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A PRESIDENTIAL STRATEGY FOR REPEALING THE WAR POWERS RESOLUTION

INTRODUCTION

The 1973 War Powers Resolution typifies what is now widely recognized as a trend by Congress toward aggrandizing to itself the powers that the Constitution gives to the executive branch.[1] Indeed, every president since the Resolution was passed has considered it to be unconstitutional. Said George Bush in an August 25, 1987, speech to the American Legion National Convention:

> What kind of wacky world is this where the President is taken to court every time he moves our troops around in the national interest? Sometimes a President must take risks for peace, and he doesn't need to be blocked every step of the way.

Understandable only as a product of a unique period in the nation's history, the War Powers Resolution long ago proved itself useless for its intended purpose and extremely harmful to national defense in its actual effect. It should be repealed before it causes any more damage to United States security or to the constitutional framework so carefully crafted by the Founders two centuries ago.

The War Powers Resolution was passed over the veto of Richard Nixon, who was then gravely weakened politically by Watergate, and whose final months in office marked the lowest ebb of presidential political power

1 See Gordon S. Jones and John A. Marini, eds., *The Imperial Congress: Crisis in the Separation of Powers* (Washington, D.C.: The Heritage Foundation/Claremont Institute, 1989) and L. Gordon Crovitz and Jeremy A. Rabkin, eds., *The Fettered Presidency: Legal Constraints on the Executive Branch* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1989).

perhaps in the nation's history. Although it was defended at the time as a way to "do something" about the undeclared Vietnam War, the truth is that Congress had the power under the Constitution to stop that war at any time by refusing to appropriate funds. No unconstitutional restraints on the President were required.

Counter to the Constitution. The War Powers Resolution is based on the assumption, counter to constitutional text and U.S. tradition, that the President may not use force without congressional approval unless the country is under attack. Such an assumption belies the fact that U.S. presidents since John Adams unilaterally have used force to achieve foreign policy objectives some 137 times.

The main provisions of the War Powers Resolution require the President to submit a written justification to Congress within 48 hours of introducing armed forces into hostilities or into imminent hostilities. The President must then bring the troops home within 60 (or in some cases, 90) days unless Congress acts either to declare war or to give the President an extension of time. Even before 60 days or at any time afterward, however, Congress can require the President to withdraw forces simply by passing a resolution that does not require presidential approval.

Tragic Result. This restraint on the President has had obvious and often tragic results. For one thing, Presidents always must consider that any military operation might have to end prematurely if Congress merely fails to act to approve it. This limits operations that Presidents otherwise would undertake. For another thing, the War Powers Resolution unwisely restricts military operations already underway. Ronald Reagan's 1983 deployment of Marines to Beirut, Lebanon, for example, was restricted by the War Powers Resolution. The Marines' mission was defined by Congress's ability to impose a 60-day limit under the resolution. The result: a necessarily limited show of force that turned to tragedy when the Marine barracks was bombed and 220 American servicemen lost their lives.

Under the Constitution, the executive and legislative branches are "equal," but they do not have the same powers. The Constitution assigned particular tasks to each branch based on its respective structure and purpose. Congress was supposed to be the deliberative body whose diverse and numerous members were to weigh policies and forge compromises over time. The unitary executive, in contrast, was meant to be the energetic branch that, as Federalist Paper 70 puts it, would be marked by "decision, activity, secrecy and dispatch."

Yet Congress has now so constrained the executive branch through such laws and regulations as the War Powers Resolution that neither branch performs its assigned role.[2] And by claiming presidential powers as its own, Congress has replaced decision with vacillation, action with inaction, secrecy with leaks, and dispatch with lassitude. The effect is not simply a transfer of power to Congress from the executive, but an actual paralysis of the government.

Taking the Lead. Congress should be encouraged to recognize its mistake and repeal the War Powers Resolution. The Resolution not only hinders the President, but opens Congress to ridicule for trying to enforce an unworkable, unconstitutional provision. George Bush must take the lead in explaining to Congress how relations between the two branches would work in the absence of the War Powers Resolution. The principle must be that Congress must have the ability to fulfill its deliberative functions and the President must be free to act to protect U.S. security.

The Bush Administration should pursue a twin-track policy to replace the War Powers Resolution statutory approach with a political arrangement that recognizes the special constitutional duties and powers of the respective branches. In pursuing the first track of his strategy, the President should use the bully pulpit to build public support for repeal of the resolution. Specifically he should:

♦ ♦ Explain to the American public what is at stake in revising the War Powers Resolution. He must explain that the War Powers Resolution can put the lives of American troops at risk because even congressional inaction can require the premature removal of forces. The President should cite the Beirut tragedy as partly caused by the artificial restrictions of the War Powers Resolution.

♦ ♦ Order the Secretary of Defense, in conjunction with the White House Counsel, to prepare a comprehensive study of the instances in which the War Powers Resolution actually has or potentially could endanger U.S. lives and national security interests.

♦ ♦ Include repeal of the War Powers Resolution as part of a larger strategy to protect executive branch powers and discretion. The public must understand that the very functioning of the federal government is threatened when separation of powers is put out of kilter.

2 Eugene Rostow has written that the War Powers Resolution "repudiates that history root and branch, and seeks to substitute parliamentary government for the tripartite Constitution we have so painfully forged." Eugene Rostow, "Great Cases Make Bad Law: The War Powers Act," 50 *Texas Law Review* 833, 843 (1972).

As part of the second track of his strategy to repeal the War Powers Resolution, the President should lobby Congress for repeal of the resolution. In particular, he should:

♦ ♦ Explain to members of Congress that the War Powers Resolution reduces their ability to perform the serious tasks assigned to Congress by the Constitution. Example: Congress spent many hours debating whether Reagan should have invoked the War Powers Resolution during the 1987 mission to protect free shipping in the Persian Gulf. Congress spent very little time debating the merits of the policy itself.

♦ ♦ Express the willingness to consider alternatives to the War Powers Resolution that recognize a role for Congress in defending the nation. The President, for example, could offer informal discussions with leading members of Congress as an alternative to today's sterile debate about the legality of requiring formal consultations.

♦ ♦ Acknowledge the key role that Congress plays in its unique power over appropriations. If Congress flatly refuses to vote for funds for a program or policy, there is very little the President can do about it.

♦ ♦ Recognize that, while the Founders intended that the President should have the discretion to act when necessary, the Founders also intended that Congress would be the body with the special genius for deliberation. Bush should announce that he will respect the conclusions that Congress reaches after due deliberation. Yet if Congress fails to vote unambiguously to stop an action, the President must retain the inherent power to defend the nation as he thinks best.

ANALYSIS OF THE WAR POWERS RESOLUTION

The War Powers Resolution is a product of the fevered politics of its time. As Congress debated the War Powers Resolution in July 1973, the Watergate investigation was in full swing, and America was losing the war in Vietnam. Many Americans, and not just those of draft age, were questioning the leading U.S. role in the world. They believed that American belligerence, not Soviet imperialism, was the cause of international tensions.

The Political Background

Two World Wars and the Korean War had intervened since George Washington's Farewell Address, but the festering war in Southeast Asia was something new. The resolve to win militarily was somehow lacking in both officials in Washington and demonstrators on the campuses. It would be years

before the holocaust in Cambodia and the agonies of the Boat People reminded Americans of the noble purpose of the war.

The task for many in the early 1970s was to find a scapegoat for the Vietnam War. The war had been supervised by three Presidents with the encouraging appropriations of Congress for more than twenty years. Yet for domestic political reasons, the easiest target became Richard Nixon who, ironically, had ended the war.

The Watergate Floodgate

"Watergate," became the golden opportunity for Nixon's opponents to aggrandize their own power at the expense of a badly weakened President. The key to understanding the War Powers Resolution is to recall that it was passed over Nixon's veto on November 7, 1973, just a few days after the so-called Saturday Night Massacre of October 20, when Nixon fired special prosecutor Archibald Cox. The resolution became law at a time when Nixon's political credibility had plummeted to near zero.

Since 1973, Congress has created a vast progeny of the War Powers Resolution. Such constraints on presidential powers over foreign policy include the Hughes-Ryan Amendment of 1974, the Clark Amendment of 1976, the Foreign Intelligence Surveillance Act of 1978, and five Boland Amendments between 1982 and 1985. Some 23 congressional committees and 84 subcommittees now "oversee" executive branch officials in their conduct of foreign policy. Former top CIA official Robert Gates writes that even the covert intelligence agencies are now more responsive to Congress than to the President.[3]

WHAT THE WAR POWERS RESOLUTION SAYS

There are more than 3,000 pages of congressional statutes regulating foreign relations. The Wars Powers Resolution consists of ten sections covering about five of these pages. Yet five of the ten sections are constitutionally flawed. The provisions of the Resolution that have beguiled a generation of constitutional scholars are Sections 2, 3, 4, 5, and 8.

Section 2: Purpose and Policy

Section 2 (a) states that the purpose of the Resolution is "to fulfill the intent of the framers of the Constitution...that the collective judgment of

3 Robert M. Gates, "The CIA and American Foreign Policy," *Foreign Affairs*, Winter 1987/88, pp. 215, 225.

both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."

Constitutionally Suspect. The Framers of the Constitution never used the phrase "collective judgment." The entire structure of the Constitution gives separate powers and functions to the legislative and executive branches. Congress is the branch best suited to deliberation; the President as Commander in Chief must be free to act with dispatch. "Collective judgment" is thus constitutionally suspect. A President must be free to act unilaterally to defend the nation.

Several of the terms in section 2 (a) are ambiguous to the point of rendering the act useless if not unconstitutional. Does the term "armed forces," for example, include such tactical units as anti-terrorism squads or a small number of personnel to rescue hostages? Arguably, no, because unlike the traditional "United States Armed Forces," these forces are not intended or equipped to conduct sustained combat with foreign forces.

Ambiguous "Hostilities." As Abraham Sofaer, the legal adviser of the State Department, has said, "Action by an anti-terrorist unit constitutes a use of force that is more analogous to law enforcement activity by police in the domestic context than it is to the 'hostilities' between states contemplated by the War Powers Resolution."[4] Sofaer also has pointed out that many uses of force by the U.S. are not covered by the terms of the War Powers Resolution. Examples: Military deployment including the movement of warships through foreign territorial waters, the deployment of security personnel such as embassy guards, and transits of combat aircraft through foreign airspace.

A President, moreover, can engage the country in hostilities without involving the armed forces in any way envisioned by the War Powers Resolution. Example: A President can launch intercontinental missiles without deploying troops, yet such a move would clearly be an act of war. It seems unlikely that Congress intended to limit an expedition of an anti-terrorist squad yet acknowledges that it cannot have a joint finger on the button controlling nuclear weapons.

The term "hostilities" is not defined by either the Constitution or the War Powers Resolution. Hostilities presumably includes dispatching troops to defend Europe. But does "hostilities" include sending a strike force to spend a few days liberating a Caribbean island? To liberate an occupied embassy? To liberate American hostages overseas?

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4 Statement of Abraham D. Sofaer, Legal Adviser of the Department of State, to the Subcommittee on Arms Control, International Security and Science of the Committee on Foreign Affairs of the House of Representatives, April 29, 1986.

Far from reflecting the Constitution, then, the War Powers Resolution purports precisely to define terms that are inherently ambiguous, and for that reason, left by the Founders to the discretion of the political branches to apply in cases as they arise.

Asserting One Branch Supremacy. Section 2 (b) of the War Powers Resolution invokes the clause of Article I, Section 8 of the Constitution that gives Congress the power to "make all laws which shall be necessary and proper" to justify the assumption of the War Powers Resolution that Congress has the power to define and limit the powers not just of Congress, but also of the executive branch. This ignores the fundamental tenet of constitutional law that no branch of government can unilaterally withdraw the constitutional powers of another branch. If Presidents have inherent war powers under the Constitution, therefore, Congress cannot in effect amend the Constitution by enacting a resolution defining those powers.

Section 2 (c) of the act purports to specify the powers of the President to introduce forces into hostilities or into situations where imminent involvement in hostilities is indicated by the circumstances. The President's constitutional powers, the subsection says, are limited to: 1) a declaration of war; 2) specific statutory authorization; or 3) a national emergency created by attack upon the U.S., its territories or possessions, or its armed forces.

Ignoring History. This is far too narrow a view of presidential authority. "National emergency" as defined here does not cover a wide range of the uses of force that Presidents have ordered throughout history without congressional approval. It does not include, for example, rescuing American hostages overseas, protecting free shipping, sending war material to allies, or traditional displays of strength to ward off potential adversaries. Presidents unilaterally have pursued all of these powers.[5]

Even Senator William Fulbright, a significant backer of the War Powers Resolution and the chairman of the Senate Foreign Relations Committee at the time understood that this list was dangerously incomplete and that a President "may find it absolutely essential to use the armed forces without or prior to congressional authorization." In his "supplemental views" following the committee report on the War Powers Resolution, Fulbright proposed an alternative section that would recognize the power of the President "to respond to any act or situation that endangers the United States, its territories or possessions, or its citizens or nationals when the necessity to respond to such act or situation in his judgment constitutes a national emergency of such a nature as does not permit advance congressional

5 For a complete list of these cases, see L. Gordon Crovitz, "Presidents Have a History of Unilateral Moves," *The Wall Street Journal*, January 15, 1987, editorial page; reprinted as Appendix in Rotunda and Nowak, *Treatise on Constitutional Law* (St. Paul, Minnesota: West Publishing Co., 1988).

authorization to employ such forces."[6] This would have been an improvement but still would have prohibited such important significant actions as aiding U.S. allies.

The War Powers Resolution errs in attempting to create a comprehensive list of potential national security contingencies. The Founders intentionally left out any such list from the Constitution because they understood the impossibility of such a task.

Section 3: Consultation

In practice, the requirement that the President "consult" with Congress before dispatching armed forces politically has been the most explosive provision. Political confrontation over this section in recent years involved the raid on Libya, and sending Marines to Beirut and convoys to protect ships in the Persian Gulf.

Section 3 specifies that "in every possible instance" the President "shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." In addition, the President must "consult regularly" with Congress once armed forces are introduced until the forces "are no longer engaged in hostilities or have been removed from such situations."

Need for Secrecy. The most controversial aspect of this section is the very idea of Congress requiring consultation by the President. It is unclear what "consult" means. Must congressional leaders simply be informed, or must Congress have some power to affect policy before it is made? While there may be times when a consultation is possible and advisable, at other times a President may consider it unwise. Example: The success of the April 14, 1986, raid in Libya would have been endangered by any wide advanced knowledge. The ability of a President unilaterally to pursue foreign policy and execute policy requires secrecy. Indeed, the Founders gave the executive branch special responsibilities in foreign affairs because a unitary executive has different qualities than a large legislature. In ascribing "decision, activity, secrecy, and dispatch" to the executive branch in Federalist Paper 70, Alexander Hamilton wrote that these features "will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."

6 "Supplemental Views of J. W. Fulbright," War Powers Report Together with Supplemental Views, Senate Foreign Relations Committee, June 14, 1973, p. 35.

Consultation as Blackmail. The main effect of the consultation requirement of the War Powers Resolution has been to give congressmen the opportunity to blackmail the President. In several cases, congressmen have been "consulted," and then threatened to go public with the information if the policy is pursued. Brit Hume, the former Capitol Hill reporter for ABC, reported that Senator Joseph Biden, the Delaware Democrat, said that, when serving on the Intelligence Committee, he had "twice threatened to go public with covert action plans by the Reagan administration that were harebrained."[7]

Consultation is no guarantee of agreement or cooperation between the branches. Example: The Vietnam War was a product of policy making by three Presidents, together with continuing appropriations by Congress.

Section 4: The Reporting Requirement

Section 4 requires that the President submit a written report to Congress within 48 hours of introducing U.S. forces under any of three circumstances: 1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; 2) into the territory, airspace, or waters of a foreign nation, while equipped for combat, except for deployments that relate solely to supply, replacement, repair, or training of such forces; or 3) in numbers which substantially enlarge U.S. Armed Forces equipped for combat already located in a foreign nation.

The confusions of other sections also are present here. What can "numbers which substantially enlarge" armed forces mean? Arguably, for example, sending a small force to liberate Grenada did not "enlarge" forces there, because no forces were there before.

Informing Congress. But in practice, reports to Congress after committing U.S. troops have not been as troublesome as other provisions of the War Powers Resolution. Indeed, Presidents have issued reports in cases where the War Powers Resolution does not necessarily require them. Examples: Gerald Ford issued reports to Congress about the evacuations from Southeast Asia and the *S.S. Mayaguez* incident. Jimmy Carter reported after the fact on the failed mission to rescue the U.S. hostages from Iran. Ronald Reagan submitted reports on U.S. participation in the multinational forces in the Sinai and Lebanon, the deployment of U.S. aircraft relating to the war in Chad, deployment of the forces that liberated Grenada, U.S. attacks on Libyan jets in the Gulf of Sidra, and the U.S. bombing of Tripoli.

Yet Presidents have taken care to indicate that these reports are not being delivered in deference to the War Powers Resolution – a concession that

7 Brit Hume, "Mighty Mouth," *The New Republic*, September 1, 1986, p. 20.

would be inconsistent with the views of all Presidents since Nixon that the Resolution is unconstitutional. Presidents simply have deemed it good policy to make prompt and formal reports to Congress after significant foreign actions. As the branch of government charged with deliberation and on-going review of policy, the legislature must have reports on all features of foreign policy. Certainly the President has no compelling reason for secrecy once troops have been openly deployed. It is doubtful, therefore, that the War Powers Resolution itself actually encourages Presidents to report.

Section 5: Congressional Action/Inaction

Section 5 is in many ways the core of the War Powers Resolution. It contains the most controversial provisions, including a legislative veto that nearly all legal scholars agree was made patently unconstitutional by the Supreme Court's 1983 ruling in *Immigration and Naturalization Service v. Chadha*. Section 5 provides that the President must terminate the use of U.S. forces within 60 days after the President has reported the commitment of forces, as required under Section 4. There are only three exceptions that would allow continued deployment of forces, all but the most extreme of which require action by Congress. Section 5(b) stipulates that the President can continue his policy only if Congress: 1) has declared war or has enacted a specific authorization for such use of U.S. forces, 2) has extended by law the 60-day period, or 3) is physically unable to meet as a result of an armed attack upon the U.S.

The President also can extend the 60-day period by an additional 30 days if he certifies to Congress in writing that "unavoidable military necessity" requires the additional time to bring about a "prompt removal of such forces" – that is, to allow a safe retreat. Thus, unless Congress is physically prevented from meeting, the President must yield to Congress's action – or to its inaction.

Logical Questions. This raises many serious constitutional and logical questions. For example, if the President had the constitutional power to send troops abroad in the first place, by what constitutional provision can Congress reverse that power simply by passing a law? The easiest position for Congress to take is no position at all. Inaction comes naturally to a body as large and diverse as Congress. This tendency to inaction in Congress is precisely why the Founders gave the President broad unilateral powers to act in foreign affairs.

Section 5 of the War Powers Resolution has had tragic results. In 1983, for example, Reagan complained that this provision made a sensible policy in Lebanon impossible to pursue. The disastrous deaths of 220 U.S. Marines can be traced to the strategy forced on the executive branch by the knowledge that the military could have only 60 days to effect its peacekeeping function.

The imposition of this inflexible and arbitrary deadline led to the decision to place so many Marines in one location as a show of strength.

Misdirected Debate. Section 5 of the Act also has caused great problems for the policy-making process. The recent debate on the U.S. policy of protecting free shipping in the Persian Gulf, for example, became almost entirely a debate about whether the War Powers Resolution applied, not whether the Gulf strategy was good or bad. In this way, the War Powers Resolution focuses attention on legal issues, not on the merits of using force in the particular situation. By imposing what appears to be a legal obligation on the President, Section 5 of the War Powers Resolution threatens to become part of the trend by Congress to criminalize its policy differences with the President.[8]

Finally, there is a provision of Section 5 that purports to give Congress the power unilaterally to demand withdrawal of U.S. forces within 60 days. Section 5 (c) says that "forces shall be removed by the President if the Congress so directs by concurrent resolution." When the War Powers Resolution was adopted, this was one of many of the so-called legislative vetoes that were regularly written into legislation. In *Immigration and Naturalization Service v. Chadha*, the Supreme Court in 1983 invalidated the legislative veto as a violation of the constitutional separation of powers. Yet Congress has not made any change to the War Powers Resolution.

Section 8 of the War Powers Resolution ignores the other sweeping sections of the act to assert that "nothing in this joint resolution is intended to alter the constitutional authority of...the President." A brief review of the text of the Constitution and its structure that defines the separation of powers as well as 200 years of history and court opinions shows that the protestations of innocence by Congress in Section 8 will not withstand scrutiny.

PRESIDENTIAL POWER UNDER THE CONSTITUTION

The Constitution is the fundamental source for the respective powers of the branches. Legislative powers under the Constitution are distributed in limited terms whereas the powers of the President are expressed expansively. Congressional power is inherently limited by the first words of Article I, Section 1, which provides that "All legislative Powers *herein granted* shall be vested in a Congress of the United States." (Emphasis added.) In contrast, Article II, Section 1 begins, "The executive Power shall be vested in a President of the United States." There is no parallel "herein granted" to restrict the President's powers as an executive.

8 See L. Gordon Crovitz, "The Criminalization of Politics," in Jones and Marini, eds., *op. cit.*, pp. 239-267. See also Robert Bork, "Foreword," in Crovitz and Rabkin, *op. cit.*, p. xi.

In the foreign policy context, the missing "herein granted" makes the critical distinction between Congress and the President: The sovereignty necessary for any nation to pursue a policy of defense against other sovereigns must reside somewhere, and the Founders determined that in many cases it would reside in the President.

Some powers of sovereignty must as a practical matter reside in a single, unitary executive. This is especially true regarding the power to defend the nation from foreign dangers. Indeed, the need for a strong executive in a dangerous world was already clear by the late 18th century. The Founders thus created a system in which foreign policy would be determined and executed largely by the executive branch. This system has passed the test of time. Changes in the technology of war and the more complex risks facing the nation and its allies make this system of broad powers in the executive branch all the more necessary.

The Commander in Chief Power. After the general delegation of the executive powers the president's most significant war power derives from the Article II, Section 2, designation of the President as "Commander in Chief of the Army and Navy of the United States and of the militia of the several States." This could have meant that the President would function only as a symbolic chief commander, the way European monarchs led the troops only in a ceremonial sense. Yet the dismal experience under the Articles of Confederation had taught the Founders that the nation could not be protected by a collection of commanders in chief.

The President's Commander in Chief power dwarfs Congress's power to "declare war." The Constitutional Convention decided after some debate to alter the original delegation to Congress of the power to "make war." James Madison and Elbridge Gerry argued for the change because it would leave "the Executive the power to repel sudden attacks." In the next speech at the debate, Roger Sherman noted that the change giving Congress only the power to declare war would give the President not just the power to defend against such a sudden invasion, but would give the President the power "to commence war." The Founders thus opted to give the executive the power to engage the country in war, while Congress alone would have the power to make the formal declaration of war.

CONGRESSIONAL POWER

The foreign affairs powers delegated to Congress are less exhaustive. Contrary to the argument made by many defenders of the War Powers Resolution, the power to declare war is not the greatest congressional war power. The ultimate congressional power in war-making, as in so many other areas, is its sole power to appropriate funds.

The power of the purse is defined by the Article I, Section 9 requirement that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." This power cannot be overestimated. There is nothing in the Constitution, for example, that requires the existence of an intelligence agency. It is entirely within the power of Congress to choose not to fund intelligence agencies. Upon refusal, a President could do nothing but plead for Congress to change its mind.

Voting A War's End. This power to refuse appropriations is the declaration that a war has ended. Indeed, the end of the Vietnam War was presaged by Congress refusing – after many years – to appropriate adequate funding for a war. A similar refusal by Congress to fund the freedom fighters in Nicaragua led to a dismantling of the Contras as a significant military force.

Congress thus has the power under the Constitution to act by refusing to appropriate. Such a refusal to appropriate, however, requires a decision by Congress. It must decide to turn down requests from the President for more funds. This in turn requires members of Congress to vote "yes" or "no" on funding – and to be held accountable for their decisions. The ultimate war power is the power to fund or not to defund.

SUPREME COURT CASES

To the degree that the courts have become involved in determining the extent of each branch's war power, they mainly have acknowledged that the President has the pre-eminent role. One important case even limits the congressional power of the purse. When Congress has attempted to attach conditions to the spending of authorized funds instead of simply withholding appropriations, the courts have held that such conditions cannot be used to usurp the constitutional authority of the President.

In *U.S. v. Lovett* in 1946, the Supreme Court was faced with a congressional omnibus appropriation that included a condition that three particular executive-branch officials, suspected of subversive activities, would be denied their salaries. The Supreme Court ruled in part that this usurped the President's power to hire and fire his own staff.

The leading Supreme Court case on the war power is the much-cited *U.S. v. Curtiss-Wright Export Co.* of 1936. Franklin D. Roosevelt had issued a proclamation that no arms be sold by Americans to warring factions in Bolivia. While there was also a joint resolution by Congress establishing penalties for any violations, the Supreme Court upheld Roosevelt without taking into consideration the fact that Congress also had acted. Justice George Sutherland wrote for a 7-1 Court that the Constitution gives the executive branch supreme powers in foreign affairs. "Not only...is the federal power over external affairs in origin and essential character different from

that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate, and manifold problems, the President alone has the power to speak or listen as a representative of the nation."

Further, Justice Sutherland referred to the "very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other government power, must be exercised in subordination to the applicable provisions of the Constitution."

President's Discretion. Using reasoning that would apply equally to the War Powers Resolution, Sutherland wrote, "It is quite apparent that if, in the maintenance of our international relations, embarrassment – perhaps serious embarrassment – is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."

Concludes Sutherland: "This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly defined standards by which the President is to be governed."

The War Powers Resolution is an example of precisely this overreaching: It purports to narrowly define the ability of the President to deploy and commit troops overseas.

U.S. TRADITION

In addition to the Constitution and court interpretations giving the President extremely broad powers, the history of American foreign policy is a history of presidential action. From the beginning of the Republic until 1970, Presidents ordered troops or significant levels of arms abroad 199 times. In only five of these cases did Congress declare war. In 62 of the cases, Congress consented to the President's actions by specifically appropriating funds, passing resolutions, or by the Senate having ratified a treaty that envisioned the action that the President took. In the remaining two-thirds of these cases – 137 of 199 occasions – the President made war without any authorization whatsoever by Congress. This directly contradicts the erroneous assumption

of the War Powers Resolution that its strictures against Presidential authority were merely codifying years of practice or constitutional design.[9]

The following examples show the extensive range of unilateral uses of force by the President, which undermine the War Powers Resolution notion that the President can act without Congress only in limited circumstances and then only for limited periods:

♦ ♦ Jefferson, in 1801-1805, sent warships to the Mediterranean to sink Barbary pirate ships.

♦ ♦ Monroe, in 1816-1818, ordered attacks on Spanish Florida.

♦ ♦ Tyler, in 1844, sent forces to protect Texas from Mexico, anticipating Senate approval of a treaty of annexation that was later rejected.

♦ ♦ Buchanan, in 1856, ordered troops to land in Canton, China, to destroy forts after an attack on an unarmed ship bearing the U.S. flag.

♦ ♦ McKinley, in 1900-1901, sent troops to China to protect Americans during the Boxer Rebellion.

♦ ♦ Theodore Roosevelt, in 1904, sent a squadron to Moroccan waters to free an American hostage and issued the ultimatum, "We want either Perdicaris alive or Raisuli dead."

♦ ♦ Taft in 1912, sent troops to Nicaragua to protect U.S. interests during a civil war.

♦ ♦ Wilson in 1918-1920, sent aid to the anti-Bolshevik forces at Archangel, Vladivostok, and the Murmansk coast near Norway in Russia; he also sent troops to Dalmatia to quell fighting between Italians and Serbs.

♦ ♦ Coolidge, in 1926, sent troops to Nicaragua to put down a revolt by Sandino. Congress called this President Coolidge's "private war," but took no action.

♦ ♦ Franklin Roosevelt, in 1940, delivered a flotilla of destroyers to Britain, and later ordered troops to occupy Iceland and Dutch Guiana, despite congressional prohibition.

♦ ♦ Truman, in 1946, sent warships to protect Turkey from the Soviet Union and later, without congressional approval, dispatched U.S. troops to counter the communist attack that began the Korean War.

9 Crovitz, footnote 5, *supra*.

◆ ◆ Eisenhower, in 1958-1960, sent troops to Beirut and Cuba.

◆ ◆ Kennedy, in 1962, quarantined Cuba during the missile crisis.

◆ ◆ Johnson, in 1964, sent aid to the Congo and troops to the Dominican Republic.

◆ ◆ Nixon, in 1970, sent Marines to Lebanon.

◆ ◆ Carter, in 1980, tried to rescue the hostages in Iran.

◆ ◆ Reagan liberated Grenada, attacked Libya, and deployed U.S. warships to protect shipping in the Persian Gulf.

REFORM PROPOSALS BY CONGRESS

"As a Southerner, I hope I will be understood when I say that if the War Powers Act had existed between 1860 and 1865, when Abraham Lincoln was President, the U.S. Capitol would be just up the road – in Richmond." So said Senator Sam Nunn, the Georgia Democrat and chairman of the Armed Services Committee. He and others in Congress recognize that something must be done to change the War Powers Resolution. Several proposals have been introduced in recent years or are in the works that would change or replace the War Powers Resolution. Despite Nunn's historical comparison, none of the congressional proposals would go so far as to return to the pre-1973 level of Presidential discretion. Some of the proposals are more valuable than others, however, and are worth considering for their strengths and weaknesses.

The Lawsuit Approach

One proposed reform seeks to force the courts to decide. Early last year, Representative Peter DeFazio, the Oregon Democrat, proposed a bill containing a provision to confer legal standing on members of Congress seeking to sue the President for non-compliance with the War Powers Resolution. This might have solved the problem faced by Representative Mike Lowry, the Washington Democrat, and 109 other Democratic colleagues who had filed such a lawsuit against Reagan. The case was thrown out by the federal appeals court in Washington, D.C., as moot after the Iran-Iraq ceasefire, but courts have traditionally denied the right of congressmen to sue the President in such cases. Courts reason that congressmen can simply pass legislation, rather than approaching the court to settle a political matter. In fact, the DeFazio legislation might itself be unconstitutional. While Congress has the power to decide some questions of

court jurisdiction, it does not have the constitutional authority to dictate such a core judicial principle as who can sue whom for what.

The "Permanent Consultative Group"

A proposal made in spring 1988 would have reversed the one provision of the War Powers Resolution that nearly everyone agrees is unconstitutional. Introduced in the Senate by Democrats Robert Byrd of West Virginia, George Mitchell of Maine, and Sam Nunn of Georgia, and Republican John Warner of Virginia, the bill would have revised the War Powers Resolution in three main ways.

First, the bill would have repealed the legislative veto provision in the law that requires automatic troop withdrawal if Congress simply fails to vote to approve a deployment. Instead, troops would be allowed to remain unless Congress voted to recall them. This would have recognized that congressional failure to act must not have the same impact as Congress's voting and taking responsibility for its actions.

Second, the bill proposed creation of an eighteen-member congressional group empowered to invoke the War Powers Resolution, thus triggering all the remaining provisions of the Resolution. This group also would have the power to introduce a congressional resolution to either authorize continued deployment or require the withdrawal of forces. This, of course, would continue to burden the Commander in Chief by denying him medium- to long-term deployment of forces without congressional meddling.

Third, the bill would have established a six-member "permanent consultative group" of leading Congressmen with whom the President would be required regularly to consult. Such a consultation requirement would raise the problem of leaks by Congressmen, either out of carelessness or, more likely, as political blackmail. Example: Speaker of the House Jim Wright was accused of leaking confidential information about Nicaragua, putting at risk the lives of Contras and political prisoners in that communist country.

Informal Consultation

Another, less formal, proposal emerged just before the 1988 presidential election. Six Senators sent a letter to George Bush suggesting a "regular monthly meeting" among the President, his top advisers and a group of congressional leaders. The signatories included Democrats David Boren of Oklahoma, Bill Bradley of New Jersey, and Sam Nunn of Georgia, and Republicans John Danforth of Missouri, Rudy Boschwitz of Minnesota, and Nancy Kassebaum of Kansas. The letter promised that "in return for more real consultation by the executive branch, Congress would agree to accept

less congressional intervention and micromanagement of foreign policy." The details of the proposal remain sketchy, but it does have the virtue of acknowledging that the War Powers Resolution needs replacing. This proposal acknowledges that more informal arrangements for the two branches to make foreign policy would be an improvement over the current overly legalistic procedure.

The Biden Panel

Finally, an eleven-member Senate Foreign Relations Special Subcommittee on War Powers was formed in summer 1988 and heard testimony on reforming the Resolution. Delaware Democrat Joseph Biden chairs the group. Many witnesses called for repeal of the legislative veto provision that forces removal of U.S. troops even with congressional inaction. Biden has drafted an article for the *Georgetown Law Journal* proposing that the War Powers Resolution be replaced by a "Use of Force Act," which would acknowledge some greater powers for the President but would add new requirements for Congress in authorizing the use of such power.

RECOMMENDATIONS FOR THE BUSH ADMINISTRATION

The Bush Administration should pursue a twin-track policy to repeal the War Powers Resolution and replace it with a political arrangement with Congress that recognizes the special constitutional duties and powers of the respective branches. Bush must return the separation-of-powers battle with Congress to the political realm out of the legal morass in which it is now deadlocked.

The first track should be to use the bully pulpit of the Presidency to explain to the American public what is at stake in repealing the War Powers Resolution. The President should:

♦ ♦ Include repeal of the War Powers Resolution as part of a larger strategy to protect executive-branch powers and discretion. The Bush Administration, led by White House Counsel C. Boyden Gray, frequently has referred to the erosion of presidential authority at the hands of an overweening, micromanaging Congress. There is even an interdepartmental task force to study ways to reverse this trend.

♦ ♦ Convince the public that the very functioning of the federal government is threatened when separation of powers is undermined. The case of Nicaragua may be best for explaining how years of differences between the executive and legislative branches result in no clear policy. And the role of such statutes as the War Powers Resolution in promoting such a divisive stalemate must be explained. The President should articulate how the

War Powers Resolution is a special case because it can put the lives of Americans at risk.

♦ ♦ Make a plea not just as Chief Executive but also as Commander in Chief. The President's job is to protect the nation and its military personnel. This task is made difficult indeed by the impossibility of any medium- to long-range military planning because of the possibility that inaction by Congress will prematurely require the removal of forces. Bush should cite the Beirut tragedy as partly caused by the artificial restrictions of the War Powers Resolution.

♦ ♦ Order a study identifying how the War Powers Resolution has and potentially could endanger U.S. lives and security. The President should order the Secretary of Defense and the White House Counsel to prepare a study of the actual and potential national security costs of the War Powers Resolution. The role of the Resolution in the Beirut tragedy, for example, should be more fully explored and documented. Likely consequences of imposing the current law in such potential scenarios as a nuclear crisis or combating terrorism should be detailed.

♦ ♦ Stress that the 60-day deadline for removing troops has several clear dangers. This ticking clock could easily force Presidents to escalate the use of force in the hope of obtaining victory before the time period expires. It sends the obvious message to America's enemies that it is foolish to negotiate for a U.S. withdrawal because all they need to do is wait for the unilateral withdrawal. It also sends the message to America's allies that, despite treaty obligations, 60 days may be the limit of any U.S. military deployment.

♦ ♦ Be blunt in warning of the dangers of any required consultation with Congress before committing troops or taking military action. Some members of Congress have leaked such information in the past and perhaps would in the future. Bush should not shy from naming names. The President should direct the White House Counsel to document congressional leaks and assess their impact on national security.

The second track that President Bush should pursue to repeal the War Powers Resolution requires explaining to members of Congress that they, too, would be better off limiting their role to the duties envisioned for them by the Constitution. The War Powers Resolution reduces Congress's ability to perform the serious tasks assigned it by the Constitution. Example: Congress never took a position on Reagan's Persian Gulf policy despite many hours of debate on its legal status under the War Powers Resolution. Bush should assure Congress that he would be willing to offer alternatives to the War Powers Resolution that recognize the role Congress must play in defending the nation. As part of his congressional strategy, the President should:

♦ ♦ Acknowledge the key role Congress plays in its unique power over appropriations. If Congress flatly refuses to fund a particular agency or

project, there is little the President can do. The trouble occurs when Congress fails to enunciate a clear policy, as in Nicaragua; then the position of Congress is much weaker, and the power of the President to act unilaterally is much greater.

♦ ♦ Declare himself willing to take the heat for military operations, as Chief Executive and Commander in Chief, whenever Congress as a body decides to duck an issue. If a President's policy fails, the voters will have a chance to make their views known. If Congress refuses to act by using such traditional constitutional powers as appropriations, then Congress likewise should be held accountable through the political process.

♦ ♦ Emphasize that the key to constitutional war powers is political accountability to the voters. Presidents and Congresses may find it politically risky either to act or to fail to act, but in either case the voters deserve to know where both branches stand, so that they can vote for those whose policies they support and against those whose policies they oppose.

♦ ♦ Announce that, within the limits of the safety of military operations, he will keep Congress informed at every stage of a use of force. The reporting requirement of Section 4 of the War Powers Resolution would provide a model for future voluntary information providing by the President.

♦ ♦ Announce that he will respect the conclusions that Congress reaches after due deliberation. The Founders intended Congress to be the body with the special genius for deliberation. If Congress votes to stop a particular military action, it should stop. Conversely, if Congress fails to vote to stop an action, the President must retain the inherent power to defend the nation as he thinks best.

♦ ♦ Respond significantly and positively to the 1988 letter from six Senators proposing an informal consultation process in lieu of the War Powers Resolution. Bush should instruct his legislative staff to work closely with the staffs of the six Senators who signed the letter. The objective should be to construct a flexible political framework to replace the rigid statutory approach of the War Powers Resolution. The solution must not unconstitutionally bind either branch but instead establish a framework for ensuring maximum political accountability for the actions of each branch. Senate Majority Leader Mitchell, for example, has said that the War Powers Resolution "severely undercuts the President by encouraging our enemies simply to wait for U.S. law to remove the threat of further American military action."

On a more public level, the President should embrace the six Senators who signed the letter as a symbol of bipartisan consensus on repeal of the War Powers Resolution. As soon as a gentleman's agreement has been settled with congressional leaders, the President should announce the agreement at a White House press conference.

CONCLUSION

The War Powers Resolution is unconstitutional in its overall approach and also in its specific provisions. As a consequence, Presidents routinely ignore it. Leading Congressmen also have concluded that it no longer serves any useful function—if it ever did.

Unique Powers and Responsibilities. Instead of a law dictating specific procedures and reassigning constitutional rights, the country needs to return to the intent of the Founders of the Constitution. The war powers are "shared" by the executive and legislative branches, yet each branch has its own unique powers and responsibilities that must not be mixed. In particular, Congress has the power and duty to deliberate and make its views known, especially through the power of the purse, while the President must be free to act with dispatch to protect American lives and U.S. security.

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