that correspond to the realities of the environment in which they are to be implemented.”<sup>71</sup>

There is no hard evidence that these Marines were made vulnerable because of the desire to avoid consultations with Congress under the War Powers Resolution. However, it seems clear that the administration knew that the Marines had been placed in a situation where hostilities were at least imminent, if not ongoing.

During the period prior to the terrorist attack, the administration was engaged in a major dispute with key members of Congress over war powers. The administration argued that U.S. forces in Lebanon were not involved in hostilities as defined by the law. Yet, on August 29, 1983, two Marines were killed and fourteen wounded when they received and returned hostile fire.<sup>72</sup> On September 1, an additional 2000 Marines were sent in, along with fighter planes and artillery.<sup>73</sup> On September 12, the Marines were authorized to call in air strikes.<sup>74</sup> On September 19, U.S. naval forces offshore shelled the Suk el Gharb area in support of the Lebanese Army, an action cited in the Long Commission Report as having changed the fundamental nature of our involvement.<sup>75</sup>

Rules of engagement should reflect the potential for danger to U.S. military forces, as the Long Commission stated. They represent a key factor in assessing whether the Executive Branch considers hostilities to be “clearly indicated by the circumstances.” If Congress truly were interested in preserving its war powers and in assuring that our military forces are being adequately protected, it would take a keen interest in the state of these rules.

### III. WAR POWERS IN THE AGE OF TERRORISM

Terrorism is not a new phenomenon, but it is a growing threat. The attack on the United States on September 11, 2001, evoked an overwhelming public response and a demand that our government protect the domestic population and punish the terrorists. The public looked to the president for leadership, and an immediate consequence was that an already assertive Executive Branch became even more dominant in the war powers area. Addressing the nation in the immediate aftermath of the attacks in New York, Washington, and Pennsylvania, President George W. Bush said “we stand together to win the war against terrorism.”<sup>76</sup> The atmosphere inside the White House was captured by CIA Director George Tenet in his recent book:

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71. *Id.* at 47.

72. *Id.* at 40; *War Powers*, *supra* note 49, at 64.

73. *War Powers*, *supra* note 49, at 64.

74. *Id.*

75. *Id.* at 65; LONG COMMISSION, *supra* note 68, at 40, 42.

76. Address to The Nation on the Terrorist Attacks, 2 PUB. PAPERS 1100 (Sept. 11, 2001).

After 9/11, everything changed. Many foreign policy issues were now viewed through the prism of smoke rising from the World Trade Center and the Pentagon. For many in the Bush administration, Iraq was unfinished business. They seized on the emotional impact of 9/11 and created a psychological connection between the failure to act decisively against al-Qa'ida and the danger posed by Iraq's WMD programs.<sup>77</sup>

The National Security Strategy (NSS) document released to the public by the Bush administration in 2002 was described by President Bush in a cover letter as "a wartime national security strategy."<sup>78</sup> The document distinguished the new threat from the Cold War-era threat, saying that during the Cold War the adversary was "a generally status quo, risk averse adversary. . . ." Today, however, "our enemies see weapons of mass destruction as weapons of choice."<sup>79</sup> This led, in the same document, to the "preemption doctrine," wherein "we do not rule out the use of force before attacks occur, *even if uncertainty remains as to the time and place of the enemy's attack.*"<sup>80</sup>

The concept of preemption has been with the nation since the very beginning. The discussion over giving the President the right to "repel sudden attacks" assumed that the Executive would not have to await an actual attack if solid information existed to the effect that an attack was imminent.<sup>81</sup> However, the phrase in the NSS stating "*even if uncertainty remains. . . .*" dramatically changes the traditional concept of preemption.<sup>82</sup> Both Ron Suskind (*The One-Percent Doctrine*) and George Tenet (*At the Center of the Storm: My Years at the CIA*) recount Vice President Cheney's instructions. Suskind quotes a source who recalled Cheney saying, "If there's a one percent chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response. It's not about our analysis, or finding a preponderance of evidence. It's about our response."<sup>83</sup>

It is unimaginable that an administration that has such an expanded view of its authority to defend the nation against terrorism would pay heed to a requirement in the War Powers Resolution to consult in advance. The Bush administration also has adopted the "unitary executive theory," which centralizes power within the White House and constrains departments and

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77. GEORGE J. TENET, *AT THE CENTER OF THE STORM: MY YEARS AT THE CIA* 305 (2007).

78. See Richard B. Doyle, *The U.S. National Security Strategy: Policy, Process, Problems*, 67 PUB. ADMIN. REV. 624, (2007).

79. *Id.* at 627.

80. *Id.* (emphasis added).

81. See War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555, H.R.J. Res. 93d Cong. (1973).

82. Doyle, *supra* note 78 (emphasis added).

83. RON SUSKIND, *THE ONE PERCENT DOCTRINE* 62 (2006).

agencies in their interactions with Congress.<sup>84</sup> It is doubtful that executive branch lawyers are playing the role they once did in the war powers arena.

For its part, Congress performed as Congresses often do in time of crisis. Just as in the case of the Gulf of Tonkin incident, Congress supported the President's desire to pursue the terrorists in Afghanistan and Iraq.<sup>85</sup> Rourke's description of the political dynamic that exists when the nation is facing a crisis certainly held in this case.<sup>86</sup>

Concerns that irrational reactions can take hold when the nation is in crisis are not new. Supreme Court Justice Joseph Story in 1833 wrote that republics suffered from dangerous tendencies to be "too ambitious of military fame and conquest" "imbecile in defense, and eager for contest."<sup>87</sup> Alexander Hamilton warned of times when "the national councils may be warped by some strong passion or momentary interest. . . ."<sup>88</sup>

The 9/11 attacks certainly created strong passion. As Hamilton observed, the Constitution envisioned an Executive who could act with "decision, activity, secrecy, and dispatch."<sup>89</sup> He added, however, that Congress's power over war provided "safety in the republican sense."<sup>90</sup> The question remains as to whether Congress played its role when it was asked by the President to authorize war against Iraq.

George Tenet has confirmed—and others have reported—that a National Intelligence Estimate (NIE) was sent to the Congress in the midst of the debate over Iraq.<sup>91</sup> It was ninety pages long and was kept in a vault in the center of the Capitol.<sup>92</sup> Dana Priest of the *Washington Post* quotes congressional aides responsible for safeguarding the material as saying "no more than six Senators and a handful of House members read beyond the five-page . . . summary. . . ."<sup>93</sup>

It is doubtful that a full reading of the NIE would have changed many minds. According to Tenet, the document seemed to confirm that Iraq possessed WMD, though the evidence was skimpy and based more on

84. Karl Manheim & Allan Ides, *National Security & the Law: Special Issue: The Unitary Executive*, LA. LAW., Sept. 2006, at 24.

85. H.R.J. 114, 107th Cong. (2002) (enacted); S.J. Res. 23 107 Cong. (2001) (enacted).

86. ROURKE, *supra* note 10.

87. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 92 (5th ed. 1994).

88. THE FEDERALIST NO. 63 (James Madison).

89. Michael Ramsey, *The Framers' War-Making Powers*, 28 HARV. INT'L REV. 4, 4 (2006).

90. *Id.*

91. TENET, *supra* note 77, at 322.

92. *Id.* at 327; Dana Priest, *Congressional Oversight of Intelligence Criticized: Committee Members, Others Cite Lack of Attention to Reports on Iraqi Arms, Al Qaeda Threat*, WASH. POST, April 27, 2004, at A1.

93. Priest, *supra* note 92.

historical than current analysis.<sup>94</sup> It offered nothing to support the widely-held perception—promoted by the White House—that Iraq was behind the 9/11 attacks, and little to prove that there was an al Qaeda–Iraq connection.<sup>95</sup> The document was typically obscure. It was, as Tenet has said, an “estimate,” and estimates are often based on best guesses.<sup>96</sup> Still, hearings on the NIE might have enabled Congress to dig deeper into the administration’s rationale for war. They were never held. There was no time.

What was at play was the dynamic described by Rourke.<sup>97</sup> No member of Congress wanted to be seen as weak on terrorism. The administration timed its national campaign to win approval for the war for September in an election year, one year after the 9/11 attack.<sup>98</sup> If more time had been taken to examine the case for war more deeply, Democrats would have suffered at the polls, the pundits opined. There was no time.

There were many *ex post facto* explanations given for voting to approve the war. Most in Washington believed that Saddam had WMD, not perhaps nuclear weapons, but chemical and biological weapons.<sup>99</sup> Few accepted the case that there was an al Qaeda connection.<sup>100</sup> Many said they wanted to strengthen the President’s hand in his effort to gain the support of the Security Council and that they did not expect him to use the authority to go to war without U.N. approval.<sup>101</sup> All of these explanations would have been unneeded if the war had gone well. As the nation has turned against the war, so has the Congress.

Congress was not the only institution that let down the Republic in the Iraq matter. There was an overwhelming internal dynamic in favor of war with Iraq inside the Bush administration that made open debate difficult, if not impossible. George Tenet put it this way: “There was never a serious debate that I know of within the administration about the imminence of the Iraqi threat. . . . Nor was there ever a significant discussion regarding enhanced containment of the costs and benefits of such an approach versus full-out planning for overt and covert regime change.”<sup>102</sup>

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94. See TENET, *supra* note 77, at 327–30.

95. See generally *id.* at 322–30 (discussing contents of the NIE).

96. *Id.* at 327.

97. ROURKE, *supra* note 10.

98. Jeff Gerth & Don Van Natta, Jr., *Hillary’s War*, N.Y. TIMES MAG., June 3, 2007, at 40.

99. See *id.* at 42.

100. See *id.*

101. *Id.* at 45.

102. TENET, *supra* note 77.

## IV. WAR POWERS, THE FUTURE

The Congress of the United States has become much more divided and partisan in recent years. There are serious questions as to whether the institution can play the role the Founders had envisioned for it on matters of war and peace. Meanwhile, the Executive Branch has used its natural attributes of decisiveness and secrecy to take the initiative. Yet, once again the Founders' fear that the Executive acting in crisis and alone would be prone to major mistakes seems as valid as ever. As constitutional scholar Louis Fischer has argued, "If the current risk to national security is great, so is the risk of presidential miscalculation and aggrandizement—all the more reason for insistence that military decisions be thoroughly examined and approved by Congress. Contemporary presidential judgments need more, not less, scrutiny."<sup>103</sup>

Can Congress be trusted in an age when the nation clearly needs efficiency, flexibility, and secrecy in its struggle with terrorists? A government has a fundamental responsibility to provide for the security of its people. The terrorism challenge must be met with a wide variety of policies and techniques. The military option is one of these, but it is a highly visible and very blunt instrument. One counter-terrorism expert, Ambassador Henry Crumpton, has said that the military is at best twenty percent of the answer.<sup>104</sup> In fact, as we have learned, the use of the military in inappropriate situations can exacerbate the terrorist threat.

As we have learned from various confrontations between conventional military forces and terrorist organizations, there are inherent dangers in seeking battlefield victories over an asymmetric force. Terrorists retain a certain tactical advantage when they lure a conventional force onto territory known best by the terrorist organization. The terrorists' first victory may well be luring the dominant power into combat. The second victory is then gained when the terrorists avoid defeat by melting into the civilian landscape, radicalizing the local population over the incursion by foreign forces, and recruiting more to their cause who are willing to commit suicidal terrorist acts. We have seen this scenario play out in Iraq in the past several years, and in Southern Lebanon in 2006 when the Israeli army attempted to defeat Hezbollah and failed.<sup>105</sup>

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103. LOUIS FISCHER, *PRESIDENTIAL WAR POWER* 185–86 (1995).

104. Henry A. Crumpton, *A New Era of Conflict*, Address at the University of Minnesota Humphrey Institute (Jan. 31, 2007) (Audio Available at <http://blog.lib.umn.edu/hhhevent/news/audio/Crumpton.mp3>).

105. Tom Ruys, *Crossing the Thin Blue Line: An Inquiry Into Israel's Recourse to Self-Defense Against Hezbollah*, 43 *STAN. J. INT'L L.* 265, 266 (2007).



In 1986, just after the Gulf of Sidra incident, House Foreign Affairs Committee Chairman Fascell challenged the Executive on the issue of taking preemptive action against terrorists:

... [The] new [Executive Branch] theory is that since we have state-supported terrorism, and since they have declared war on us, we do not really have to declare war on them. The United States, under the Commander in Chief theory, and under the theory of self-defense, can attack, can use the military might of the United States. . . .<sup>106</sup>

Fascell went on to ask whether these theories were, in effect, “modifying the [C]onstitution.”<sup>107</sup>

As we have accumulated more evidence about terrorist tactics—and about the difficulties of engaging them with conventional forces on territory familiar to them—the danger of delegating the war power to the President alone has become more apparent. Yet, Congress has thus far failed to play its role as a brake as the founders envisioned. Perhaps its members have been intimidated by the ongoing “emergency” called the “war on terrorism.”

If Congress is politically intimidated in times of crisis and unwilling to examine the case for war in depth, what then is the answer? If the institution is weakened and politicized to the point that it is incapable of performing its constitutional role, there are only two solutions: (1) change the Constitution or (2) strengthen the institution. I favor the latter.

#### V. COVERT WARS

When the Senate War Powers Bill (S-440) came to the floor in July 1973, Senator Eagleton proposed an amendment that would have the law cover so-called “covert operations,” combat activity instigated and carried out by civilian intelligence officials.<sup>108</sup> He argued that the exclusion of combat operations undertaken by the Central Intelligence Agency constituted a loophole that future presidents would exploit.<sup>109</sup> Urging his colleagues to “make the language of legislation match the realities of war,” Eagleton pointed out that “wars do not always begin with the dispatch of troops. They begin with more subtle investments . . . of dollars and advisors and civilian personnel.”<sup>110</sup>

Eagleton’s chief co-sponsors, Senators Stennis and Javits, opposed this amendment on the grounds that sensitive intelligence matters should not be covered by the legislation.<sup>111</sup> However, they agreed to undertake a study of the

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106. *War Powers*, *supra* note 49, at 3.

107. *Id.*

108. 119 CONG. REC. 25,079 (1973).

109. *Id.*

110. EAGLETON, *supra* note 1, at 193.

111. *Id.* at 189–95.

charter of the intelligence community and into covert activities that could lead to war.<sup>112</sup> The Eagleton amendment was defeated soundly, but it provided the impetus for enhanced congressional scrutiny and oversight of the intelligence community and, eventually, to the creation of permanent committees to perform this work.<sup>113</sup>

In this period after the 9/11 attacks on the United States, it is not any more likely that Congress would wish to close this “loophole” in the War Powers Resolution. Still, we have come to realize that taking covert combat action can be highly consequential and can lead to a wider war. Even an attack against “known terrorist bases” can produce added hostility toward the United States, especially if innocent civilians are killed. This is the danger of using force against an asymmetric force, e.g., international criminals who do not acknowledge or respect the international rules of war.

The demands created by the terrorism threat on the intelligence community are very real. Flexibility is required, and special needs are cited to meet the challenge of individuals who operate in the shadows. Congress has accommodated these needs by insinuating itself into the decision processes related to the requests made by intelligence agencies for presidential “findings,” the approval process for covert operations.<sup>114</sup> This process may have its flaws in that Congress is normally notified on an ex post facto basis, but the Executive Branch understands that it will undergo scrutiny and that it will be held accountable. Likewise, the Intelligence Committees have demonstrated over time that they can keep a secret, especially when they believe that highly sensitive matters or lives are at stake.

There is no similar process when the Executive is contemplating the introduction of U.S. armed forces into hostile situations. When we take this step, whether to attack terrorists or states that we believe are sponsoring them, “we do not operate in the shadows; we operate under the glare of international scrutiny with all the risks inherent in using overt force in another nation.”<sup>115</sup> As former CIA Director William Colby warned, “military engagements can lead ‘by an inexorable process of reactions’ to a general war and to nuclear confrontation. He . . . observed that the use of force as a consistently applied policy option might only contribute to the ‘sum of anarchy.’”<sup>116</sup>

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112. *Id.* at 195–96.

113. *Id.* Later in the 1970s, when CIA abuses came to light, a special committee chaired by Senator Frank Church investigated the Agency and recommended major reforms, including enhanced congressional oversight. William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 715 (2003).

114. Lori Fislser Damrosch, *Covert Operations*, 83 AM. J. INT’L L. 795, 795, 805 (1989).

115. *War Powers*, *supra* note 49, at 81.

116. *Id.* at 82.

## VI. INSTITUTIONALIZING THE WAR POWERS CONSULTATION PROCESS

The decisions we make in dealing with terrorism require consideration by the most experienced minds in our government, in both the Executive and Legislative Branches. The complexity of the problem is so great and the ramifications of using force so fateful that we should take the utmost care in considering the options.

What then is the relevance of the War Powers Resolution in this age of terrorism? I believe that a constructive role for Congress is even more important today than it was in 1973. It is my belief that the consultation provision provides the opportunity for Congress to play that role. Congress, however, needs to reassert itself as an institution. It needs to create a process that enables it to participate in the decision process *before* U.S. forces are on their way to battle stations. Congress cannot easily offer advice, manage, or even terminate an involvement in hostilities after they have begun. If Congress is to insist on the full implementation of the Section 3 consultation provision, it must organize itself to perform this function in a proactive manner that will inspire the confidence of the public and the Executive Branch. Above all, Congress must begin to take seriously its constitutional responsibility and find ways to avoid being swept away by the political forces so vividly described by Rourke.<sup>117</sup>

Senator Eagleton, Congressman Lee Hamilton, and Senator Robert Byrd have recommended the formation of a special leadership committee.<sup>118</sup> This committee would be professionally staffed with military, diplomatic, and intelligence analysts and assigned responsibility for tracking situations that could require the introduction of U.S. forces into hostilities.<sup>119</sup> Senator Byrd, who still serves in the U.S. Senate, has proposed that the “leadership of both Houses and the chairmen and ranking members of the foreign relations, armed services, and intelligence committees be assigned to this special ‘consultative committee.’”<sup>120</sup> The participation of these eighteen senior members of Congress from both parties could provide strong bipartisan support for whatever action is decided upon, including a decision not to use force. The presumption is that it would offer independent views, unintimidated by the bureaucratic pressures extant in the Executive Branch.

The founders of our nation lived in less complicated times, but their wisdom on the issue of war carries through to this day. They did not wish to leave the security of our nation and the world to the exclusive judgment of a single person whose accountability is limited in the short term.

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117. See ROURKE, *supra* note 10.

118. *War Powers*, *supra* note 49, at 83.

119. *Id.* at 84.

120. *Id.* at 83.

Senator Eagleton met with very impressive legal scholars during his work on the Senate war powers legislation. The late Alexander Bickel, then of Yale University Law School, impressed him deeply. Professor Bickel summed it up best: “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, together they are all we’ve got.”<sup>121</sup> It is not a perfect system and the political dynamics surrounding the decision to use force will always make dissent difficult; however the decision to go to war should not be an easy one. Congress is a check and balance we need in this complex age of terrorism.

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121. ROURKE, *supra* note 10, at 7.

