THE WAR POWERS RESOLUTION AFTER THE LIBYAN AND PERSIAN GULF CRISES

*By Robert G. Torricelli**

Congressman Robert G. Torricelli, a Democrat representing New Jersey's Ninth Congressional District, has been a member of the House Committee on Foreign Affairs since 1982. In this capacity, he has had a first-hand opportunity to witness the executive-legislative tension inherent in the War Powers Resolution. The following article represents his perspective on this controversial issue.

The United States' raid on Libya in April of 1986 and its involvement the following year in military action in the Persian Gulf, raised once again the issue of presidential compliance with the War Powers Resolution.[1] It also raised the larger issue concerning the proper roles of the executive and legislative branches in formulating foreign policy. Among the questions were the applicability of the War Powers Resolution to anti-terrorist operations, the nature of the obligation to consult with Congress, and the constitutional implications of an executive-legislative clash.

The War Powers Resolution was enacted in a triumph of congressional power when the House and Senate overrode President Nixon's veto in 1973. The increased complexity of the federal government's obligations and the transformed nature of warfare made the Constitution's eighteenth century war-making procedure unworkable. Since 1973, the transition in warfare not just to insurgency, but to terrorism as well, has called into question the utility of the War Powers Resolution.

The legislative history of the War Powers Resolution is long and complicated. As early as 1969, dissatisfaction with the Vietnam War led the Senate to pass a non-binding resolution, S. Res. 85, declaring that a national military commitment could be made only "from affirmative action taken by the legislative and executive branches . . . by means of a treaty, statute, or concurrent resolution of both houses . . . specifically providing for such commitment."

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[1] War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (current version at 50 U.S.C. §§ 1541-1548 (1982 & Supp. IV 1986)).

In 1970, the House passed H.R.J. Res. 1355, the first in a series of measures that urged the President to consult with Congress before ordering an unauthorized use of troops, and required him to report his actions to Congress. It did not, however, give Congress the ability to force troop withdrawals. H.R.J. Res. 1355 died in the Senate, as did a similar bill, H.R.J. Res. 1, in 1971. The next year, the Senate passed a bill, S. 2956, that included provisions for congressional termination of United States military involvements. The House version contained no such provision, and Congress could not reach a compromise in conference.

A variety of circumstances occurring in 1973 made the final passage and enactment of the War Powers Resolution possible. The increasingly unpopular Vietnam War had escalated to include Laos and Cambodia. The Watergate scandal weakened the influence of President Nixon. In March of that year, a House Foreign Affairs Subcommittee began hearings on the War Powers Resolution. By May, the subcommittee approved H.R.J. Res. 542, a bill that became law despite amendments, a conference and a presidential veto.

The subcommittee version stated that in the absence of a declaration of war, congressional approval was needed for the commitment of United States troops to hostilities for more than 120 days. In addition, Congress would have the power to shorten the 120-day period by passage of a concurrent resolution. The full House Foreign Affairs Committee version contained essentially the same language. In July, the House of Representatives passed H.R.J. Res. 542. Floor amendments changed the committee version by deleting committee language which applied the resolution to present conflict, while also deleting the provision that allowed the President to declare an emergency.

Meanwhile, in May of 1973, the Senate Foreign Relations Committee approved a bill containing stricter provisions than the House version. The measure, S. 440, enumerated several emergency situations in which the President could deploy United States troops into hostilities without a congressional declaration of war. It prohibited the continuation of any military actions after thirty days without Congressional approval. The objections to S. 440 came from Senators, including committee Chairman J.W. Fulbright, who thought that the bill was too permissive because the emergency powers granted to the President were destined for abuse. In July, the Senate passed S. 440 virtually unchanged.

Following House and Senate action, conferees from the two bodies compromised on a sixty-day deadline on commitment of

United States forces not authorized by Congress, except under certain circumstances. Conferees also accepted language allowing Congress to force withdrawal of United States forces by concurrent resolution, despite doubts about the constitutionality of this provision. These doubts, of course, were justified, as evidenced by the case of *Immigration & Naturalization Service v. Chadha*.[2] The House and Senate approved the conference report in early October 1973. On October 24th of that year, President Nixon vetoed the measure. Congress overrode the presidential veto on November 7th, and the measure became law without the President's signature and over his strenuous objections.

Throughout the debate a striking coalition of liberals and conservatives opposed the War Powers Resolution. The latter, primarily Republicans, stressed the danger of limiting the flexibility of the President and questioned the Act's constitutionality. The liberals also raised a constitutional argument, but in an entirely different manner. They maintained that the President's authority was already circumscribed, and argued that the Resolution would actually increase his power. According to this line of reasoning, the President's statutory authority to commit troops without a declaration of war gave him more power than constitutionally permissible.

Of the fifteen House liberals who voted against the War Powers Resolution, eight changed their position at the last moment and provided the margin necessary to override the President's veto. The margin was only four votes over the required two-thirds majority, so the votes of the holdout liberals or more aptly, strict constructionists, were vital. In the Senate, support for the Resolution was stronger. President Nixon's hold over Republican Senators was uncertain, and one of them, Jacob Javits of New York, was a prime supporter of the legislation.

In its final form, H.R.J. Res. 542 contains three central elements relating to presidential war-making power: restrictions, requirements for consultation, and requirements for reporting. First, the Resolution authorizes the President to send United States armed forces into hostilities or potentially hostile situations only pursuant

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[2] 462 U.S. 919 (1983). At issue in this case was the constitutionality of a statutory provision that allowed one House of Congress to invalidate, by resolution, an executive branch decision. *Id.* at 923. Concluding that the one-House veto power was not a recognized Article I exception to the bicameral structure of the federal government, the Supreme Court decided that any attempt to invalidate an executive branch decision must satisfy constitutional provisions for legislative action. *Id.* at 956-58. Thus, the Court held the congressional veto provision in question unconstitutional. *Id.* at 959.

to a declaration of war, specific statutory authorization, or a national emergency arising from an attack on the United States or its territories, possessions, or armed forces. Secondly, the President must consult with Congress, in every possible instance, before introducing United States troops into hostilities or situations in which hostilities are imminent. Such consultations must continue as long as hostilities continue. Finally, in the absence of a declaration of war, the Resolution requires the President to report to the Speaker of the House and President pro tempore of the Senate within forty-eight hours regarding the circumstances, scope, and projected duration of hostilities.

The Resolution then goes on to provide active and passive Congressional impediments to the continuation of hostilities. Within sixty days after submission of the report, United States troops must be withdrawn unless Congress either declares war or specifically authorizes the continued commitment of troops. By concurrent resolution Congress may also terminate, either before or after the end of the sixty-day period, the use of armed forces.

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In the 1980's, the need for absolute secrecy in planning quick, limited military strikes has become essential. A direct conflict now exists between military utility and constitutional checks and balances. While this dilemma has marked the entire history of the Republic, the increased speed of military capability and breakdown of traditional definitions of war have brought this issue into sharper focus.

On April 14th, 1986, United States warplanes attacked military installations in Libya. The attack followed a series of Libyan-directed terrorist bombings in Western Europe that killed Americans and others. It also followed an incident of the previous month in which United States aircraft, challenged by Libyan forces in international waters claimed by Libya, destroyed anti-aircraft missile sites in that country.

President Reagan invited fifteen congressional leaders to discuss United States plans at approximately 4:00 p.m. on the day of the attack. The planes were already airborne, and reached their targets three hours later. The President subsequently submitted to Congress a report in accordance with the War Powers Resolution. The fifteen Congressmen and Senators invited to the White House briefing on the day of the attack included: the Speaker of the House and President pro tempore of the Senate; the Majority and Minority Leaders of the House and Senate; the House Majority Whip; the

Chairman and Ranking Minority Member of the House and Senate Armed Services Committees; the Chairman and Ranking Minority Member of the House Foreign Affairs Committee; the Chairman and Ranking Minority Member of the Senate Foreign Relations Committee.

As a result of the controversy surrounding the attack on Libya, Senator Robert Byrd, then Senate Minority Leader, proposed legislation that would have codified the question of which members of Congress were entitled to consultation regarding prospective hostilities.[3] One of the problems in persuading administrations to comply with the Resolution has been its requirement to consult with "Congress" without being more specific. Presidents were free to decide which members of Congress to consult, since discussing imminent hostilities with the entire membership of both houses would be unwieldy and would threaten secrecy.

The Byrd proposal designated a permanent consultative body of the above members, with the exception of the House Majority Whip and the addition of the Chairmen and Ranking Minority Members of the House and Senate Intelligence Committees. No legislation, however, can address the main obstacle to compliance with the War Powers Resolution. It is not that Presidents do not know with whom to consult, it is that they would rather not consult at all.

Although the Constitution explicitly gives Congress the power to declare war, the framers implicitly gave the President the power to *make* war, by designating him Commander-in-Chief.[4] Until recent times, presidential dispatches of United States troops into foreign countries met little congressional opposition. Vietnam, of course, changed this. America found itself embroiled in a war that lasted for more than a decade while appearing nightly on millions of home television screens, and eventually lost popular support. As a result of Vietnam, the President's competence to enter into war was called into question.

Very few of the military actions in United States history have been wars declared by Congress. Except for the Civil War, all were limited enough in duration or expense so as not to incur widespread popular opposition. In the case of Vietnam, however, a substantial segment of the American people and their elected representatives came to the conclusion that the war failed to meet the test of protecting either the " 'inchoate interests' and honor of the United

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[3] *See* S.J. Res. 340, 99th Cong., 2d Sess. (1986).

[4] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (M. Farrand ed. 1966).

States, or the rights and property of American citizens abroad."[5]

The 1986 attack on Libya must be evaluated in light of post-Vietnam congressional attitudes toward presidential deployment of military forces. In the period since 1973, and particularly during the Reagan Administration, Congress became far more tolerant of presidential authority in military matters. This was displayed, for instance, by the relatively mild congressional reaction to the United States operation in Grenada in 1983.

Several factors have contributed to this trend. First, Americans perceived the Soviet Union as growing in military strength and increasingly willing to challenge the United States' interests in the Third World. The breakdown of detente in the 1970's and the Soviet invasion of Afghanistan have also contributed to this perception. Second, the Sandinista revolution in Nicaragua, and the perception of Nicaragua as a Soviet satellite, created new fears about the security of the United States. In this setting, the landing on Grenada and overthrow of a Soviet-allied regime evoked relatively little domestic outcry. The Grenada incursion's speed, low price, and ease of victory contributed to this muted reaction.

The April raid on Libya was not, as in the case of Grenada, undertaken for the stated purpose of safeguarding American lives in a direct sense. Rather, it was designed to deter Libya from carrying out further attacks on American citizens abroad. The attack raised questions in Congress about compliance with the War Powers Resolution and spurred House Foreign Affairs Committee hearings on the issue.

During the hearings, State Department Legal Advisor Abraham Sofaer asserted that the President met both the consultation and reporting requirements of the Resolution. He stated that "extensive consultations occurred with congressional leaders. They were advised of the President's intention after the operational deployments

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[5] C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES, 53 (1970). The author explained:

> The power of the President to employ the land and naval forces on his own authority, whether for the purpose of protecting the so-called "inchoate interests" and honor of the United States, or the rights and property of American citizens abroad, has thus been demonstrated in actual practi[c]e again and again, and seems also to have been approved by Congress, by the courts, and by public opinion. It seems scarcely necessary to suggest the possibilities of international complications and conflicts that may result from an unwise exercise of this power, and hence the enormous responsibility for the peace of the United States that rests in this way upon the shoulders of the President.

Id. at 52-53.

had commenced, but hours before military action actually occurred."[6] However, in actuality, congressional leaders were not consulted until the aircraft were already on their way to Libya. The President presented a *fait accompli*, thus informing the legislators of his decision rather than consulting with them.

Sofaer then went on to note that Congress had previously instructed the Department of Defense about the duty of the government to protect United States citizens abroad from terrorism and had authorized funds for that purpose.[7] Throughout the controversy surrounding the attack on Libya, there was little question of the President's right to engage in anti-terrorism operations. The April 14th operation, however, did not involve a special squad engaged to free American hostages as envisioned by Congress in its mandate to the Department of Defense. Rather it involved a large assemblage of regular military forces deployed to attack the regular military forces of another country—an action which should have come under the requirements of the War Powers Resolution.

The reaction to the raid on Libya demonstrates that Congress, while concerned about protecting its prerogatives, will not provoke a serious confrontation over questions of compliance with the War Powers Resolution if it deems the presidential action appropriate. President Reagan's policy towards Libya gained wide support in Congress and among the public. Few legislators were willing to object on grounds of either procedure or substance. To the contrary, many of the Administration's critics maintained that the United States had not been firm enough in its actions.

Following the attack on Libya, legislation was introduced in the House and Senate to loosen the restrictions of the War Powers Resolution. This was in direct opposition to the Byrd measure.[8] This bill, the Senate version introduced by then Majority Leader Robert Dole, authorized a President "to undertake actions to protect United States persons against terrorists and terrorist activity through the use of all such antiterrorism and counterterrorism measures as he deems necessary."[9] The bill also required the Presi-

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[6] *War Powers, Libya, and State-Sponsored Terrorism: Hearings Before the Subcomm. on Arms Control, Int'l Security & Science of the House of Representatives Comm. on Foreign Affairs*, 99th Cong., 2d Sess. 9-10 (1986) (statement of Abraham Sofaer, Legal Advisor, U.S. Dep't of State).

[7] *Id.* at 10.

[8] *See* H.R. 4611, 99th Cong., 2d Sess. (1986); S. 2335, 99th Cong., 2d Sess. (1986).

[9] H.R. 4611, 99th Cong., 2d Sess. (1986).

dent to report to Congress on his actions within ten days,[10] rather than the forty-eight hours mandated in the War Powers Resolution.

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Just over a year after the attack on Libya, the United States again became involved in hostilities in the Middle East, this time in the Persian Gulf. In response, members of Congress attempted to invoke the War Powers Resolution through legislative and judicial action.

In September 1980, Iran and Iraq became embroiled in a bloody, protracted and largely inconclusive war. The United States, while claiming official neutrality, maintained a de facto tilt against Iran because of that country's fanatical regime and its professed desire to spread its revolution throughout the Middle East. Though it began as a land conflict, the Iran-Iraq war soon spread to the sea, thereby involving the countries of the Persian Gulf as well as the major world oil importers. Iraq launched continual attacks on oil tankers trading with Iran. Since Iraq was shut off from the Gulf at the beginning of the war, and therefore conducted its commerce by land, Iran attacked ships trading with Kuwait and the other Gulf states supporting Iraq.

In March of 1987, the Reagan Administration announced its intention to reregister, under the United States flag, eleven tankers belonging to the Kuwait National Oil Company. This move would qualify the ships, half of the Kuwaiti-owned tanker fleet, for United States naval protection. The Administration's stated rationale for the new policy was to safeguard oil supplies flowing through the Persian Gulf and counter a Soviet offer to lease a number of tankers to Kuwait. Congressional and other critics contended that the real reason for the Administration's step was to restore Arab confidence in the United States after the Iran-Contra affair. In any case, the reregistration, known as reflagging, marked, for all practical purposes, the beginning of direct American involvement in the Gulf War.

The degree of American involvement became apparent even before the beginning of reflagging when the newly increased United States Navy presence in the Gulf suffered its first casualty. On May 17th, 1987, an Iraqi warplane attacked the frigate U.S.S. *Stark*, killing thirty-seven crewmen and crippling the vessel. The Iraqi government called the incident an accident, but it aroused public and congressional reaction. The reflagging policy, which until then at-

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10 *See id.*

tracted little scrutiny, came under growing criticism and spurred legislative and judicial efforts to invoke the War Powers Resolution.

In the House and Senate, a number of unsuccessful attempts were made to delay the reflagging operation. In July, when reflagging began, another incident occurred that sparked a fresh evaluation of the policy. On July 24th, the *Bridgeton*, a reflagged tanker sailing in the first convoy escorted by the Navy, hit a mine presumably planted by Iran.

In September of 1987, the coincidence of Senate consideration of the annual Defense Authorization Bill and further Iranian military activity provided renewed calls for War Powers compliance. On September 18th, Senator Mark Hatfield proposed an amendment to invoke the time limits set forth in the War Powers Resolution.[11] This proposal was killed by a nine-vote margin.[12] Barely three days later, United States helicopters disabled an Iranian landing craft caught in the act of laying mines. The next day, Senator Lowell Weicker introduced legislation to invoke the War Powers Act.[13]

Debate continued on the Weicker resolution throughout October, when the focus again shifted to military developments in the Persian Gulf. On October 16th, Iran fired a Chinese-made Silkworm missile at Kuwait, which struck the reflagged tanker *Sea Isle City*. In retaliation, United States naval forces shelled and debilitated two Iranian offshore oil drilling platforms used to stage attacks on commercial shipping.

In Washington, the Senate was in the process of diluting the Weicker resolution. On October 21st, the upper house instead adopted[14] a substitute measure offered by Senator Byrd, Majority Leader, and Senator John Warner, that merely required an Administration report on Persian Gulf policy.[15] A resolution introduced by Senator Brock Adams that would have ended the reflagging by December 20th, was shelved on December 4th,[16] Senate leaders agreed to procedurally block a possible filibuster of legislation that would invoke the War Powers Resolution should such a measure be offered in 1988.

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11 133 CONG. REC. S12,336-37 (daily ed. Sept. 18, 1987) (statement of Sen. Hatfield).

12 133 CONG. REC. S12,358 (daily ed. Sept. 18, 1987) (result of vote to table the Hatfield amendment).

13 S.J. Res. 194, 100th Cong., 1st Sess. (1987).

14 *See* 133 CONG. REC. S14,656 (daily ed. Oct. 21, 1987) (record of vote on the Byrd-Warner amendment).

15 *See* 133 CONG. REC. S14,644-46 (daily ed. Oct. 21, 1987) (statement of Sen. Byrd).

16 *See* S.J. Res. 217, 100th Cong., 1st Sess. (1987).

Meanwhile, the House of Representatives proceeded on two tracks relating to the War Powers issue, although no votes on any measures actually took place. One group of 110 House members, under the auspices of the Democratic Study Group, brought suit in United States District Court for the District of Columbia to force the President to comply with the provisions of the War Powers Resolution.[17] The suit was based on the argument that presidential failure to comply with the law should be resolved in the courts, not by passing a new law, as the Senate was considering.

On December 18th, 1987, the court rejected this claim and dismissed the complaint on the following grounds: 1) there were prudential considerations associated with the exercise of equity discretion and the constraints of the political question doctrine; 2) a decision on whether the President is required to submit a report to Congress under section 4(a)(1) would require deciding whether the twin tests—introduction into hostilities or imminent involvement in hostilities—had been met, and the court was in no position to make that decision; and 3) the suit was a byproduct of political disputes within Congress rather than between Congress and the Executive. The court cited the ongoing debate in the Senate, in concluding that the debate was primarily between legislators. The court stated, in effect, that Congress would have to make up its mind before the judiciary could decide what Congress meant by the term "hostilities" as stated in the War Powers Act.[18]

Leading the second House approach, Representative Stephen Solarz introduced legislation on October 22nd, that would have simultaneously invoked the War Powers Act and authorized the President to continue the presence of United States Armed Forces in the Persian Gulf.[19] This resolution specified no time limit for withdrawal, but did provide for expedited legislative procedures should withdrawal legislation be introduced. The Solarz resolution had precedent in an earlier Middle East crisis. The Multinational Force in Lebanon Resolution declared that section 4(a)(1) became operative on August 29th, 1983, and at the same time authorized United

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17 Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987).

18 *See id.* at 340-41. The court did not want to overstep its authority in deciding whether the United States armed forces were actually engaged in hostilities in the Persian Gulf. *See id.* at 340. In so holding, the court stressed the need for a "single voiced statement of the Government's views" in foreign policy. *Id.* (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)).

19 H.J. Res. 387, 100th Cong., 1st Sess. (1987).

States Marines to remain in Lebanon for eighteen months.[20]

I supported both the law suit to invoke War Powers and the Solarz legislation. The suit was warranted because the test set forth in section 4(a)(1) of the Act—imminent involvement in hostilities—had been met several times. The Administration, however, refused to comply with section 5(b) of the Act, which required withdrawal of United States armed forces absent specific congressional authorization.

In the spring of 1988, military action in the Persian Gulf once again brought the War Powers issue to the surface. On April 14th, the frigate U.S.S. *Samuel Roberts*, operating in the Gulf, struck a mine presumably planted by Iranian forces. On June 6th, Senate Majority Leader Byrd effectively blocked consideration of a resolution introduced by Senator Adams that would have invoked the War Powers Resolution.[21]

Senator Byrd's action in this instance was not surprising. Earlier, on May 19th, he introduced, along with Senators Sam Nunn and John Warner, the Chairman and Ranking Republican respectively of the Senate Armed Services Committee, a major overhaul of the War Powers Resolution.[22] The Byrd-Nunn-Warner bill, in essence, would establish a fixed body of congressional leaders to consult with the President on national security matters and, in a reversal of the War Powers Resolution formula, would force withdrawal of United States forces only if Congress so mandated.

The new bill would repeal section 2(c) of the War Powers Resolution, which prohibits deployment of United States forces into hostilities or into a situation of imminent involvement in hostilities, absent a declaration of war, specific statutory authorization, or an attack on United States forces or territory. Additionally, the bill would create a core group of six legislators—the Speaker of the House, the President pro tempore of the Senate, and the majority and minority leader of each body to consult with the President regularly on vital national security issues.[23] A majority of the members of the core group could request the President to consult with a wider group of eighteen, which would include the chairman and ranking minority members of the Committees on Armed Services, Foreign Affairs, and Intelligence of the House and Senate.

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[20] Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, § 2, 97 Stat. 805 (1983).

[21] S.J. Res. 305, 100th Cong., 2d Sess. (1988).

[22] S.J. Res. 323, 100th Cong., 2d Sess. (1988).

[23] *Id.*

Further, the Byrd-Nunn-Warner legislation would repeal section 5(b) of the War Powers Resolution requiring withdrawal of United States forces from hostilities absent specific congressional authorization. Instead, it would expedite the procedures by which Congress would consider a resolution either to withdraw United States forces from such a situation or authorize their continued presence. The Byrd-Nunn-Warner proposal would make the President far less dependent on congressional agreement than he is under the terms of the current War Powers Resolution. True, a legislative effort to withdraw United States forces from a combat situation would not, because of the expedited procedures, be subject to filibuster in the Senate. However, the certainty of a veto of any such resolution would effectively require a two-thirds supermajority in each chamber for enactment.

The idea of a congressional consultative group, as previously mentioned, was proposed by Senator Byrd in the aftermath of the Libya crisis. Members of the House of Representatives also advocated the formation of such a group. In July of 1988, Representative Dante Fascell, Chairman of the House committee on Foreign Affairs, repeated his proposal of the previous year for the formation of a leadership consultative group to consist of senior Administration foreign policy figures and senior members of Congress.[24] Representative Fascell noted that such a group could be created on an ad hoc basis, without legislation, and could meet informally.

To date, the Administration has reported to Congress six times on military actions involving United States forces in the Persian Gulf. In the first instance, Secretary of State George Schultz wrote to House of Representatives Speaker Jim Wright regarding the Iraqi attack on the U.S.S. *Stark* on May 17th, 1987.[25] The letter made no mention of the War Powers Resolution. In letters to Speaker Wright and Senate President pro tempore John Stennis following a United States Navy attack on the Iranian minelaying ship *Iran Ajr*, President Reagan mentioned the War Powers Resolution, but only to note that it had been the subject of differing interpretations between Congress and the Executive.[26] In the next four instances,

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[24] *See Testimony Before the Special Subcomm. on War Powers of the Senate Comm. on Foreign Relations*, 100th Cong., 2d Sess. (1988) (statement of Dante Fascell, Chairman of House of Representatives Committee on Foreign Affairs).

[25] *See* SUBCOMM. ON ARMS CONTROL, INT'L SECURITY & SCIENCE OF THE HOUSE OF REPRESENTATIVES COMM. ON FOREIGN AFFAIRS, 100TH CONG., 2ND SESS., THE WAR POWERS RESOLUTION, RELEVANT DOCUMENTS, CORRESPONDENCE, REPORTS 91-92 (Comm. Print 1988).

[26] *See* COMMUNICATION FROM THE PRESIDENT OF THE U.S., A REPORT ON THE SEPT.

President Reagan, in his letters to congressional leaders, stated that he was providing a report consistent with the requirements of War Powers Resolution.[27] In no case, however, did the President undertake specific compliance with the Resolution by invoking section 4(a)(1). The Administration noted that since the reports did not cover the circumstances requiring United States intervention or estimate the scope and duration of the intervention, the statutory requirements were not triggered.

My view on this series of events is, first, that in the incidents following the attack on the U.S.S. *Stark*, actual combat, not merely imminent involvement in hostilities, did occur. This would meet the "introduction into hostilities" test of section 4(a)(1). Second, if a President has doubts about the constitutionality of the War Powers Resolution, it should be tested in the courts. I do not accept the view that merely because the Resolution is or might be unconstitutional, the President can ignore it. Statutes should be obeyed until such time as they are struck down in court.

Third, the Reagan Administration operated on a faulty premise with regard to congressional attitudes toward the Persian Gulf situation. The Administration feared that Congress, if the War Powers Resolution was invoked, would refuse to authorize the continued presence of United States forces in the Persian Gulf. The opposite, however, is closer to the truth. For political and policy reasons, many members of Congress initially opposed to the reflagging and escort policy would have approved a continued United States presence in the Persian Gulf. Those members understood that a withdrawal of forces would embolden Iran at a time when that country continued to attack neutral shipping and to intimidate the Arab Gulf states. For this reason I supported the Solarz legislation, which by simultaneously invoking the War Powers Resolution and authorizing a continued United States presence, sought to remove the fear that adherence to the Resolution would be a cloak for retreat.

21, 1987 ENGAGEMENT OF U.S. ARMED FORCES AND IRANIAN MINELAYING LANDING CRAFT IN THE PERSIAN GULF, H.R. DOC. No. 112, 100th Cong., 1st Sess. (1987).

27 *See* COMMUNICATION FROM THE PRESIDENT OF THE U.S., A REPORT ON THE OCT. 8, 1987 ENGAGEMENT BETWEEN U.S. ARMED FORCES AND IRANIAN NAVAL VESSELS IN THE PERSIAN GULF, H.R. DOC. No. 113, 100th Cong., 1st Sess. (1987); COMMUNICATION FROM THE PRESIDENT OF THE U.S., A REPORT ON THE OCT. 19, 1987 ACTIONS BY U.S. ARMED FORCES IN THE PERSIAN GULF, H.R. DOC. No. 120, 100th Cong., 1st Sess. (1987); COMMUNICATION FROM THE PRESIDENT OF THE U.S., A REPORT ON THE APR. 18, 1988 ACTIONS BY ARMED FORCES OF THE U.S. IN THE PERSIAN GULF, H.R. DOC. No. 181, 100th Cong., 2d Sess. (1988); COMMUNICATION FROM THE PRESIDENT OF THE U.S., A REPORT ON THE JULY 3, 1988 ACTIONS BY ARMED FORCES OF THE U.S. IN THE PERSIAN GULF, H.R. DOC. No. 210, 100th Cong., 2d Sess. (1988).

As of this writing, the War Powers Act is no longer a burning issue in Congress. In August 1988, Iran and Iraq reached a cease-fire agreement which spurred the expectation of a reduced United States naval presence in the Gulf. Nonetheless, the War Powers Resolution, having neither been obeyed nor struck down, is in limbo. I believe that if a vote had been taken on the Persian Gulf deployment, Congress would have invoked the Resolution and authorized United States forces to remain in the Gulf. For a variety of reasons, that vote did not occur. A disparate coalition came together to prevent the issue of War Powers compliance from surfacing in simple form in the Senate and in any form in the House. One element of this coalition is those members who, like Senator Fulbright, believe that the War Powers Resolution gives more warmaking power to the President than the Constitution intended. This group is interested not so much in invoking the Resolution in its current form as in strengthening it so as to avoid the post-*Chadha* necessity for an affirmative two-thirds vote in each House. Another faction in this coalition is those members who dislike the precedent of passing a law to enforce a prior law. This group favors pursuing remedies exclusively. A third group is composed of those Representatives and Senators who agree with the Administration that the Resolution unconstitutionally ties the President's hands and should therefore not be invoked.

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The War Powers Resolution remains valid in terms of anti-terrorist operations and not just conventional warfare. However, the Resolution is most effective for keeping the United States out of the Vietnam-type of conflict from which the legislation arose. Perhaps legislators should reserve their heaviest fire for circumstances closer to those on which the framers of the Resolution based their formulations. The introduction of United States ground troops near or into Nicaragua might be one such case.

Congressional restraint on the Executive works best when Administration policies threaten to entangle the United States in a drawn-out war with confused goals and little chance of success. President Reagan has avoided a major confrontation with Congress over the War Powers issue because he has drawn back whenever a conflict has become prolonged. The 1983 Beirut peacekeeping misadventure is a good example of this conduct. The Administration decided to withdraw the Marines from Lebanon when it became clear that their presence only inflamed passions instead of calming them.

Congress' ability to exercise a direct say in foreign and defense policy has been weakened by the march of technology. When faced with an imminent nuclear attack, a President would have no time to consult Congress even if he so desired. Congressional control over the budget is frequently cited by the executive branch as evidence of Congress' influence over military matters. Congressional power of the purse, however, only influences long-term policy, not decisions that must be made quickly.

The political reality of Washington is that Congress, for the most part, prefers a President to take the lead on foreign policy. As long as it agrees with presidential policy, Congress is unlikely to step in, even when it is not consulted. Congress tends to fence in a President when it disagrees with both the substance and method of presidential conduct.

The framers of the Constitution sought to limit the executive branch's power without damaging the degree of central government control. The dilemma of executive expedience versus popular accountability has not changed that much in two hundred years. The margin of error, however, has become greater. Until World War II, a balance of power tipped in favor of Congress would not have caused the nation serious damage. Secure behind two oceans, the United States had a fairly large margin of error in the conduct of foreign and military affairs. Today, no such security exists.

The dispute over the War Powers Resolution is yet another example of Congress' desire to assert what it believes to be its legitimate role in foreign policy and war, while shrinking from the use of the strongest congressional weapon: a refusal to appropriate funds. Congress could have ended the Vietnam War in this manner, and could have forced the withdrawal of the Persian Gulf force in the same way. The problem is that the use of the power of the purse is politically unacceptable. No legislator wants to be accused of cutting off money to soldiers, sailors, and pilots who are in danger.

Including congressional leaders in major foreign policy decisions will subdue efforts to impose statutory restrictions on presidential flexibility in foreign and military policy. In the Libyan and Persian Gulf affairs, the Administration escaped the full extent of congressional wrath because of the consensus supporting the substance of the policy.

On the issues of war powers and overall foreign policy, I question whether a single statute can resolve the conflicts between the President and Congress. Presidents will always attempt to stay within the letter of the consulting and reporting requirements with-

out ceding their prerogatives. Congress runs the risk of tying the President's hands by imposing too many restrictions. The threat of such legislation, however, might be enough to convince a President to be more cooperative.

The War Powers Resolution, even if it cannot be strictly enforced in every instance, will continue to remind the executive branch of the need to work with Congress in the formulation of foreign policy. The Resolution's primary purpose has been accomplished through its application and through greater public and congressional awareness. It is unlikely that a future President could involve the United States in major hostilities, as was the case with Presidents Johnson and Nixon in Indochina, without legislative oversight.

The War Powers Resolution must be viewed within the context of the overall balance between Congress and the Executive in national security affairs. When Congress believes that it is part of policy formulation, and when a consensus has formed around an issue, it will not demand literal compliance with the Resolution. When Congress feels excluded, however, it will insist on the Resolution's formal prerogatives.

Because of his enormous popularity, President Reagan was given a great deal of latitude in authorizing American military interventions. His popularity stemmed from the sentiment that the United States needed to recover from global setbacks in the 1970's. In light of the Iran arms scandal, President Reagan's successors will be called to account for their actions with greater frequency. The War Powers Resolution, may then be seen as a fallback. For future Presidents that attempt to engage in military commitments without a congressional consensus, it will remain potent.