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The gulf between congress and the president over war powers: An analysis of the Persian Gulf War

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THE GULF BETWEEN CONGRESS AND THE PRESIDENT OVER WAR POWERS: AN ANALYSIS OF THE PERSIAN GULF WAR

by

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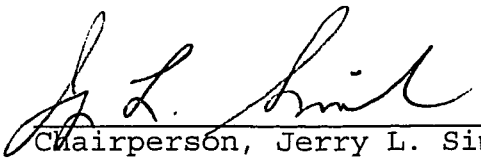

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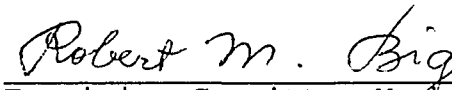

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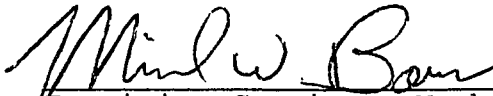

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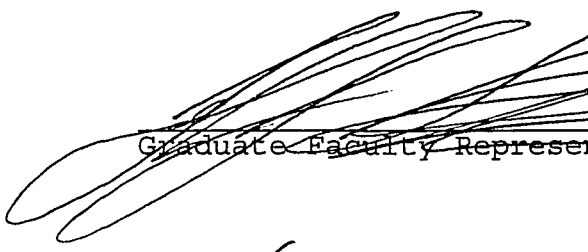

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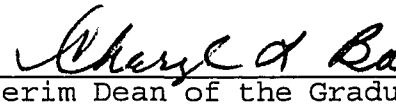

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ABSTRACT

The Persian Gulf War of 1991 highlighted the gulf between the executive and legislative branches over the extent of the president's constitutional and practical war powers. President Bush appealed to his constitutional designation as commander-in-chief, among other things, as well as U.N. authorization in asserting broad authority to conduct extensive military activity in the Persian Gulf. Congress, on the other hand, countered by invoking their plenary constitutional war powers and the requirements of the War Powers Resolution. This thesis examines that controversial and recurring debate.

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CHAPTER 1

THE PERSIAN GULF WAR

I. INTRODUCTION

The debate over the appropriate allocation of war powers between the president and Congress has raged since the Constitution was drafted. The president, as commander-in-chief, possesses broad discretion in exercizing his authority over military affairs and foreign policy. His power is balanced, however, by the constitutional requirement that Congress declare war, raise armies, and appropriate funds. In a modern context, these shared and divided war powers have led to a complex and continuing debate over how the Founders intended war powers to be defined and, notwithstanding their intentions, whether presidential practice and congressional acquiesence have changed the Constitution's meaning.

The discussion over war powers has been complicated by passage of the War Powers Resolution, an attempt by Congress to reassert authority over military deployments, and by America's membership in the United Nations, whose requests for American involvement in multilateral military operations have increased dramatically in the last decade. The Persian

Gulf War encompassed all these factors and provides a classic example of the struggle between the president and Congress over how America should go to war. Considering the escalating number of global conflicts involving American troops, it is a question that transcends the Gulf War and certainly one that warrants further examination.

II. OPERATION DESERT SHIELD

The events surrounding the initiation of the Persian Gulf War illustrate the disagreement between the executive branch and the legislative branch over the extent and scope of the president's unilateral military authority.

On August 2, 1990, Iraq invaded and occupied Kuwait. The next day President George Bush met with key advisors from the National Security Council, his cabinet, and the military to formulate a U.S. response. General Norman Schwarzkopf, leader of Central Command, presented a previously designed plan (Operations Plan 90-1002) for defending Saudi Arabia that involved the deployment of 150,000 troops.[1] National Security Advisor Brent Scowcroft, Defense Secretary Dick Cheney, and Joint Chiefs Chair Colin Powell favored a military response.[2]

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[1] Time Magazine, Otto Friedrich, ed., Desert Storm: The War in the Persian Gulf (Boston: Little, Brown & Co., 1991), p. 24.

[2] U.S. News and World Report, Triumph Without Victory (New York: Times Books, 1992), p. 65.

President Bush immediately ordered three aircraft carriers to the region and NATO was informed of a possible troop deployment. Although the President publicly assured the nation that the U.S. was not contemplating military action, he did indicate at a press conference on August 3 that the U.S. would not allow Iraq to retain Kuwait: "I view very seriously our determination to reverse out this agression. . . . This will not stand. This will not stand. This agresssion against Kuwait."[3] Saudi Arabia initially declined the President's offer of troops but after several days of negotiations and a visit to Saudi Arabia by Secretary Cheney to emphasize the Iraqi threat, King Fahd decided to permit the deployment.

Meanwhile, President Bush and Secretary of State James Baker began extensive diplomatic discussions with numerous countries to establish a coalition willing to impose economic and diplomatic sanctions against Iraq.[4] Once President Bush decided to send soldiers, these countries were similarly solicited to commit troops to a multinational U.N. force led by the United States. The Bush administration promised to forgive billions of dollars in

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[3] James P. Pfiffner, "Presidential Policy-making and the Gulf War," in The Presidency and the Persian Gulf War, Marcia Lynn Whicker, James P. Pfiffner and Raymond A. Moore eds. (Westport, CN: Praeger Series in Presidential Studies, 1993), p. 4.

[4] Dilip Hiro, Desert Shield to Desert Storm (New York: Routledge, 1992), p. 112.

debt to critical countries such as Syria, Egypt and Turkey, in exchange for their support of the U.S. military deployment.

President Bush ordered the deployment of troops to Saudi Arabia on August 6th. He publicly announced on August 8th that the U.S. would send a possible 50,000 troops to Saudi Arabia, and officially notified Congress of the deployment the next day. According to presidential spokesperson Marlin Fitzwater, the President's letter to congressional leaders informing them of the deployment was "consistent with the War Powers Resolution" but was not the formal notification required by the legislation.[5] In a speech announcing the military action, President Bush explained that the troops' mission was "wholly defensive" and that they would "not initiate hostilities."[6] President Bush also stated that the time restrictions of the War Powers Resolution should not be commenced as American troops would not be faced with immediate hostilities. Within two weeks, nearly 100,000 American troops were deployed in the

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[5] Jean Edward Smith, George Bush's War (New York: Henry Holt & Co., 1992), p. 106. President Bush's statement was consistent with previous presidents who, while not explicitly repudiating the WPR and facing a confrontation with Congress, sought to avoid its reporting requirements by filing reports that merely paid lip service to the resolution.

[6] Micah L. Sifry and Christopher Cerf, eds., The Gulf War Reader (New York: Times Books, 1991), p. 199.

Gulf.[7] Originally, Congress strongly supported the President's decision to defend Saudi Arabia. For example, House Speaker Tom Foley was quoted as saying, "Democrats and Republicans, House and Senate . . . are very strongly of the opinion that the president had to act."[8]

Despite the extensive discussions about military action taking place within the Bush Administration and with its international allies, the only legislator informed of President Bush's decision to send troops prior to their deployment was Senator Sam Nunn, Chairperson of the Senate Armed Services Committee.[9] Although Congress immediately constituted a committee of eighteen members for the President to consult if he contemplated hostilities, President Bush ignored it. On August 22, President Bush first acknowledged the possibility of offensive action when he responded to reporters' queries about a potential use of force: "I don't rule in or rule out the use of force."[10]

As the magnitude of the deployment became apparent, several legislators expressed misgivings about the President's unilateral military commitments. Senator Joseph

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[7] Robert J. Spitzer, "The Conflict Between Congress and the President Over War," in The Presidency and the Persian Gulf War, p. 28.

[8] Smith, p. 102.

[9] James A. Nathan, "Revising the War Powers Act," Armed Forces and Society 17 (Summer 1991), p. 513.

[10] Smith, p. 138.

Biden was quoted as saying he was "struck at the size of this. This is a big, big deal. . . I never contemplated talk of 250,000 troops." He added that there should be "not only some consultation, but some extensive debate."[11] On September 17, Representative Henry Gonzalez expressed a similar sentiment in a letter to House Speaker Foley: "Do we have a president? Or a Caesar? A monarch? A potentate . . . What happened to the power invested in Congress to declare war?"[12]

President Bush's assertion that U.S. troops were not deployed into a hostile situation seemed contradicted by the facts. Satellite photos indicated that a large number of Iraqi troops were massed on the border of Kuwait and Saudi Arabia. As the first American troops arrived in the region, Iraq deployed 50,000 more troops to the Saudi border.[13] By late September, the Pentagon estimated that Iraq had 430,000 troops and 2,800 tanks in Kuwait. U.S. troop strength was estimated at slightly more than 150,000.[14] Although President Bush and his advisors were not certain that Iraq would attack Saudi Arabia and embroil American troops in

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[11] The Gulf War Reader, p. 360.

[12] Hiro, p. 190.

[13] Arthur H. Blair, At War in the Gulf (College Station, TX: Texas A & M University Press, 1992), p. 17.

[14] Ibid., pp. 29, 31.

war, the President acknowledged the seriousness of the Iraqi threat in a speech on August 8, 1990:

> But we must recognize that Iraq may not stop using force to advance its ambitions. Iraq has amassed an enormous war machine on the Saudi border capable of initiating hostilities with little or no additional preparations. Given the Iraqi government's history of aggression against its own citizens as well as its neighbors, to assume Iraq will not attack again would be unwise and unrealistic.[15]

The public, and hence not suprisingly, the majority of Congress continued to support the President's policy in the Persian Gulf throughout the fall. On October 1, 1990, both houses of Congress overwhelmingly passed resolutions that supported the troop deployment.[16] Leaders of both Houses made clear, however, that their approval of the President's actions did not authorize the use of force. As the troop buildup continued, a few members of Congress began to increasingly question the President's actions. Although no vote was taken, Senator Mark Hatfield introduced legislation requiring the President to invoke the War Powers Resolution (WPR) or ask for specific congressional approval.[17] Secretary Cheney, among others in the administration, did not want Congress to meddle in the President's foreign policy and was quoted as he candidly acknowledged: "As a

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[15] The Gulf War Reader, p. 198.

[16] The House voted 380 in favor and 29 against the resolution. The Senate passed the resolution by an even larger margin: 96-3.

[17] Smith, p. 172.

former member, I have to say it was an advantage that Congress was out of town" when troops were initially committed.[18]

Congress adjourned in October with the provision that it could be recalled on two days notice if required. By the middle of October, President Bush asked advisors whether Hussein could be ejected from Kuwait with the existing number of ground forces.[19] The military was then requested to prepare a preliminary attack plan.[20] On October 31, President Bush secretly approved the timetable for a January air battle and a February land offensive.[21] Later, President Bush was to tell U.S. News and World Report:

> I became convinced early on that, if diplomacy failed, we would indeed have to use force. . . I kept hoping that the use of force could be avoided. I cannot pinpoint all of this to a certain date, but I was determined from the very beginning that aggression would not stand . . .[22]

Throughout October, President Bush repeatedly discussed offensive options with military leaders, coalition members, and the administration. However, during several meetings with congressional leaders he failed to inform them of any

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[18] Ibid., p. 172.

[19] Triumph Without Victory, p. 155, 166.

[20] Smith, p. 188.

[21] Hiro, p. 229.

[22] Triumph Without Victory, p. 172.

possible offensive action.[23] Congressman William Broomfield put it succinctly:

> While the president has taken great pains to consult with the Soviets, the Syrians, the Egyptians, the Saudis, the French, the Germans, the British, and many others at the United Nations . . . his administration has failed adequately to consult with the American Congress.[24]

Although President Bush clearly understood the practical political necessity of garnering international support for his actions in the Persian Gulf, he ignored the equally important political necessity of marshalling domestic support by coordinating his military response with the U.S. Congress.

III. OPERATION DESERT STORM

On November 8, shortly after congressional mid-term elections and while Congress was in recess, President Bush announced that the number of troops in the Gulf would be doubled to 430,000.[25] He explained in a news conference:

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[23] Smith, p. 198. It should be noted that author Dilip Hiro stated President Bush initiated talks with Congress on October 5 regarding the possible use of force. (Hiro, p. 225).

The vast majority of Persian Gulf War authors, however, maintain that the President did not discuss his plans with Congress nor did he ever indicate that congressional authorization was required.

[24] Smith, p. 204.

[25] At least one author describes a build-up of that magnitude as the point of no return on the road to war. (Pfiffner, p. 7).

> After consultation with King Fahd and our other allies, I have today directed the secretary of defense to increase the size of U.S. forces committed to Desert Shield to insure that the coalition has an adequate offensive military option should that be necessary to achieve our common goals.[26]

Shortly after the announcement, Secretary Cheney stated the position of the executive branch to the Senate Armed Services Committee as follows: "I do not believe the President requires any additional authorization before committing U.S. forces to achieve our objectives in the Gulf."[27] During an exchange with reporters in late October, President Bush had similarly insisted he possessed the power to initiate unilateral military activity without authorization from Congress: "History is replete with examples where the president has to take action. And I've done this in the past (Panama) and certainly . . . would have no hesitancy at all."[28] Congressional Democrats were angered by the timing of the announcement and believed that it was related more to domestic political considerations than to military considerations.[29]

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[26] Quoted in The Gulf War Reader, pp. 228-29. When questioned about the troop increase the next day, President Bush added, "I have not ruled out the use of force at all . . . and I think that is evident by what we're doing here today." (Triumph Without Victory, p. 176).

[27] Quoted by Harold Honju Koh, "Presidential War and Congressional Consent: The Law Professors Memorandum in Dellums v. Bush," Stanford Journal of International Law 27 (Spring 1991), p. 248.

[28] Smith, p. 4 n. 17.

[29] Triumph Without Victory, p. 177.

In the Gulf War Reader, Washington Monthly editor James Bennet reviewed numerous newspaper accounts and concluded there were earlier clues that should have indicated the administration was preparing an offensive. For example, as early as September 16, The New York Times reported:

> The question here has shifted from how well the United States and its allies would defend the Saudi kingdom to how well Washington and its allies might exercise an "offensive option" to push the Iraqis out of Kuwait.[30]

Author Dilip Hiro similarly argued that the decision to implement an offensive response was taken much earlier than November. He asserted that the September 17th dismissal of General Michael Dugan for revealing offensive military details to reporters signaled the end of the defensive phase of Desert Shield and the commencement of the offensive phase.[31]

Ironically enough, although the Bush Administration thought congressional authorization was unnecessary, they strongly believed international approval was crucial before offensive force was used.[32] During the months following the Iraqi invasion of Kuwait the United Nations passed twelve resolutions condemning the invasion, imposing economic sanctions, demanding the release of hostages, and

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[30] The Gulf War Reader, p. 360.

[31] Hiro, p. 189.

[32] Triumph Without Victory, p. 173.

demanding an Iraqi withdrawal.[33] The most critical of these, U.N. Security Council Resolution 678, was passed on November 29th after extensive U.S. diplomatic efforts. It stated that member states might use "all necessary means" to enforce previous resolutions if Iraq did not leave Kuwait by January 15, 1991. After the vote on the resolution, Under Secretary of State Bob Kimmitt stated, "We feel like we now have a strong basis in international law for the use of force."[34] President Bush subsequently asserted that he had the constitutional authority to use force to implement the U.N. resolution without further congressional authorization.[35]

As it became apparent that President Bush believed he could initiate offensive military action in Kuwait without reference to Congress, an increasing number of legislators

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[33] James F. Dunnigan and Austin Bay, From Shield to Storm (New York: William Morrow & Co., 1992), p. 34-35.

[34] Triumph Without Victory, p. 182.

[35] Mathew D. Berger, "Implementing a United Nations Security Council Resolution: The Presidential Power to Use Force Without the Authorization of Congress," Hastings International and Comparative Law Review 15 (Fall 1991), p. 84.

In Triumph Without Victory, the authors argue that innumerable post-war interviews reveal:

> The decision to seek United Nations involvment was part of a larger, more cynical strategy of the Bush administration to circumvent Congress, to bypass the constitutional authority of Congress--and only Congress-- to declare war. (Triumph Without Victory, p. viii).

Later, a confidant of Secretary Baker was quoted as saying, "How could the United States not support something that Ethiopia was supporting?" (Ibid., p. 198).

became vocally opposed to the President's position. On November 10, Senate Majority Leader George Mitchell stated that the President "must come to Congress and ask for a declaration. If he does not get it, then there is no legal authority for the United States to go to war."[36] Representative Ronald Dellums and 53 other members of Congress filed a federal lawsuit seeking to enjoin the President from attacking Iraqi troops without express congressional approval. Although Judge Harold Greene ruled that the issue was not ripe for a decision as the majority of Congress had not sought the injunction, he did state the following:

> An injunction may issue at the request of Members of Congress to prevent the conduct of a war which is about to be carried on without congressional authorization . . .[37]

This ruling was significant because it indicated that the judge in Dellums, unlike the majority of other courts which had dismissed war powers issues summarily, might have granted an injunction to the majority of Congress if the President had not sought congressional authorization for the war.

On November 13, several members of Congress demanded that President Bush call a special session of Congress to discuss the Persian Gulf conflict. President Bush

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[36] Quoted by Spitzer, p. 29.

[37] Dellums v. Bush, 752 F.Supp. 1141, 1149 (D.D.C. 1990).

circumvented the issue by replying that he had not decided to use force and the troop increase only made that option more credible and possible.[38] Senator Nunn began hearings on November 27 in front of the Armed Services Committee regarding whether the U.S. was becoming involved in war too rapidly. Most witnesses, including two former chairs of the Joint Chiefs, testified that sanctions were working and should be continued.[39] Many in Congress also still believed that economic and diplomatic pressure could force Iraq from Kuwait without the necessity of a military response and concommitant loss of life.

On November 30, President Bush told congressional leaders he would like a congressional review of his Persian Gulf policy but if Iraq failed to withdraw from Kuwait by the January deadline he would not need to consult with Congress prior to commencing the war.[40] At a Camp David meeting on December 1, the President similarly asserted that, although he was concerned with the reaction of Congress, he had the legal authority as commander-in-chief to commence military activity without congressional approval.[41]

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[38] Blair, p. 38.

[39] Desert Storm, p. 31.

[40] Triumph Without Victory, p. 185.

[41] Triumph Without Victory, p. 187.

In a letter to President Bush on December 27, 1990, Congressman George Miller and 110 other Democratic representatives emphasized that the U.N. could not authorize a U.S. offensive:

> So long as neither the lives of American citizens nor our troops are subjected to immediate danger and the international economic embargo continues to exert substantial pressure against Iraq . . . offensive military action by the United States unwisely risks massive loss of life . . . (the U.N.) does not commit, or authorize, the use of United States armed forces.[42]

Despite congressional misgivings about President Bush's unilateral military commitment, the majority of Congress still either tacitly or vocally supported the troop deployment. This is perhaps not surprising in light of public opinion polls which indicated that President Bush's actions maintained broad public support.[43] In fact, Senate leaders planned to recess until January 23rd (after the U.N. deadline) and consequently avoid directly addressing the Persian Gulf issue. The strenuous objections of senators such as Tom Harkin and Brock Adams caused Senate Majority Leader George Mitchell to reconsider.[44] After reviewing

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[42] Quoted in "Yes, no, maybe," Economist 18 (January 5-11, 1991), p. 19. It should be pointed out that the U.N. has no power to implement its decisions. Member states may either comply or refuse to comply with the requests made in its resolutions.

[43] By December, opinion polls indicated that nearly 65% of Americans approved using force to achieve the nation's goals. (Blair, p. 60). A poll conducted by the Washington Post and ABC News similarly showed that 7 of 10 respondents favored the use of force. (Triumph Without Victory, p. 202).

[44] The Gulf War Reader, 260.

several constitutional considerations, Senator Harkin argued:

> So any objective reading of the Constitution itself and the clear language of the Constitution, or any reading of the Federalist Papers, or writings of those who drafted this clear clause in the Constitution, can lead to only one clear and unambiguous conclusion: that only Congress can declare war, and the president has the power to repel attacks and invasions, which is not the situation at hand.[45]

After continuously maintaining that legislative authorization was not needed, President Bush formally requested congressional support on January 8th. This request followed intensive lobbying by the administration which indicated the majority of Congress would support a declaration of war. Democratic leaders asked the President to forestall offensive action until a vote was taken; however, he declined to give any assurances.[46] In fact, the next day the President commented, "I don't think I need it . . . I feel I have the authority to fully implement the United Nations resolutions."[47]

A sharply divided Congress passed a joint resolution after several days of vigorous debate, authorizing the President to "use United States armed forces pursuant to

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[45] Ibid., p. 262.

[46] Ibid., p. 192.

[47] Louis Fisher, "Historical Survey of the War Powers and the Use of Force," in The Constitution and the Power to Go to War, Gary M. Stern and Morton H. Halperin, eds. (Westport, CN: Greenwood Press, 1994), p. 25.

United Nations Security Council Resolution 678."[48] The resolution expressly maintained that the authorization was to be consistent with the War Powers Resolution of 1973.[49] The House also overwhelmingly passed a general resolution stating:

> The Congress finds that the Constitution of the United States vests all power to declare war in the Congress of the United States. Any offensive action taken against Iraq must be explicitly approved by the Congress of the United States before such action may be initiated.[50]

During debate on the resolution, Senator Nunn commended the President for "recognizing Congress' constitutional role." Representative Richard Durbin similarly concluded that "the United States' Constitution has prevailed."[51]

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[48] The Senate voted 52-47 in favor of the resolution. The House voted 250-183 in favor of the resolution.

[49] Congressional acquiescence to the President's policy may have been influenced by the fact that Bush did not request the vote until only several days remained before the January 15th deadline. As one commentator notes, several legislators did not support the war:

> However, the president had got himself, and the country's prestige so committed to the deadline set by the United Nations (at our behest) that by the time the debate began, on Thursday, January 10, there was no question as to the outcome of the vote. (The Gulf War Reader, p. 189).
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> . . . George Bush, by working multilaterally through the United Nations (and unilaterally making troop commitments), had rendered Congress irrelevant. (ibid., p. 192).

[50] Cong. Rec. H405 (January 12, 1991), p. 302.

[51] Michael J. Glennon, "The Gulf War and the Constitution," Foreign Affairs 70 (Spring 1991), p. 84.

President Bush, on the other hand, stated the following upon signing the resolution:

> My request for congressional support did not, and my signing of this resolution does not, constitute any change in the long-standing position of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution.[52]

Interestingly enough, President Bush indicated that he might have commenced Operation Desert Storm even if Congress had voted against using force. Prior to the vote, the President repeated remarks made to coalition diplomats at Christmastime:

> it boils down to a very moral case of good versus evil, black versus white. If I have to go (to war), its not going to matter to me if there isn't one Congressman who supports this, or what happens to public opinion. If it's right, it's gotta be done.[53]

In his memoirs, former Vice President Dan Quayle concluded that President Bush would still have initiated the Persian Gulf War without legislative authorization.[54] When asked after the vote if he could have proceeded if Congress voted against the resolution, the President replied: "I still feel that I have the constitutional authority, many attorneys have so advised me."[55]

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[52] Quoted by Koh, p. 254, n. 26.

[53] Quoted by Smith, p. 237.

[54] Dan Quayle, Standing Firm (New York: HarperCollins Publishers, 1994), p. 227.

[55] Quoted by Pfiffner, p. 22 n. 32.

Considering President Bush's comments and his unilateral escalation of the situation in the Persian Gulf prior to asking for congressional authorization, if the vote was a victory for the Constitution, the Constitution prevailed by the narrowest of margins.

CHAPTER 2

CONSTITUTIONAL GRANTS OF POWER

The Framers were acutely aware of the perils of concentrating the power over war. After much discussion, consequently, they decided to shackle the "dog of war" by providing that war powers would be both divided between and shared by the legislative and executive branches through several express constitutional provisions. This separation of powers, however, has generated enormous conflict over its proper exercise. In fact, within five years of the Constitution's ratification, prominent Framers James Madison and Alexander Hamilton were already arguing over whether the Constitution granted President George Washington the authority to issue a neutrality proclamation in the war between Britain and France.[56] The discussion regarding the constitutionality of President Bush's actions in the Persian Gulf War is only a continuation of this historic debate.

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[56] Ralph A. Rossum and G. Alan Tarr, American Constitutional Law, 3rd ed. (New York: St. Martin's Press, 1991), p. 157.

I. CONGRESSIONAL WAR POWERS

A. THE DECLARATION CLAUSE

Congress derives its war powers from several constitutional provisions. The most prominent grants Congress the authority to "declare war."[57] Prior to drafting the Constitution in its final form, the Framers proposed various methods of going to war. Charles Pinckney and Alexander Hamilton suggested that the Senate be given the authority to make war. Edmund Randolph responded that the power would best be placed with the House of Representatives. Only Pierce Butler recommended that the warmaking power be given to the executive; however, his suggestion received no recorded support.[58]

In fact, after specifically discussing the potential problems of an excutive possessing power over war, the Framers deliberately chose to give this power to Congress.[59] Thus, they initially agreed to give Congress the power to "make" war. James Madison and Elbridge Gerry later suggested this should be changed to "declare" war in

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[57] Article 1, section 8.

[58] James Madison, Notes of Debates in the Federal Convention of 1787 (Athens, OH: Ohio University Press, 1966), p. 476.

[59] David Gray Adler, "The Constitution and Presidential Warmaking: The Enduring Debate," Political Science Quarterly 103 (Spring 1988), pp. 3-4.

order to give the president authority to "repel sudden attacks."[60]

Scholars differ on what the Framers intended "declare" to mean. Shortly after the Constitution was drafted, Alexander Hamilton explained the declaration clause and its significance as follows:

> The Congress shall have the power to declare war; the plain meaning of which is, that it is the peculiar and exclusive duty of Congress, when the nation is at peace, to change that state into a state of war; whether from calculations of policy, or from provocations or injuries received; in other words, it belongs to Congress only to go to war.[61]

Law professors Ann Thomas and A.J. Thomas define a declaration of war as "simply a communication made by one nation state to another that the status of peace. . . is now terminated and a status of war has taken its place."[62] In a commonly used definition of the Framer's time, Emerich de Vattel described war as "that state in which we prosecute our rights by force."[63] In Bas v. Tingy (1800), the Supreme Court referred to war as a "contention by force between two nations, in external matters, under the authority of their respective governments."[64] Legal

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[60] Madison, p. 476.

[61] Quoted by Ann Van Wynen Thomas and A.J. Thomas, Jr., The War-Making Powers of the President (Dallas: SMU Press, 1982), p. 37.

[62] Ibid., p. 36.

[63] Ibid., p. 39.

[64] 4 Dallas 37, 40 (U.S. 1800).

scholars such as David Gray Adler, Edwin Firmage, Francis Wormuth, and John Hart Ely maintain the term "declare" was well understood at the time of the Framers to be synonymous with commence.[65] Firmage and Wormuth argue that contemporary usage shows the declaration clause "gave to Congress the exclusive right to initiate war."[66] This interpretation coincides with James Madison's statement regarding the importance of separating war powers: "Those who are to conduct a war . . . cannot in the nature of things, be the proper or safe judges whether a war ought to be commenced, continued or concluded."[67]

Several constitutional experts such as Eugene Rostow and Terry Emerson argue that the change from "make" to "declare" lessened Congress' power. Rostow believes the term "declare" war refers only to the distinction between a state of war and peace at international law and using force during times of peace is part of the "sovereign right of self defense."[68] Rostow quotes Professor Ratner who

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[65] Adler, p. 6; Francis D. Wormuth and Edwin B. Firmage, To Chain the Dog of War (Dallas: Southern Methodist University Press, 1986), p. 20; John Hart Ely, "Suppose Congress Wanted a War Powers Act that Worked," Columbia Law Review 88 (November 1988), p. 1379 n. 33.

[66] Wormuth and Firmage, p. 21.

[67] Quoted by Michael J. Glennon, Constitutional Diplomacy (Princeton, N.J.: Princeton University Press, 1990), p. 83 (emphasis supplied).

[68] Eugene V. Rostow, "Great Cases Make Bad Law: The War Powers Act," in Modern Constitutional Theory: A Reader, 2nd ed. eds. John H. Garvey and T. Alexander Aleinikoff (St.

contends that the change from "make" to "declare" actually grants the president much more authority than simply to "repel sudden attacks." In a modern context, it "authorizes the president to protect Americans from external force in an emergency." This, concludes Ratner, indicates that "presidentially authorized hostilities are always ostensibly 'defensive.'"[69] Gordon Crovitz adds that the distinction between "declare" and "make" is of great significance as it allows for a broad range of presidential military activity without congressional authorization.[70]

The majority of constitutional scholars, on the other hand, maintain that substituting the word "declare" for "make" merely authorizes the president to defend the country against attack or "to have the direction of war when authorized or begun."[71] The complete power to commence war remained vested in the legislature. As noted constitutional expert Edward Corwin explains: "It was clearly the original understanding of the Constitution that under it all measures of hostility toward another government not justifiable immediately as acts of self-defense, have the sanction of

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Paul: West Publishing Co., 1991), p. 216.

[69] Ibid., p. 216.

[70] Gordon L. Crovitz, "Micromanaging Foreign Policy," The Public Interest 100 (Summer 1990), p. 108.

[71] Quoted by Charles A. Lofgren, Government from Reflection and Choice (New York: Oxford University Press, 1986), p. 13.

Congress."[72] Law professors Edwin Firmage and Francis Wormuth concur and explain that the motion's meaning was clear. It left the power to initiate war with Congress subject to "the reservation that the President need not await authorization from Congress to repel a sudden attack against the United States."[73] Constitutional scholar John Hart Ely similarly argues that the substitution of "declare" for "make" was made:

> to make clear that once hostilities were congressionally authorized, the President, as Commander in Chief, would assume tactical control. . . and to preserve to the President the power, without advance congressional authorization, to respond defensively to "repel sudden attacks."[74]

After reviewing the comments of the Framers, presidential scholar Arthur Schlesinger Jr. concludes that "no one wanted either to deny the President the power to respond to surprise attack or to give the President general power to initiate hostilities."[75]

The argument that the change in this constitutional provision did not divest Congress of any significant war

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[72] Quoted by Jeremy J. Stone, "Presidential First Use is Unlawful," Foreign Affairs 56 (Fall 1984), p. 105.

[73] Wormuth and Firmage, p. 18. Louis Fisher adds that the power to repel sudden attacks is an emergency measure which does not authorize the President to "take the country into full-scale war or to mount an offensive attack against another nation." (Louis Fisher, "The Power of Commander in Chief" in The Presidency and the Persian Gulf War, p. 48).

[74] Ely, pp. 1387-88.

[75] Arthur M. Schlesinger, Jr., The Imperial Presidency (Boston: Houghton Mifflin Co., 1973), p. 4.

power is supported by numerous statements by influential and diverse members of the Constitutional Convention. Their comments indicate that the Framers considered congressional authority to declare war of vital importance to the preservation of democracy. James Madison stated:

> Every just view that can be taken of this subject admonishes the public of the necessity of a rigid adherence to the simple, the received and the fundamental doctrine of the Constitution, that the power to declare war is fully and exclusively vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war; that the right of convening and informing Congress, whenever such a question seems to call for a decision, is all the right which the Constitution has deemed requisite and proper.[76]

James Wilson concurred:

> This system will not hurry us into war, it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress, for the important power of declaring war is vested in the legislature at large and this declaration must be made with the concurrence of the House of Representatives; from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.[77]

Because of their fear of the tyranny of a monarchy, it is clear that the Framers wanted Congress alone to decide

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[76] Quoted by Glennon, "The Gulf War and the Constitution," p. 87.

[77] Quoted by The Gulf War Reader, p. 261.

when war would be initiated.[78] As Madison wrote to Thomas Jefferson:

> The Constitution supposes what the history of all governments demonstrates, that the executive is the branch of power most interested in war, and most prone to it. It has accordingly, with studied care, vested the question of war in the legislature.[79]

Experience with the English king caused the Framers to fear that the president might abuse a war power. George Mason expressed this fear when he stated he was "against giving the power of war to the Executive, because [he was] not to be trusted with it."[80] Gerry added that he "never expected to hear in a republic a motion to empower the Executive alone to declare war."[81]

The Framers' statements indicate they believed Congress' power to declare war to be of great significance and not simply a seldomly-used formality. The Framers agreed that congressional participation would minimize the dangers of precipitous military involvements and maximize the requirements for deliberation and debate.

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[78] According to Charles Lofgren, state ratification debates shed little additional light on this issue as the states were unconcerned with how the government would go to war (Lofgren, p. 16). Only one of 77 proposed amendments dealt with Congress' power to go to war and this would have required a 2/3 vote of both houses to declare war (Ibid.).

[79] Quoted by Glennon, "The Gulf War and the Constitution," p. 87.

[80] Fisher, "The Power of Commander in Chief," p. 48.

[81] Ibid.

Although the right of Congress to formally declare war is rarely contested, the question of what type of military activity constitutes war is the source of much debate. As the Constitution only uses the word "war," it is unclear from the declaration clause alone whether the Framers intended it as a generic term to apply to all forms of hostilities short of formal war or whether it left the commander-in-chief with the authority to initiate and participate in limited uses of force.[82]

Rostow, and other supporters of executive power, argue that under international law declarations of war are only required on the limited occasions when states "engage in unlimited general war."[83] Terry Emerson adds that the Framers were aware declarations of war had already fallen into disuse and thus knew that Congress' declaration power would be limited to a small number of cases.[84] Representative Dick Cheney similarly maintains: "The declaration of war is almost an outmoded concept under virtually any set of circumstances we can conceive of under

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[82] W. Michael Reisman, "War Powers: The Operational Code of Competence," in Foreign Affairs and the U.S. Constitution, eds. Louis Henkin, Michael J. Glennon, and William D. Rogers (New York: Transnational Publishers, Inc., 1990), p. 69.

[83] Eugene V. Rostow, "President, Prime Minister or Constitutional Monarch," American Journal of International Law 83 (October 1989), p. 744.

[84] Terry J. Emerson, "Making War Without a Declaration," Journal of Legislation 17 (Winter 1990), pp. 29-30.

which a president would decide to commit troops to combat."[85]

However, to restrict Congress' power over war to the extremely small number of cases in which a formal declaration is issued appears inconsistent with the weight the Framers gave this power and with their expressed intention to curtail the president's ability to embroil the nation in hostilities. It seems reasonable to conclude the Framers intended that the declaration provision encompass the power to initiate both total war and limited or undeclared war. Otherwise, Congress could not effectively check presidential military power and determine whether armed intervention would be in the national interest. As international legal scholar John Basset Moore explains:

> There can hardly be room for doubt that the framers of the constitution, when they vested in Congress the power to declare war, never imagined that they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his own notion or the fitness of things as long as he refrained from calling his action war or persisted in calling it peace.[86]

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[85] Quoted in War Powers and the Constitution (Washington, D.C.: American Enterprise Institute, 1984), p. 3. During the Vietnam War, Under Secretary of State Nicholas Katzenbach similarly argued that Congress' authority to declare war was "outmoded phraseology." (quoted by John T. Rourke and Russell Farnen, "War, Presidents and the Constitution," Presidential Studies Quarterly 18 (Summer 1988), p. 515).

[86] Quoted by Wormuth and Firmage, p. 33.

Early federal cases indicate that the courts also believed Congress' authority over the initiation of military conflict was complete. In 1782, the Federal Court of Appeals explained that international law recognized two types of war over which Congress had power:

> The writers upon the law of nations, speaking of different kinds of war, distinguish them into perfect and imperfect: A perfect war is that which destroys the national peace and tranquility, and lays the foundation for every possible act of hostility. The imperfect war is that which does not entirely destroy the public tranquility, but interrupts it only in some particulars, as in the case of reprisals.[87]

The U.S. Supreme Court similarly recognized in Talbot v. Seeman (1801),[88] that Congress could authorize total war or partial war.[89] Chief Justice John Marshall added: "The whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body alone be

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[87] Quoted by Adler, p. 7.

[88] 1 Cranch 1 (U.S. 1801).

[89] See also Bas v. Tingy, 4 Dallas 37 (1800), in which the Supreme Court explained that "Congress is empowered to declare a general war, or Congress may wage a limited war . . ."

In The Eliza, 11 S.Ct. 113 (1800), the Supreme Court reiterated the differences between formal declared wars and imperfect wars:

> If it be in declared form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation . . . But hostilities may subsist between two nations, more confined in its nature and extent; being limited as places, persons, and things; and this is more properly termed imperfect war; . . .(quoted in Lehman, p. 57).

resorted to as our guides in the inquiry."[90] In United States v. Smith (1806), Justice Patterson reiterated Congress' power: "Does he [the President] possess the power of making war? That power is exclusively vested in Congress . . ."[91]

After reviewing the historical evidence, legal scholar Charles Lofgren concludes that the Framers intended Congress' power to "commence war to be as broad as the Confederate Congress" -- which was exclusive. He continues:

> Since the old Congress held blanket power to "determine" on war, and since undeclared war was hardly unknown in fact and theory in the late eighteen century, it therefore seems a reasonable conclusion that the new Congress' power to declare war was not understood in a narrow technical sense but rather as meaning the power to commence war, whether declared or not.[92]

Political scientist Morton Halperin similarly argues that the declaration clause clearly signifies: "The president may not introduce the United States into a military situation without the consent of Congress. This applies

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[90] 1 Cranch 1, 24 (U.S. 1801).

[91] 27 F.Cas. 1192, 1230 (No. 16342) (C.C.D.N.Y. 1806), quoted by David Gray Adler, "Foreign Policy and the Separation of Powers: The Influence of the Judiciary," in Judging the Constitution, eds. Michael W. McCann and Gerald L. Houseman (Glenview, IL: Scott, Foresman and Co., 1989), p. 157.

[92] Lofgren, pp. 35-36. Douglas Steele adds that evidence from the state ratification conventions "strongly suggests that the ratifiers believed the power to declare war in the Constitution to be virtually identical to the power of determining war contained in the Articles of Confederation." (Douglas L. Steele, "Covert Action and the War Powers Resolution," Syracuse Law Review 39 (1988), p. 1150).

whether the war is declared or undeclared, whether it is gradual or immediate, ...[93]

B. LETTERS OF MARQUE AND REPRISAL

In addition to the power to declare war, Congress derives authority over military action from its constitutional power to "grant letters of marque and reprisal."[94] From its origins in the Middle Ages, the practice of reprisals evolved into using public armies in limited ways.[95] Although this term has fallen into disuse today, numerous scholars argue that at the time of the Framers the power to grant letters of marque and reprisal signified authority over hostilities short of war.[96] According to Halperin: "Congress' constitutional power to 'grant letters of marque and reprisal' is the historical and legal equivalent of today's low-intensity conflict."[97] Special letters were granted by Congress "for the peacetime satisfaction of private claims."[98] Peter Raven-Hansen

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[93] Morton H. Halperin, "Lawful Wars," Foreign Policy 72 (Fall 1988), pp. 187-88.

[94] Article I, section 8, clause 11.

[95] Adler, "The Constitution and Presidential Warmaking," p. 8.

[96] Steele, p. 1152; Mark J. Yost, "Self Defense or Presidential Pretext? The Constitutionality of Unilateral Preemptive Military Action," Georgetown Law Journal 78 (December 1989), p. 423; Schlesinger, p. 21.

[97] Halperin, p. 188.

[98] Lofgren, p. 31.

adds: "Any power to commence undeclared war that was not granted to Congress by the Declaration Clause was therfore arguably granted by the Marque and Reprisal Clause."[99]

The use of the term reprisal is consistent with the concept of limited wars. Hugo Grotius, a writer with whom the Framers were familiar, asserted that declared wars were perfect and undeclared wars were imperfect. He equated such imperfect wars with reprisals.[100] Grotius' contemporary Jean Jacques Burlamaqui elaborated: "This last species of war [undeclared or imperfect war] is generally called reprisals. . ."[101] Lofgren argues that even if the Framers did not intend the declaration clause to be interpreted broadly, the addition of the authority to grant letters of marque and reprisal "conferred on Congress control over general reprisals outside the context of declared war."[102] Francis Wormuth and Edwin Firmage similarly maintain that whatever powers were not covered directly under the declaration clause were "residual" in Congress' power to issue letters of marque and reprisal.[103] Justice Joseph Story in his Commentaries on the Constitution concluded that

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[99] Peter Raven-Hansen, in The U.S. Constitution and the Power to Go to War, p. 31.

[100] Lofgren, p. 27.

[101] Ibid.

[102] Ibid., p. 32.

[103] Wormuth and Firmage, p. 179 n. 4.

Congress was given the power over letters of marque and reprisal to remove doubts about legislative power to authorize undeclared hostilities.[104]

C. THE NECESSARY AND PROPER CLAUSE

Another constitutional provision that grants Congress warmaking authority is the general responsibility conferred upon the legislative branch "to make all Laws which shall be necessary and proper for carrying into Execution all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer Thereof."[105] Legal scholar Alexander Bickel maintains that this power encompasses the president and thus: "The implied powers of the federal government, most of the unstated powers that inhere in nationhood, most everything that went without saying or that is residual--all that belongs to Congress."[106] This enumeration grants Congress power to take measures short of war.[107] Political scientist Jeremy Stone adds that the "necessary and proper" power coupled with Congress' war powers grant Congress the authority to

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[104] Quoted by Lofgren, p. 12.

[105] Article 1, section 8.

[106] Alexander M. Bickel, "Congress, the President and the Power to Wage War," in Modern Constitutional Theory: A Reader, p. 209.

[107] Ibid., p. 212.

conduct war in many respects.[108] Terry Emerson warns, however, that this power "cannot be used as a guise for congressional measures stripping the Executive of its vested functions."[109] Although Congress cannot use its authority under the necessary and proper clause to infringe on the president's express power, it can legislate on military affairs that are outside the president's authority.

It should additionally be remembered that Congress' war powers in Article 1, section 8 of the Constitution also consist of its authority to "raise and support Armies," "to provide and maintain a Navy," "to provide for calling forth the militia," and "to provide for the common defense."[110]

The Constitution grants only Congress the power to initiate war, both declared and undeclared. Determining what constitutes war within the meaning of the Constitution should be a question of substance not semantics. Experience has shown that if the president has the exclusive right to decide what type of military action constitutes war, he merely avoids using the title and thus justifies any type of unilateral military involvement. For example, when

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[108] Stone, p. 99.

[109] Emerson, p. 31.

[110] Legal Scholar William Van Alstyne argues that Congress' paramount war power is derived from its authority to determine whether the United States should even have an army or navy. (Charles Bennet et al., "The President's Powers as Commander-in-Chief Versus Congress' War Power and Appropriations Power," University of Miami Law Review 43 (September 1988), pp. 26-28.

President Harry Truman sent troops to South Korea to stop the North Korean offensive in 1950, he referred to the situation as a "police action" rather than a war. This semantical sleight-of-hand was followed by President Lyndon Johnson in Vietnam, President Ronald Reagan in Grenada, and President Bush in Panama and the Persian Gulf. Practical factors such as the number of troops deployed and the length and danger of the engagement should be obvious considerations. For example, deploying 1200 marines to facilitate the PLO evacuation does not clearly invoke the specter of war. On the other hand, sending 25,000 troops to Panama to capture President Manuel Noriega leads one to the opposite conclusion. More specifically, deploying over 400,000 troops to the Persian Gulf who are threatened with imminent attack by the Iraqi army even more obviously presents a war-like situation that requires congressional approval.

Clearly President Bush should have, and did eventually, receive congressional authorization prior to commencing offensive action against Iraq. However, a more controversial question concerns whether the President should have received congressional approval at an earlier date. When troops were initially deployed, Saudi Arabia immediately needed American military assistance to fend off an anticipated Iraqi offensive. There was little time for congressional debate and the President arguably acted

appropriately. Furthermore, he indicated that American troops were engaged in a strictly defensive operation which Congress sanctioned by resolution in October. However, the President should have requested congressional authorization prior to doubling the number of troops and publicly endorsing an offensive option. Several months had elapsed since the invasion. Congress had time to debate and determine the appropriateness of offensive action before additional troops were committed and Congress was presented with a fait accompli. It is ironic that the Bush Administration went to such great lengths to marshall international consensus on war while ignoring its responsibility to seek the even more critical approval of the U.S. Congress.

The deployment of over 400,000 troops, coupled with the President's threats of force, escalated the situation into a de facto war. The Constitution requires that Congress alone determine whether the U.S. should be engaged in such large-scale military operations.

II. PRESIDENTIAL WAR POWERS

A. COMMANDER-IN-CHIEF

The president derives his war power from several clauses in the Constitution. The most prominent states that the president is the "Commander in Chief of the Army and

Navy of the United States."[111] As a practical matter, this power confers upon the president virtual autonomy over a broad range of military activities during times of peace and control over hostilities once war is declared. Since the time of President Truman, presidents have invoked their authority as commander-in-chief to justify unilateral military activity without the prior approval of Congress. President Bush, for example, maintained that he could deploy troops to Saudi Arabia pursuant to his power as commander-in-chief.

Although the executive branch interprets the commander-in-chief clause broadly,[112] legal scholars differ on whether the clause grants the president authority over all military conflicts short of total war or whether it merely designates the president as commander of U.S. forces once Congress has chosen to become involved militarily. Justice

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[111] Article II, section 2, cl. 1.

[112] In an argument very similar to the ones made by the executive department prior to the Persian Gulf War, the State Department under President Johnson issued a bulletin supporting the President's actions in the Vietnam War by referring to his power as commander-in-chief:

> Under the Constitution, the President, in addition to being Chief Executive, is Commander in Chief of the Army and Navy. He holds the prime responsibility for the conduct of the United States foreign relations. These duties carry very broad powers, including the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States. (quoted in David O'Brien, Constitutional Law and Politics, vol 1 (New York: W.W. Norton & Co., 1991), p. 220.)

Robert Jackson insightfully remarked that the commander-in-chief clause implies:

> something more than an empty title. But just what authority goes with the name has plagued presidential advisors who would not waive or narrow it by non-assertion yet cannot say where it begins or ends.[113]

Proponents of presidential power such as Eugene Rostow, Gordon Crovitz, Geoffrey Miller, and Terry Emerson argue that the commander-in-chief clause empowers the president to take unilateral military activity in a wide range of circumstances.[114] The majority of constitutional scholars, on the other hand, maintain that the commander-in-chief provision is merely a military designation or title that involves certain responsibilities--not a blanket grant of military power. Louis Henkin argues: "There is no evidence that the Framers contemplated any significant role--or authority--for the President as Commander in Chief when there was no war."[115] Edward Corwin adds that the

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[113] Quoted by Louis Fisher, Constitutional Conflicts between Congress and the President (Princeton, N.J.: Princeton University Press, 1985), p. 285, quoting Youngstown Co. v. Sawyer, 343 U.S. 579, 641 (1952).

[114] Bennett et al., p. 32; Emerson, p. 28.

[115] Louis Henkin, Constitutionalism, Democracy, and Foreign Affairs (New York: Columbia University Press, 1990), p. 25.

Wormuth and Firmage similarly argue that the president simply commands troops specifically designated by Congress and is subject to congressional limitations (Wormuth and Firmage, p. 121). William Van Alstyne concurs: "The President is Commander-in-Chief only with regard to such armed forces as Congress provides, and such uses as Congress deems appropriate." (Bennett et al., p. 37).

commander-in-chief clause was largely forgotten by early presidents until President Abraham Lincoln transformed its significance by using it to justify his broad use of war powers during the Civil War.[116] David Grey Adler concurs and states that the president's designation as commander-in-chief conferred no independent warmaking authority.[117]

Alexander Hamilton explained that the president's power as commander-in-chief was necessarily limited by the legislature's war powers:

> . . . the President is to be Commander in Chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British King extends to the declaring of war and the raising and regulating of fleets and armies; all which by the Constitution under consideration would appertain to the Legislature.[118]

After reviewing Hamilton's statement, Henkin argues: "generals and admirals, even when they are 'first,' do not determine the political purposes for which troops are to be used; they command them in the execution of policy made by

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[116] Edward S. Corwin, The President: Office and Powers, 4th ed. (New York: New York University Press, 1957), p. 229.

[117] Adler, "The Constitution and Presidential Warmaking," p. 9.

[118] Quoted in Jacob E. Cooke, ed. The Federalist (Middletown, CN: Wesleyan University Press, 1961), p. 465.

others."[119] Edwin Corwin agrees: "in any war in which the United States becomes involved--one presumably declared by Congress--the President will be top general and top admiral of the forces provided by Congress."[120] Law professor Raoul Berger similarly notes that the commander-in-chief clause only designated the president as first general of American forces.[121] According to Lofgren, the commander-in-chief clause was passed without debate which indicates that the military designation was commonly understood.[122]

The early Supreme Court similarly interpreted the commander--in-chief clause as Justice Roger Taney explained in Fleming v. Page (1850):

> His (the president's) duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.[123]

The Framers viewed the commander-in-chief as subject to the will of Congress. The Continental Congress, for example, directed much of George Washington's military

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[119] Quoted by Adler, "The Constitution and Presidential Warmaking," p. 13.

[120] Corwin, p. 229. Schlesinger similarly concludes: "There is no evidence that anyone supposed that his office as Commander in Chief endowed the President with an independent source of authority." (Schlesinger, p. 6).

[121] Quoted by Glennon, Constitutional Diplomacy, p. 82 n. 66.

[122] Lofgren, p. 12.

[123] 9 Howard 603, 614 (U.S. 1850).

activity in the Revolutionary War. In fact, Washington's commission of June 19, 1775, stated that he should

> . . . observe and follow such orders and directions from time to time as you shall receive from this or a future congress of these United Colonies, or a committee of congress, for that purpose appointed.[124]

David Grey Adler reviews the role of commander-in-chief in English history and concludes that he was always subject to a political superior.[125]

Because the Framers did not want the executive to have the power to initiate war, they expressly (and with much discussion as to its significance) granted that power to Congress. To interpret the commander-in-chief clause as a grant of authority to the president to engage in military activity, no matter how great its scope, undermines the Framer's separation of powers and contravenes what appears to have been the settled understanding of the term commander-in-chief as a simple military title. Alexander Hamilton explained that the president as commander-in-chief was simply "to have the direction of the war once authorized or begun."[126]

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[124] Stone, p. 97.
It should be noted that Louis Henkin faults reliance on George Washington's early role as commander-in-chief because it ignores later extensive delegations of power to General Washington and because it occurred prior to the creation of a separate and independent executive branch (Henkin, Constitutionalism, Democracy and Foreign Affairs, p. 286).

[125] Adler, "The Constitution and Presidential Warmaking," p. 9.

[126] Ibid., p. 12.

B. EXECUTIVE POWER

The president also claims that the Constitution grants him military authority as the holder of executive power. This encompasses the responsibility to protect and insure the safety of citizens at home and abroad. Alexander Hamilton broadly construed presidential executive power and argued that it was only restricted by the enumerated constitutional authority of Congress.[127] Crovitz concurs and argues that congressional grants of power in the Constitution are defined in limited terms while presidential powers are defined expansively.[128] Eugene Rostow similarly maintains that the president's preeminent foreign affairs power is derived from his constitutional grant of executive power.[129] Rostow warns that Congress is usurping the president's constitutional power over military operations which he characterizes as "matters of executive discretion."[130]

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[127] Thomas and Thomas, p. 9.

[128] Crovitz, p. 107.

[129] Quoted by Henkin, Glennon, and Rogers, p. 31.

[130] Ibid., p. 32.

It is interesting to note that Gordon Crovitz and Eugene Rostow refer to Congress as imperial and argue that it is Congress who is now attempting to infringe on the president's constitutional powers. On the other hand, the majority of scholars contend the opposite--that the president has become imperial and has augmented his authority over war at the expense of Congress. (Rourke and Farnen, p. 513; Yost, p. 415; Steele, p. 1142).

On the other hand, James Madison viewed executive power as narrowly limited to explicit grants of power in the Constitution. Adler and Berger explain that the Framers discussed executive power and explicitly agreed that it should not extend to powers of peace and war.[131] Moreover, the president cannot execute what Congress has not first legislated. Bickel underscores that the president requires legislation to implement his powers:

> Whatever is needed to flesh out the slender recital of Executive functions must be done by Congress under the "necessary and proper" clause. Congress alone can make the laws which will carry into execution the powers of the Government as a whole, and of its officers, including the President.[132]

James Madison similarly stated: "The natural providence of the executive magistrate is to execute the laws as that of the legislature is to make laws. All his acts, therefore, properly executive, must presuppose the existence of the laws to be executed."[133]

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[131] Adler, "The Constitution and Presidential Warmaking," pp. 14-15; Glennon, Constitutional Diplomacy, p. 82 n. 66.

When the creation of the national executive branch was discussed at the Constitutional Convention and it was proposed that the branch be granted the executive power of the Continental Congress, Charles Pinckney worried that "the Executive powers of (the existing Continental) Congress might extend to peace and war which would render the Executive a Monarchy of the worst kind, towit an elective one." James Madison and James Wilson reassured Pickney that making peace and war were legislative matters. (quoted by Wormuth and Firmage, pp. 17-18).

[132] Quoted by Glennon, Constitutional Diplomacy, p. 73.

[133] Quoted by Wormuth and Firmage, p. 16.

Even if the president does have broad executive powers in domestic affairs, the Constitution expressly grants Congress authority to initiate hostilities. The president's executive powers, then, are terminated where express constitutional provisions regarding war begin.[134]

Presidents have also argued that their foreign affairs power authorizes the utilization of forces and arms abroad in international conflicts as an instrument of foreign policy.[135] The president's foreign affairs authority is derived from his executive power, treaty making power, and power to receive ambassadors.[136] In an often cited case on the president's preeminent role in foreign affairs, United States v. Curtiss-Wright Export Corporation (1936), Justice George Sutherland ruled that Congress could delegate

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[134] Yost, p. 421 n. 33.

[135] While campaigning for president in 1988 before an American Legion Convention, George Bush faulted Congress for usurping presidential prerogatives in foreign affairs and pledged to redress the perceived imbalance:

> 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 (quoted by Crovitz, p. 103).

[136] Contrary to presidential claims of plenary power over foreign relations, several constitutional scholars argue that the Framers intended Congress to have primary responsibility in international affairs (Wormuth and Firmage, p. 177).

authority to the President to embargo the sale of arms to Paraguay and Bolivia.[137] Sutherland stated:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.[138]

The Court's ruling in Curtiss-Wright has been criticized on numerous grounds. Most legal experts argue that Sutherland's reference to the president as the "sole organ" of foreign policy is merely unnecessary dicta and thus not binding.[139] Several authors also note that Sutherland's use of former Representative John Marshall's "sole organ" statement was misplaced as Marshall was only referring to the president's role as exclusive communicator with other governments.[140] There has also been disagreement on whether this case directly applies to war powers controversies.

After reviewing and faulting the Court's reasoning in Curtiss-Wright, Lofgren concludes that although the case does not limit Congress' authority to declare war as the Court recognized limitations on the president's use of

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[137] 299 U.S. 304 (U.S. 1936).

[138] Ibid., pp. 319-20.

[139] Ibid., p. 20; Wormuth and Firmage, p. 181 n. 7.

[140] Glennon, Constitutional Diplomacy, p. 24; Wormuth and Firmage, pp. 181-82.

external powers, the ruling does "implicitly support executive authority to use the armed forces in implementing foreign policy objectives."[141]

On the other hand, Bickel argues that the holding in Curtiss-Wright is limited to the facts in that case and does not extend to war powers because the Court stated that presidential powers "must be exercised in subordination to the applicable provisions of the Constitution."[142] Bickel adds that the case says "nothing about the powers to go to war or to use the armed forces without restriction."[143] After criticizing Justice Sutherland's opinion in Curtiss-Wright, Adler quotes Arthur Schlesinger, Jr. who similarly contended:

> The case itself involved the power to act under congressional authorization, not the power to act independently of Congress. Moreover, it involved the power over foreign commerce, not the power over war.[144]

It is illuminating to contrast the judicially created "sole organ" doctrine with Alexander Hamilton's specific reference to foreign policy in Federalist 75:

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[141] Lofgren, p. 204.

[142] Bickel, p. 211.

[143] Ibid.

[144] Quoted by Adler, "The Constitution and Presidential Warmaking," p. 32.

> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate a momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be the president of the United States.[145]

Although the president does have broad foreign policy powers, he is far from the "sole organ" in international affairs. Congress has been given an explicit constitutional role in several critical areas of foreign policy: Congress regulates commerce between the U.S. and other nations; the Senate has treaty ratification powers; and Congress has significant war powers. While the president should have some flexibility to use the military to protect and promote American interests abroad, this power is necessarily limited by certain enumerated grants of authority to Congress. Political and military decisions regarding America's national interests abroad should not be made by the commander-in-chief alone, but should emerge (as the Framers intended) from a dialogue between the executive and legislative branches. While the president may have the authority to deploy limited numbers of troops internationally, he cannot take action that, as a practical matter, constitutes war. In other words, the president's right to use gun boat diplomacy depends on the size of the boat.

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[145] Quoted in Cooke, pp. 505-06.

C. CONSTITUTIONAL CUSTOM

President Bush, like other presidents before him, also argued that the repeated historic practice of international presidential military actions created a precedent providing authority for his prosecution of the Persian Gulf Crisis. The President stated: "history is replete with examples where the President has had to take action."[146] The executive branch emphasized that American presidents had used the armed forces abroad more than 200 times. However, a closer examination of history supports the Framers' more conservative view of presidential power.

Early American presidents were especially deferential of the war powers of Congress. America's quasi-war with France in 1798, although not preceded by a declaration of war, was debated by Congress and authorized through a series of legislation.[147] In his first message to Congress in 1801, President Jefferson requested guidance from Congress in dealing with threats against American ships from the Pasha of Tripoli. Jefferson stated that he was "unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense;" Congress must authorize "measures of offense also."[148] President Andrew Jackson similarly viewed his war-making powers as limited by

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[146] Hansen, p. 29.

[147] Fisher, "The Power of Commander in Chief," p. 49.

[148] Ibid., p. 50.

Congress. He refused to recognize Texas and referred the issue to Congress as a question "probably leading to war" and thus a subject for "that body by whom war can alone be declared."[149]

When President James Polk ordered the army to occupy disputed territory with Mexico in 1846 and started the Mexican American War, he was censured by the House. President Lincoln did take unilateral military action during the Civil War; however, his actions were later upheld by the Supreme Court as defensive.[150] The Court explained that the President was "bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any legislative authority."[151] The next three major conflicts: the Spanish American War of 1898, World War I, and World War II, were all formally declared by Congress.

President Truman's unilateral deployment of troops to Korea in 1950 signaled a new era of presidential military

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[149] Quoted by Schlesinger, p. 29.

[150] Ironically enough, while a congressperson Lincoln was an eloquent critic of Polk's actions. When asked whether Polk should have been allowed to determine if an invasion of Mexico was necessary, Lincoln famously responded:

> Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion . . . and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect. (Ibid., p. 42).

[151] Ibid., p. 51.

committments abroad.[152] The Korean War was not explicitly authorized by Congress. The Vietnam War, although initially sanctioned by Congress through the Gulf of Tonkin Resolution in 1964, was later repudiated by Congress through the repeal of that Resolution and other express legislation curtailing military appropriations. With the exception of Korea and Vietnam nearly all the other examples of presidental military activity cited by the executive branch as precedents were minor incidents involving small numbers of troops and material. With the exception of Korea, no other presidential unilateral military committment approached the scale of the Persian Gulf War.

The Supreme Court first introduced the idea of constitutional custom in Stuart v. Laird (1803). There the Court held that where the interpretation of a constitutional clause is doubtful, practice and acquiescence over years can fix construction.[153] In a separate opinion in the Steele Seizure Case, Justice Felix Frankfurter elaborated on the doctrine of "quasi-constitutional custom:"

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[152] President Dwight Eisenhower, however, faulted Truman's unilateral exercise of military force in Korea. As president, he requested congressional authority to act in the Middle East and the Straits of Formosa. (Fisher, "Historical Survey," pp. 22-23).

[153] 1 Cranch 298 (U.S. 1803).

> systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned. . . making it as it were such an exercize of power part of the structure of government, may be treated as a gloss on 'executive power' vested in the President by section 1 of Article II.[154]

Prior presidential uses of military force without sanction of Congress do not meet these requirements. As previously mentioned, they were largely minor actions. Moreover, many of the instances cited by the executive were actually legimized or authorized by Congress through affirmative legislation. Finally, Congress has repeatedly questioned the executive branch's post-Korean War assertion that the president is authorized to initiate military action without the approval of Congress. It did so in Vietnam when the Gulf of Tonkin Resolution was repealed. It did so in 1973 when the War Powers Resolution, a congressional attempt to restrict presidential war powers, was passed. It did so in 1982 when the requirements of the War Powers Resolution were imposed upon President Reagan's deployment of Marines in Lebanon. And it did so when Congress debated and passed the Resolution authorizing President Bush to use force in the Persian Gulf.

After discussing the list of presidential uses of power abroad in detail and concluding that the majority were trivial actions, Firmage and Wormuth argue that the "quasi-

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[154] Youngstown Sheet & Tube Co. v. Sawyer, 72 S.Ct. 863, 897 (U.S. 1952).

constitutional custom" doctrine does not apply. They explain:

> In the case of executive wars, none of the conditions for the establishment of constitutional power by usage is present. The Constitutional is not ambiguous. No contemporaneous congressional interpretation attrubutes a power of initiating war to the President. The early Presidents, and indeed everyone in the country until the year 1950, denied that the President possessed such a power. There is no sustained body of usage to support such a claim.[155]

Even if prior examples of presidential uses of force abroad had been substantially similar to the Persian Gulf War and met the factual requirements of the "quasi-constitutional custom" doctrine, they would still constitute an unconstitutional expansion of executive power. Unconstitutional actions cannot change the meaning of the Constitution.[156] Moreover, the president should not be allowed to augment his power through continuous usurpation.[157]

III. CONCLUSION

The Persian Gulf War is a classic example of presidential military action which clearly exceeds constitutional boundaries. The Persian Gulf deployment occurred on a massive scale over a period of months. Congress should have and could have been meaningfully

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[155] Firmage and Wormuth, p. 149.

[156] John Hart Ely, War and Responsibility (Princeton: Princeton University Press, 1993), p. 9.

[157] Firmage and Wormuth, p. 136.

consulted. If a national consensus for war did not exist in November, President Bush should not have committed to it publicly. The Constitution requires more.

CHAPTER 3

THE WAR POWERS RESOLUTION

I. INTRODUCTION

The constitutional debate regarding the appropriate separation of war powers between Congress and the president reached its zenith in 1973 when Congress adopted the War Powers Resolution (WPR) over President Richard Nixon's veto. Enacted largely as a response to unilateral presidential military activity in Vietnam, the WPR attempts to restrict the president's power to intervene militarily in hostile situations and also seeks to define Congress' role in determining when and how American forces will be engaged.

Since 1973, legislators have repeatedly raised the requirements of the WPR as a basis for asserting that the president should discuss and receive authorization for large-scale troop deployments. However, every president since the Resolution's enactment has refused to recognize the its constitutionality and meaningfully comply with its provisions. Proponents of the WPR assert that it is a necessary measure to curb executive military excesses and to return to the separation of war powers outlined in the

Constitution. The Resolution's critics contend that it unconstitutionally restrains the president from exercising his powers as commander-in-chief and head of foreign policy. Both supporters and critics of the Resolution concur that it has not functioned as intended and should be amended.

President Bush's broad assertion of war powers renewed debate on this controversial resolution. Although the President stated that his initial report was "consistent with" the WPR, he later ignored its provisions. Congress, on the other hand, repeatedly referred to the Resolution in legislation relating to the Gulf War. In fact, after the use of force resolution was adopted in early January, House Foreign Affairs Committee Chair Dante Fascell stated that the WPR was functioning--the President had filed a WPR report, Congress debated, and legislation was passed providing authorization pursuant to the Resolution. Faschell optimistically concluded: "the War Powers Resolution is alive and well."[158] Considering the President's evasion of the WPR and Congress' unwillingness to impose its requirements, Faschell's optimism was somewhat misplaced.

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[158] Ellen C. Collier, "Statutory Constraints: The War Powers Resolution," in The Constitution and the Power to Go to War, p. 24.

II. THE WAR POWERS RESOLUTION

A. BACKGROUND

President Nixon's continuation of the Vietnam War despite congressional disapproval illustrated the practical difficulties Congress experienced playing a role in modern military conflicts. Therefore, Congress outlined and codified what it perceived its war making authority to be in the WPR. According to political scientist James Nathan, three political assumptions underlay the adoption of the WPR:

> (1) that U.S. armed forces should not enter hostilities without adequate domestic support, (2) that only a compelling national interest should dictate a commitment of troops, and (3) that the Congress provided a kind of "reality test" for the President in these matters.[159]

Drafters of the WPR recognized that Congress has historically attempted to avoid the politically troublesome issues of war and peace. They hoped the Resolution would require legislative action where Congress had previously chosen to remain silent.[160] The WPR was also passed because Congress acknowledged its inability to act quickly and desired a mechanism to expedite debate.[161]

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[159] Nathan, "Curbing the Distress of War: An Outline for a War Powers Resolution that Works," p. 609.

[160] Ely, "Suppose Congress Wanted a War Powers Resolution that Worked," p. 1415, n. 12.

[161] John Spanier and Joseph Nogee, eds., Congress, The Presidency and American Foreign Policy (New York: Pergamon Press, 1981), p. xxvi.

Interestingly enough, the WPR has divided both liberals and conservatives. It was opposed by a unique alliance of liberals who thought it gave the president too much power and conservatives who believed it infringed on the president's authority as commander-in-chief.[162] It was supported by those who argued that the president had exceeded his constitutional authority and usurped congressional power to decide when hostilities should be initiated.

B. TEXT

The text of the Resolution is illustrative of its potential as a procedural device for delineating war powers and also its constitutional and practical problems. The Resolution's express purpose as explained in Section 2(a) is to:

> (E)nsure that the collective judgment of 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, and to the continued use of such forces in hostilities or in such situations.[163]

Section 2(c) states that executive power as commander-in-chief to deploy forces into hostilities or areas of imminent hostilities is limited to: "1) a declaration of war, 2)

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[162] Stuart W. Darling, "Rethinking the War Powers Act," Presidential Studies Quarterly 7 (Spring/Summer 1977), p. 127.

[163] The WPR is codified in 50 U.S.C. ss. 1541-1548 (1982).

specific statutory authorization, 3) a national emergency created by attack upon the United States" or its forces or territories abroad. Section 3 provides:

> The President in every possible instance 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, and after every such introduction shall consult regularly with Congress . .

Sections 2 and 3 are in the "Purpose and Policy" portion of the Resolution and as such are not considered binding.

Section 4(a) requires the president to report to Congress within 48 hours of the introduction of military forces into a number of circumstances including situations of imminent hostilities (section 4(a)(1)). Section 5(b) states that when a section 4(a)(1) report of imminent hostilities is required by military commitments, the president shall terminate the use of armed forces within 60 days unless Congress has declared war or specifically authorized a continued use of force by statute. This section further provides that Congress can extend the 60 day limit for no more than 30 days or that Congress may require the removal of troops by concurrent resolution (not subject to presidential veto) prior to the expiration of 60 days. Sections 6 and 7 discuss expedited procedures for joint and concurrent resolutions.

Section 8(a) explains that authority to commit troops shall not be inferred from any provision that does not specifically refer to the War Powers Resolution. The

section additionally states that "nothing in this joint resolution . . . is intended to alter the constitutional authority of the Congress or the President. . ." Section 9 contains a provision stating that if any section of the Resolution is found to be unconstitutional the rest of the Resolution is severable and will remain valid.

This controversial Resolution has been vigorously attacked on a variety of grounds and has never functioned as its drafters intended.

C. PRESIDENTIAL COMPLIANCE

The WPR played a significant role in the debate during the Persian Gulf Crisis. As Chapter 1 indicated, Congress repeatedly raised its requirements to pressure President Bush into obtaining authorization prior to taking offensive action. Except for describing his notification to Congress of the initial troop deployment in August as "consistent with" the WPR, President Bush virtually ignored its provisions. The President never conceded that the 60 day time period had commenced nor did he refer to the Resolution when he notified Congress in November 1991 that troop strength would be doubled.

The text of the WPR indicates that it should have applied to the Persian Gulf crisis in three ways. First, President Bush should have consulted with Congress prior to deploying additional troops after the initial emergency expired. Second, he should have fully informed Congress

within 48 hours of the troop commitment and the 60 day time clock should have been triggered. Third, within the 60 day period Congress should have determined whether the U.S. forces would take an offensive or defensive posture.[164]

President Bush's evasion of the WPR was not novel. Although 25 reports have been issued by the executive since 1973,[165] nearly all have simply declared themselves "consistent with" the WPR. This term has been used by presidents in order to placate Congress without explicitly recognizing the Resolution's constitutionality. A section 4(a)(1) report of hostilities was filed in 1975 by President Gerald Ford regarding the Mayaguez rescue mission. However, the mission was completed by the time the report was filed. In countless other instances since 1973, presidents have used force abroad without filing any report.

Congress has only formally invoked the WPR once. When President Reagan initially deployed 1200 marines on a peacekeeping mission to Lebanon in September 1982, he refused to submit a section 4(a)(1) hostilities report. As the Lebanese situation deteriorated and several marines were killed, Congress threatened to commence the 60 day time period and force a troop withdrawal. After President Reagan and Congress negotiated, the President agreed to sign a

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[164] Edwin B. Firmage, "The War Power of Congress and Revision of the War Powers Resolution," Journal of Contemporary Law 17 (1991), p. 255.

[165] Collier, p. 55.

resolution acknowledging imminent hostilities in exchange for authorization to extend the marines' mission by 18 months.

It appeared initially that President Bill Clinton might explicitly recognize the legality of the WPA and forge a more open foreign policy relationship with a Congress controlled by his own party. He consulted extensively with Congress to formulate his policy toward Haiti during his first year in office. Subsequently, however, he sent cruise missiles to Iraq without meaningfully consulting with Congress. When he notified Congress of the attack, he called his report "consistent with" the WPR.[166]

President Clinton evoked his evasive Republican predecessors by virtually ignoring Congress in the fall of 1994. He publicly announced the U.S. would invade Haiti on September 18 without consulting Congress or receiving authorization as required by the WPR. Although the invasion was aborted by last-minute diplomacy, Haiti's military leaders did not agree to leave until the first American planes had actually been launched.[167] Congress, the majority of whom opposed President Clinton's Haiti policy, debated the issue along largely partisan lines. Republicans

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[166] Gregory J. Bowens, "Iraq: Bombing, Widely Backed on Hill, Reopens War Powers Debate," Congressional Quarterly Weekly Report 51 (July 3, 1993), p. 1750.

[167] George Church, "Destination Haiti," Time (September 26, 1994), p. 23.

who had supported President Bush in Panama and the Persian Gulf, now argued that the Constitution and the WPR required the President to consult with Congress prior to invading Haiti. Democratic legislators responded that the proposed Haitan invasion was a much smaller operation than the two previous actions.[168]

Although Congress itself has consistently found the WPR unworkable, few legislators want to concede the law is invalid.[169] It has been raised, perhaps effectively, as a threat to force President Clinton to discuss military peacekeeping missions with Congress.[170] Legislation authorizing presidential military activity continues to refer to the WPR.[171]

III. THE DEBATE

The difficulty of reviewing the WPR is that there are as many opinions regarding the Resolution as there are

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[168] Ibid., p. 26.

[169] Carroll J. Doherty, "On Somalia, War Powers Law Becomes a GOP Weapon," Congressional Quarterly Weekly Report 51 (October 30, 1993), p. 2987.

[170] The House referred to the Resolution in H.Con.Res. 170 which sought to require the President to remove troops from Somalia prior to his March deadline. The resolution failed in the Foreign Affairs Committee by only one vote. (Carroll J. Doherty, "A Close Vote on War Powers," Congressional Quarterly Weekly Report 51 (November 6, 1993), p. 3060).

[171] Gregory J. Bowens, "Resolution Would OK Troops to Operate under U.N.," Congressional Quarterly Weekly Report 51 (May 22, 1993), p. 1304.

authors who have discussed its provisions. The WPR has been variously described as: "an abysmal failure;"[172] "deeply flawed;"[173] "unconstitutional, ineffective, and unwise;"[174] a "useful congressional negotiating tool;"[175] "plainly constitutional;[176] and finally, as "just another element in the political struggle between the branches."[177]

The complexity of the debate is complicated by the fact that political scientists and legal scholars approach the WPR differently. Political scientists generally focus on whether or not the legislation constitutes good policy. Legal scholars discuss its constitutionality and propose specific legislative modifications. Opponents articulately challenge the Resolution as both unconstitutional and bad

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[172] John W. Rolph, "The Decline and Fall of the War Powers Resolution: Waging War under the Constitution after Desert Storm," Mercer Law Review 43 (Winter 1992), p. 646.

[173] Firmage, p. 237.

[174] Quoted by John C. Cruden, Review of The War Powers Resolution: Its Implementation in Theory and Practice, by Robert Turner, Virginia Journal of International Law 24 (Winter 1984), p. 514.

[175] Donna Haynes Henry, "The War Powers Resolution: A Tool for Balancing Power Through Negotiation," Virginia Law Review 70 (June 1984), p. 1054.

[176] Ely, "Suppose Congress Wanted a War Powers Act that Worked," p. 1386.

[177] "Realism, Liberalism and the War Powers Resolution," Harvard Law Review 102 (January 1989), p. 638.

policy while equally eloquent proponents defend it on both grounds.

A. OPPONENTS

1. CONSTITUTIONALITY

The most common criticism of the WPR is that it is unconstitutional. The executive branch has consistently opposed the Resolution and never meaningfully complied with its requirements. No president has ever formally consulted with Congress prior to committing troops.[178] Moreover, every president since the Resolution was passed has contended that it unconstitutionally undermines his power as commander-in-chief and chief executive.

Law professors Philip Trimble and Geoffrey Miller state that the Resolution is unconstitutional because the president's constitutional powers can be regulated only by specific congressional legislation.[179] Congress cannot limit presidential action in advance through broadly phrased general restrictions.[180] A different constitutional criticism is levied by former cabinet member and ambassador Elliott Richardson. He believes the Resolution undermines

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[178] Joshua Lee Prober, "Congress, the War Powers Resolution, and the Secret Political Life of a 'Dead Letter,'" Journal of Law and Politics 7 (Fall 1990), p. 177.

[179] Quoted in "War Powers and the Responsibility of Congress," Proceedings of the 82nd Annual Meeting, American Society of International Law 82 (1988), p. 10.

[180] Charles Bennett et al., p. 32.

the system of checks and balances by attempting to delineate constitutional powers and eliminate the institutional competition and compromise the Founders intended.[181]

Opponents of the Resolution further fault the enumeration of presidential powers in section 2 as unconstitutionally underinclusive. They argue that the president does not derive all his constitutional war powers from the commander-in-chief clause and that he can introduce troops pursuant to his power: to execute commitments under security treaties, to act as the sole voice in foreign policy, and to act as the nation's chief executive.[182] Legal scholars Ann and A.J. Thomas more specifically criticize section 8(a)(2) which states that presidential authority to use force should not be inferred from treaty commitments. They argue that this provision is unconstitutional because treaties, such as our security alliance with NATO, are the supreme law of the land and the president has a constitutional duty to see that they are faithfully executed.[183]

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[181] Elliott L. Richardson, "Checks and Balances in Foreign Relations," American Journal of International Law 83 (October 1989), p. 738.

[182] Thomas and Thomas, p. 133.

[183] Ibid., p. 137. Senator Javits responds that international treaties specify they will be carried out in accordance with the "constitutional processes of the nations involved" and the WPR merely defines those processes. (Jacob K. Javits, Who Makes War (New York: William Morrow & Co., 1973), p. 268).

Critics also assert that presidents have historically committed armed forces in hostile situations and this has set a precedent that the WPR cannot change.[184] Eugene Rostow, a prominent proponent of executive power, affirms that the president has often taken military action without consulting Congress and this has created a practice which gives meaning to the Constitution.[185] A leading State Department critic of the WPR, Abraham Sofaer, notes the extensive number of presidential uses of force without congressional authorization and concludes that the president has "ample authority under the Constitution" to act militarily without specific legislative authority.[186]

2. POLICY

After reviewing the Resolution's constitutional failings, opponents further assert that it constitutes bad

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[184] Senator Tom Eagleton refers to this argument as the "bank robber theory," e.g. if numerous bank robberies were successful, the act of robbing banks should be legalized. (Thomas F. Eagleton, War and Presidential Power (New York: Liveright, 1974), p. 125).

Senator Brock Adams adds that even if a precedent was established, it was negated by passage of the WPR. (quoted in "War Powers and the Responsibility of Congress," p. 3).

Michael Glennon reviews the enumeration of unilateral presidential actions and concludes that the vast majority were minor instances which do not justify presidential claims of augmented military authority. (Glennon, "The Gulf War and the Constitution," pp. 89-90).

[185] Rostow, "President, Prime Minister or Constitutional Monarch," p. 744.

[186] Abraham D. Sofaer, "The War Powers Resolution: Fifteen Years Later," Temple Law Review 62 (Spring 1989), p. 321.

policy. Legal advisor Terry Emerson believes that the WPR precipitates a vote over military action before reasoned and deliberative judgment can occur.[187] Sofaer adds that the WPR "will lead to unnecessary and undesirable legal faceoffs between Congress and the President, when the nation most needs to implement foreign policy effectively and wisely."[188] Thus, the Resolution transforms what should be a political debate into a legal debate.[189]

Opponents further assert that the Resolution excessively limits presidential power over foreign affairs. Emerson contends that the Resolution is "dangerous to the country's safety because it denies flexibility to the President in the conduct of foreign relations and conveys a message of political disunity in the American Government."[190] Ann and A.J. Thomas concur and maintain that the WPR detrimentally removes the threat of presidential use of force in his dealings with other nations.[191] The Resolution's critics argue that the president must be able to act quickly to prevent global

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[187] Emerson, p. 31.

[188] Sofaer, p. 317.

[189] Military law professor John Rolph similarly criticizes the WPR for fostering detailed constitutional and legal arguments rather than a discussion of the political merits of the president's proposed military policy. (Rolph, p. 650).

[190] Emerson, p. 51.

[191] Thomas and Thomas, p. 138.

crises and protect American interests and citizens abroad.[192] They also point out the need for secrecy in any military situation and claim that consulting with Congress prior to troop deployments may compromise the security of American forces.

Liberal commentators criticize the Resolution for dramatically different reasons. For example, Senator Eagleton (one of the authors of the Senate version of the Resolution) and Representative Charles Bennett argue that the modified Resolution passed by both Houses granted the president excessive power because it does not require congressional approval prior to troop commitments, and then grants him 60 days to act unilaterally.[193] Law professor Edwin Firmage adds that the Resolution is "deeply flawed" for two reasons. First, if the president rapidly concludes any military deployment it would be difficult for Congress to challenge his action. Second, once troops are deployed it becomes difficult for Congress to oppose the president and remove the troops.[194]

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[192] President Nixon specifically addressed this concern in his veto message to the House. He stated that the effect of the WPR would be to "seriously undermine this Nation's ability to act decisively and convincingly in times of international crisis." (quoted by William P. Agee, "The War Powers Resolution: Congress Seeks to Reassert Its Constitutional Role as a Partner in War Making," Rutgers Law Journal 18 (Winter 1987), p. 405).

[193] Bennett et al., p. 31.

[194] Firmage, p. 237.

B. PROPONENTS

1. CONSTITUTIONALITY

Proponents of the War Powers Resolution counter that the President has preempted Congress in military affairs and violated the constitutional separation of powers. They assert that the Resolution is clearly constitutional as it encompasses the war powers of Congress. Senator Brock Adams explained: The Constitution makes it clear that the power to declare war is in the hands of the Congress. . . the resolution is an exercise of part of that constitutional power."[195] Law professor William Van Alstyne bases his view of the Resolution's constitutionality on provisions of the Constitution other than the declaration clause. He finds the WPR's authority in Congress' exclusive power to determine whether the U.S. will have an army or navy and on Congress' power to make all laws that are necessary and proper.[196]

Constitutional scholars John Hart Ely, Michael Glennon, Lawrence Tribe, and Alexander Bickel conclude the Framers clearly intended that all wars, whether declared or undeclared, be legislatively authorized.[197] In discussing the WPR, constitutional expert Louis Henken similarly

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[195] Quoted in "War Powers and the Responsibility of Congress," p. 3.

[196] Bennett et al., p. 26.

[197] Ely, "Suppose Congress Wanted a War Powers Act that Worked," p. 1386.

explained that Congress has the power to limit or regulate uses of force in situations of war and those short of war.[198] Law Professor William Spong elaborated:

> In enacting the Resolution, Congress did not seek to change the constitutional powers of the President. What they hoped to create was a procedural mechanism for coordinating the war and peace constitutional responsibilities of the President and Congress, a procedure that would bring Congress to a position where it might exercise its proper role.[199]

Glennon responds to opponents of the Resolution's time limits on presidential military action by stating that their argument applies to any constitutional limitation on presidential power.[200] Legal commentator Stephen Carter avoids the original intent conundrum by asserting that the WPR is constitutional as a mechanism effectuating Congress' role in a system of checks and balances.[201]

2. POLICY

After defending the Resolution's constitutionality, supporters of the WPR explain that it also constitutes good policy. Bickel counters pragmatic critiques of the WPR and contends that clarifying congressional control over war

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[198] Louis Henken, Foreign Affairs and the Constitution (Mineola, N.Y.: The Foundation Press, 1972), p. 103.

[199] William B. Spong, Jr., "The American Constitutional War Powers From Afar--Another Look," Federal Law Review 19 (March 1990), p. 105.

[200] Glennon, Constitutional Diplomacy, p. 95.

[201] Stephen L. Carter, "The Constitutionality of the War Powers Resolution," Virginia Law Review 70 (February 1984), p. 112.

powers will enhance American credibility abroad by requiring the U.S. to make commitments through specific and binding legislation.[202] Political scientist Morton Halperin adds that congressional participation is necessary for the success of foreign policy and military policy. He elaborates: "The benefits of public consensus on military action far outweigh the conceivable loss to some opportunities stemming from public debate and congressional approval."[203]

Proponents of the Resolution such as Stuart Darling argue that it is dangerous to allow one person to make decisions regarding war and that executive expediency must be balanced by legislative restraint.[204] Legal scholar Steven Shuster adds that the Resolution is necessary to avoid gradually escalating conflicts and political quagmires such as Vietnam; promoting the rule of law is always beneficial in the long-term. As constitutional expert Jules

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[202] Alexander Bickel, Introduction to Javits, Who Makes War, p. xi. Historian Barbara Tuchman denies that Congress' role in war is obsolete in the modern world. She eloquently explains:

> Now the need for constitutional reform has become apparent, not to restore the eighteenth-century model, but to confirm its classic balance of powers and validate its restraints upon the Executive for late-twentieth-century conditions. The War Powers Act is the first step. (Barbara W. Tuchman, Ibid., p. vii).

[203] Halperin, "Lawful Wars," p. 175.

[204] Darling, p. 134.

Lobel explained, democratic government is diminished when the executive is able to abuse constitutional power on the pretext of national security.[205]

In reply to the contention that the Resolution was simply a response to Vietnam, Halperin argues that the WPR had a "deeper source," which was to reestablish Congress' role in decisions regarding war.[206] Although proponents of the WPR concede that it needs to be amended to be effective, they view it as both beneficial and necessary. James Nathan argues that even though presidents have systematically flouted the Resolution's restrictions, the existence of the War Powers Resolution may have checked further presidential forays abroad and limited the extent of presidential military involvements. In fact, Nathan contends, if not for the Resolution, President Bush might have disregarded Congress entirely in the Gulf War.[207] Former Secretary of State Cyrus Vance similarly states that the WPR has increased "presidential self-restraint" by reminding the president he must gain political support prior to exercising force.[208] Shuster adds that the Resolution's

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[205] Jules Lobel, "Emergency Power and the Decline of Liberalism," Yale Law Journal 98 (May 1989), p. 1422.

[206] Halperin, "Lawful Wars," p. 189.

[207] Nathan, "Curbing the Distress of War," p. 626.

[208] Cyrus R. Vance, "Striking the Balance: Congress and the President under the War Powers Resolution," University of Pennsylvania Law Review 133 (December 1984), p. 90.

"mere existence forces Congress to debate military decisions" even when presidents fail to comply with the letter of the law.[209]

Legal scholar Joshua Prober carries the argument further and claims that the Resolution is a beneficial and powerful political tool to use against the president. It gives Congress the ability to criticize the president for not complying with the Resolution rather than criticizing him for a potentially popular military action.[210] It should be remembered that the success of the WPR should not be based exclusively on the success of its operative provisions, but also on achieving its goal of assuring Congress a voice regarding presidential military activity.[211]

Interestingly enough, political scientist William Olson considers the debate and concludes that both sides are right because the Constitution divides authority over foreign affairs and the arguments are based upon different provisions. He views the Resolution as a political, not legal, statement and notes that the Resolution's problem is

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[209] Shuster, p. 487.

[210] Prober, p. 179.

[211] Henry, p. 1057.

not constitutionality but enforceability since it does not contemplate sanctions against recalcitrant presidents.[212]

The debate over the WPR is clearly an extenuation of the disagreement created by fundamentally different interpretations of the Constitution. History indicates, then, that there may never be any consensus on the Resolution's constitutionality. Irrespective of its legal and practical flaws, however, the WPR can provide a useful framework for political accommodation and negotiation in war powers disputes. It will remain impotent, however, if Congress does not aggressively pursue its co-equal role and amend and enforce its requirements.[213]

IV. PROPOSED AMENDMENTS

Considering the diametrically opposed interpretations of the constitutionality and efficacy of the WPR it is not surprising that the Resolution has never functioned as intended. John Hart Ely explains that the WPR has not worked because of presidential defiance, congressional acquiescence, and judicial abstention.[214] Rather than discarding the WPR, however, numerous legislators and

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[212] William C. Olson, "The US Congress: An Independent Force in World Politics," International Affairs 67 (Summer 1991), p. 548.

[213] Martin Wald, "The Future of the War Powers Resolution," Stanford Law Review 36 (July 1984), p. 1409.

[214] Ely, "Suppose Congress Wanted a War Powers Act that Worked," p. 1381.

prominent legal scholars have sought to revise the Resolution with a plethora of proposed amendments.[215]

A. SECTION 2

Section 2 of the WPR has been criticized as underinclusive and (in any event) non-binding. Thus, a bipartisan group proposed an amendment (the Byrd proposal) that would have, among other things, repealed section 2(c) which enumerates the executive's power as commander-in-chief. Several commentators on the WPR such as Sofaer and Shuster continue to support this modification to give the president more flexibility in foreign policy.

On the other hand, WPR advocate Glennon argues that the provision is simply unduly narrow and should be amended to include the inherent presidential power to rescue endangered Americans.[216] Glennon, Thomas Franck, and Morton Halperin favor expanding the list of presidential powers further and propose retrieving the original Senate proposal that would mandatorily require congressional approval prior to troop commitments except in the enumerated circumstances. Glennon

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[215] Given the controversial constitutionality of the WPR, at least three authors suggest that the Constitution be amended to provide for congressional consultation. (Ray Forrester, "Presidential War in the Nuclear Age: An Unresolved Problem," George Washington Law Review 57 (August 1989), p. 1639; Rourke and Farnen, p. 518).

[216] Glennon, Constitutional Diplomacy, p. 96.

and Franck suggest that a funding prohibition be attached to encourage presidential compliance.[217]

Glennon, Shuster, and Henken, among others, additionally recommend that the term "hostilities" be defined clearly to reduce the possibility of presidents evading the Resolution by claiming their military activity does not involve hostilities-- a situation that has arisen repeatedly in the past.[218] The House committee report on the Resolution found that the term "hostilities" was broadly intended to include "any state of confrontation in which there is clear and present danger of armed conflict."[219] Shuster uniquely suggests that the definition should be drafted by both the executive and legislative branches to assist in forging a consensus on future troop engagements.[220]

B. SECTION 3

Several supporters of the WPR argue that the consultation requirement in section 3 be strengthened and consultation defined. Presidents have misinterpreted this

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[217] Ibid., p. 115.

[218] To avoid semantic hairsplitting, hostilities could be defined by a concrete occurrence such as a specified number of U.S. casualties or by deployed troops receiving combat pay. ("Realism, Liberalism and the War Powers Resolution," p. 650-51).

[219] Quoted by Shuster, p. 459 (H.R. Rep. No. 287, 93rd Cong., 1st Sess. 7 (1973).

[220] Ibid., p. 496.

section and have informed Congress of military activity rather than having meaningfully consulted with them prior it its initiation.[221] The section should also be amended to specify which legislators should be consulted as a discussion with Congress as a whole would admittedly be too cumbersome.[222] It has been suggested that a "Permanent Consultative Group" be created which would consist of the leadership of both the House and Senate and various committees. This group would meet on a regular basis with the president to be consulted on possible U.S. military action.[223] Commentators emphasize that, where possible, consultation must occur before troops are deployed and patriotic fervor makes a negative congressional response impossible.

Although Representative Lee Hamilton favors clarifying the consultation requirement, he insightfully adds that the Resolution will work if there is an attitude of good faith and mutual respect; however, if those attributes are lacking

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[221] Edwin Firmage adds that the term "consultation" be defined as "genuine collaborative decision-making" before troops are deployed. (Firmage, p. 257).

[222] Ely, "Suppose Congress Wanted a War Powers Act that Worked," pp. 1400-01.

[223] Eugene Rostow opposes the creation of a permanent consulting group as it would require a congressional voice in presidential decision-making and "destroy the unitary Presidency, one of the two great innovations of the American Constitution." (Rostow, "President, Prime Minister or Constitutional Monarch, p. 749).

then the Resolution will not function no matter how the consultation portion is amended.[224]

C. SECTION 4

Another loophole of the WPR that presidents have consistently exploited is its failure to require the president to specify what type of section 4 report he is filing. Because only a section 4(a)(1) report authomatically trigger the time constraint, the president can report to Congress without commencing the 60 day period.[225] Thus, presidents have sent reports of military activity to Congress and described them simply as "consistent with" the Resolution. A more detailed reporting requirement might help to minimize presidential evasion.[226] Because sections 3 and 4 are not explicit, Nathan adds that presidents have used the reporting requirement in lieu of the consultation requirement and merely informed Congress of

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[224] Quoted in War Powers and the Constitution, p. 13. General Scowcroft, an opponent of the Resolution, stated it differently: "The trouble is that with the right spirit we do not need the War Powers Resolution; with the wrong spirit, the War Powers Resolution really does not affect the executive." (Ibid., p. 16).

[225] Glennon, Constitutional Diplomacy, p. 104.

[226] Ely and Glennon propose that section 4(a)(2) and 4(a)(3) be eliminated as those reports do not trigger the 60 day clock and thus give the President a loophole to report but not be required to remove troops. (Ely, "Suppose Congress Wanted a War Powers Act that Worked," p. 1404; Glennon, Constitutional Diplomacy, p. 115).

their actions. The WPR could also be amended to provide for the report's secrecy.[227]

Ely argues that this section should also be modified to state that if the president fails to start the clock by filing a section 4(a)(1) report, one or more members of Congress should have standing to file suit in federal court.[228] Interestingly enough, Ely does not want the court to decide whether hostilities have actually commenced. Rather, he contends that the court should merely remand the case to Congress and force them to make a decision regarding whether the clock has been started by deploying troops in a situation of hostilities.[229] Other commentators similarly support adding language to the amendment promoting judicial review; however, they argue that the court is best qualified to adjudicate possible violations of the Resolution.[230] As

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[227] Quoted in Francis O. Wilcox and Richard A. Frank, eds., The Constitution and the Conduct of Foreign Policy (New York: Praeger Publishers, 1976), pp. 119-20.

[228] Glennon argues, on the other hand, that the Resolution is a "dead letter" if Congress is forced to determine when the clock should start for its drafters intended the Resolution to be a self-starting mechanism voluntarily initiated by the president. (Glennon, Constitutional Diplomacy, pp. 105-106).

[229] Ely, "Suppose Congress Wanted a War Powers Act that Worked," p. 1406. This seems ironically circuitous. Ely is saying that Congress does not have the courage to directly challenge the president and decide by resolution whether hostilities have begun so the Court should order them to do so. It seems that if Congress will not determine that hostilities have begun on its own, a court order would be ineffective.

[230] Glennon, Constitutional Diplomacy, p. 112.

Edwin Firmage explains: "Whether we go to war is a political question to be decided by Congress. . . . The way we go to war is not."[231]

D. SECTION 5(B)

Most supporters of the Resolution recognize that one of its primary problems is that it grants the president 60 days to deploy troops and thus present Congress with a fait accompli which Congress, as a practical matter, will rarely have the political will to overcome. To combat this problem, Stuart Darling agrees with other commentators that the WPR be amended along the lines of the original Senate version. This would require that Congress approve of troop commitments prior to their deployment except in several narrowly defined emergencies.[232] According to Darling, this would still allow the president to act unilaterally when vital U.S. interests are threatened.[233]

Ely argues that granting the president 60 days (plus a possible additional 30 days) is too generous. He would amend section 5 to give the president only 30 days to deploy

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[231] Firmage, p. 264.

[232] Darling, p. 133.

[233] Glennon further suggests that the Resolution's restraints be enlarged to cover covert activity. (Glennon, Constitutional Diplomacy, p. 17). Douglas Steele concurs and suggests that the language covering covert operations be broadly drafted and provide for the requisite secrecy. (Steele, pp. 1156-57).

troops without Congress' explicit approval.[234] Ely and Glennon strongly argue that there must be a time limitation placed on presidential military activity or the president would be permitted to leave troops indefinitely.[235]

Because of its controversial nature, other proponents of the WPR favor removing the 60 day clock altogether. The Byrd proposal would have removed the time limit and substituted an expedited procedure for considering legislation introduced by the Permanent Consultative Group. Opponents of the Resolution support eliminating section 5 because requiring troops be removed once they are deployed undermines presidential foreign policy.[236] Professor Trimble adds that the provision precipitates a congressional debate before the issues are clarified. He suggests instead an expedited procedure for considering the military situation 9 to 12 months after it is initiated.[237]

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[234] Ely, "Suppose Congress Wanted a War Powers Resolution that Worked," p. 1399.

[235] Ibid., pp. 1383-84; Glennon, Constitutional Diplomacy, pp. 119-120.

[236] Patrick D. Robbins, "The War Powers Resolution after Fifteen Years: A Reassessment," American University Law Review 38 (Fall 1988), p. 143.

[237] Abraham Sofaer and Geoffrey Miller fault section 5 because it allows Congress to require troop withdrawals by doing nothing. (Sofaer, p. 324).

E. SECTION 5(C)

There is perhaps the most consensus among WPR authors on the need to modify section 5(c) which provides that Congress can require the president to remove troops by concurrent resolution not subject to the president's veto. Most commentators on the WPR, including Representative Hamilton, Patrick Robbins, and Glennon, concede that this section is probably unconstitutional because it constitutes the type of legislative veto struck down by the Supreme Court's decision in I.N.S. v. Chadha.[238] In Chadha, the Court ruled that where Congress delegates authority to the executive it cannot legislatively veto executive action by concurrent resolution but must present a resolution to the president subject to his veto.

Ely, Steele, and Senator Javits, however, maintain a plausible argument could be made that section 5(c) is constitutional and can be distinguished from Chadha. They argue Congress did not delegate the authority to the president in the WPR to deploy troops and thus the Chadha presentment and bicameralism requirements do not apply.[239]

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[238] 103 S.Ct. 2764 (1983).

[239] Ely, "Suppose Congress Wanted a War Powers Act that Worked," pp. 1395-96.
Ely and Firmage add that section 5(b) should be augmented to state if the President fails to terminate the use of military force, funds to support the troops will be immediately terminated. As Congress may be reluctant to take responsibility and affirmatively deny appropriations, this should bolster Congress' ability to restrict presidential military activity. (Ibid., p. 1401).

Bills proposing that the WPR be repealed or revised have been introduced in Congress every year since 1973. Although some have been seriously considered, none have passed. On October 22, 1993, Senate Democrats announced plans to rework the Resolution. Similar legislation has been introduced in the House.[240] considering the history of congressional inertia on the issue, it is not surprising that both resolutions died in committee. The new Republican majority elected in 1994 has not announced its position on war powers reforms.

V. CONCLUSION

The WPR is as controversial today as it was when it was first enacted. The geographical focus of the debate has simply shifted from Vietnam to the Persian Gulf to Haiti. Although opponents of the WPR articulately present their arguments, the Resolution is well supported by constitutional and political considerations. The text of the Constitution and the Framer's intent indicates that Congress is granted plenary powers over war. The WPR merely attempts, albeit imperfectly, to redefine that authority. As a practical matter, if Congress has the authority to determine when America will go to war it should have the commensurate power to pass legislation that explains and procedurally facilitates this power.

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[240] Doherty, "On Somalia, War Powers Law Becomes a GOP Weapon," p. 2987.

Constitutional considerations aside, the WPR also serves several significant political purposes. The democratic process is protected by separating power, encouraging debate, and requiring consensus. The Framers wanted it to be difficult for the U.S. to get into war because they recognized that hostilities are rarely beneficial in the long-run. Although a binding WPR will admittedly preempt some presidential military successes, it will also prevent presidential debacles such as Vietnam and the Marine deployment in Lebanon.

The Resolution's political benefits, however, cannot be fully realized until its weaknesses are rectified by amendment. The Resolution's gravest functional problem is that it allows the president to initially deploy troops for 60 days without congressional authorization. As a practical matter, once troops are committed it becomes politically difficult for Congress to require their return. The original Senate language should be retrieved which would require the president to seek congressional approval prior to deploying troops in hostile situations except in clearly defined emergencies.

As consulting with the entire Congress is unwieldy and impractical, a consultative group of congressional leadership should be established with whom the president must consult on offensive military operations and covert activity. The term "hostilities" must be clearly and

unambiguously defined (if such a thing is possible), to replace arguments of semantics with arguments of substance. Although the concurrent resolution provision may be constitutional, it is so controversial it should be eliminated. Finally, to promote presidential compliance and judicial review, the WPR should contain language restricting military appropriations and providing a majority of Congress with judicial standing to file suit if the president refuses to comply with the Resolution's requirements.

Although these modifications will not guarantee presidential compliance with the WPR, they will encourage it. Ultimately, however, Congress' ability to reassert its constitutional war power depends much more on congressional will than on the WPR, no matter how artfully drafted. History has shown without that will, no constitutional, and certainly no legislative, safeguard is sufficient.

CHAPTER 4

UNITED NATIONS AUTHORIZATION

I. INTRODUCTION

In addition to claiming constitutional authority to conduct military activity in the Persian Gulf, President Bush argued that United Nations' resolutions granted him the power to take offensive action. When Iraq invaded Kuwait on August 2, 1990, the Security Council immediately passed Resolution 660 which declared that a breach of the peace had occurred and demanded Iraq withdraw.[241] Several other resolutions followed imposing economic and diplomatic sanctions against Iraq. Resolution 678 was passed by the Security Council on November 29, 1990. It authorized member states to use "all necessary means" to implement previous U.N. resolutions demanding an Iraqi withdrawal from Kuwait.[242] President Bush subsequently asserted he had

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[241] Peter R. Baehr and Leon Gordenker. The United Nations in the 1990s (New York: St. Martin's Press, 1992), p. 73.

[242] The pertinent provisions of Resolution 678 are:
1. Demands that Iraq comply fully with resolution 660 and all subsequent relevant resolutions, and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of

authority under international law to implement Resolution 678 without further authorization from Congress.[243]

In order to obtain international support for the use of force, Secretary of State Baker began extensive international negotiations in early November. He visited the countries of the Security Council and the anti-Iraq coalition. Several authors argue that President Bush's primary rationale in seeking Resolution 678 was to present Congress with a diplomatic fait accompli that would force them to approve his military actions in the Gulf.[244] Although it would be cynical to state that the President's foremost motive in seeking the Resolution was to circumvent Congress, evidence indicates that it was certainly a consideration.

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goodwill, to do so; 2. Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area; 3. Requests all States to provide appropriate support for the actions undertaken in pursuance of paragraph 2 of the present resolution;. . .(quoted by Michael J. Glennon, "The Constitution and Chapter VII of the United Nations Charter," The American Journal of International Law 85 (January 1991), pp. 74-75).

[243] After assisting in the negotiations with the Security Council to pass Resolution 678, Undersecretary of State Bob Kimmit stated: "We feel like now we have a strong basis in international law for the use of force." (quoted in Triumph Without Victory, p. 182).

[244] Ibid., pp. 175-78; Smith, p. 207.

Ironically, Congress convened hearings on President Bush's actions in the Gulf two days before Resolution 678 was passed. The administration failed to send its top witnesses to the congressional hearings for fear of upsetting delicate U.N. negotiations over the Resolution. In effect, President Bush indicated that the U.N. discussions took precedence over congressional discussions.[245]

On January 3, President Bush sent a letter to Congress requesting congressional approval for the war. He requested a resolution authorizing him to use "all necessary means" to eject Iraq from Kuwait. By deliberately using the language from Resolution 678, Congress was being asked only to authorize the President to enforce a resolution already adopted by the Security Council. Thus, Bush's aides noted, he could obtain congressional acquiescence while sidestepping the constitutional issue.[246]

Not surprisingly, supporters of President Bush used Resolution 678 as a primary rationale for endorsing the President's actions in the Gulf. The comments of Paul Henry (R.Mich.) during the congressional debate over the Gulf crisis in January were representative of many in Congress:

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[245] John F. Lehman, Making War (New York: Charles Scribner's Sons, 1992), p. 39.

[246] Triumph Without Victory, pp. 202-203.

> The U.S. Congress ought not to put itself at odds against the United Nations or question the considered opinion and actions of the Security Council. Turning against the United Nations in this instance would strike a blow against the struggle to refine and strengthen international peacekeeping institutions that will be so important in the post-cold war era.[247]

A joint congressional resolution authorizing the use of force was passed on January 12, 1991. It referred to the United Nations five times and U.N. Resolution 678 twice.[248] Clearly, the existence of Resolution 678 increased the likelihood Congress would authorize the Persian Gulf War.[249] It also increased the likelihood that President Bush would have gone to war without Congress. After the war the President commented:

> Though I felt after studying the question that I had the inherent power to commit our forces to battle after the United Nations Resolution, I solicited congressional support before committing our forces to the Gulf War.[250]

President Bush had discovered a new source of legitimacy for executive war-making: multilateral commitments under the auspices of the U.N.[251] Whether Security Council authorization to use force can be

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[247] Robert W. Gregg, About Face? The United States and the United Nations (Boulder, CO: Lynne Rienner Publishers, 1993), p. 117.

[248] Ibid., p. 117.

[249] Ibid.

[250] President Bush's speech at Princeton University on May 10, 1991, quoted by Pfiffner, p. 11.

[251] The Gulf War Reader, p. 192.

substituted for a congressional declaration of war, however, is a question that can be answered by the text of the U.N. Charter and enabling legislation, the opinions of legal scholars, the history of U.N. military activity, and the text of Resolution 678 itself.

II. THE U.N. CHARTER

Section 7 of the U.N. Charter discusses the use of military force. Article 39 provides that the Security Council will determine when a breach of the peace occurs and will make recommendations to restore peace.[252] The only section relating to the use of force, Article 42, provides that the Security Council is authorized to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security," including "demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."[253]

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[252] The entire text of Article 39 is as follows: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendation, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

[253] The entire text of Article 42 states: Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockage, and other operations by air, sea, or land forces of Members of the United Nations.

Military personnel and equipment to be used for such U.N. operations are provided for only in Article 43. It requires member states to "undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security." Article 43 adds that the armed forces to be utilized by the Security Council will be provided by member states pursuant to special agreements to be negotiated "in accordance with the respective constitutional processes" of each member state.[254]

Although Article 42 does provide that the Security Council can take military action, the equipment and troops necessary for such action are wholly dependent upon the

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[254] The entire text of Article 43 states:
1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

adoption of specific agreements. Article 43 explicitly requires these agreements be adopted pursuant to the "constitutional processes" of each member. This language preserves Congress' constitutional role in any decision to commit U.S. troops to war--whether that war is internationally sanctioned or not. No such agreement has ever been ratified by the U.S. or any other nation. A treatise on the Charter of the U.N. explains:

> Article 42 by itself does not specify the source of the "air, sea, or land forces" for implementing military enforcement measures. The drafters of the Charter clearly expected that the forces would be made available to the Security Council in accordance with the "special agreements" to be concluded under Article 43. The link between the two articles is specifically indicated in Article 106, which envisages possible joint action by the permanent members pending the coming into force of such special agreements referred to in Article 43 . . .[255]

The plain text of Articles 42 and 43 indicates that the Security Council cannot obligate or authorize a member state to deploy troops unless that nation has signed a special agreement to do so.[256] As the United States has never adopted such an agreement, the Security Council could not substitute for Congress in authorizing President Bush to

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[255] Leland M. Goodrich, Edvard Hambro and Anne Patricia Simmons, Charter of the United Nations, 3rd ed. (New York: Columbia University Press, 1969), p. 316.

[256] Berger, p. 93.

take offensive action in the Persian Gulf.[257] Because no special agreements had been adopted, in the case of Kuwait the Security Council requested the use of ad hoc forces to restore peace.[258] Although the Security Council can request such action be taken, nothing in the U.N. Charter requires the U.S. to comply or provides the president with any additional authority.

The background of the U.N. Charter supports this interpretation. The U.N. Charter was initially drafted at a meeting attended by the U.S., the Soviet Union, and Britain in Dumbarton Oaks. Prior to that meeting in April 1944, Secretary of State Cordell Hull met with a select senatorial committee to discuss drafts of the U.N. plan. President Franklin D. Roosevelt wanted to involve the Senators early in the process to avoid the embarrassing defeat Woodrow

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[257] The executive branch also cited Article 51 as authorization for President Bush's military activity. Article 51 states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. . .

This contention is not supported by the text of Article 51. This provision merely recognizes the right of collective self-defense, it does not authorize such action. Nothing in article 51 supercedes the constitutional requirement of a congressional declaration of war. Moreover, U.N. lawyers argued that the article prohibits unilateral action by one country in support of another once the Security Council has taken measures to restore international peace. (Hiro, pp. 131-32).

[258] Bruce Russett and James S. Sutterlin, "The U.N. in a New World Order," Foreign Affairs 70 (Spring 1991), p. 73.

Wilson experienced with the League of Nations. Hull assured the Senators that any agreement to supply troops for U.N. missions would be submitted to them in advance for approval.[259]

In August 1944, however, State Department Legal Advisor Green Hackworth prepared and circulated a memo arguing that once the Senate approved the U.N. Charter the president would have the authority to commit troops to U.N. peacekeeping operations.[260] To alleviate congressional criticism of this position, Edward Stettinius, the head of the American delegation to Dumbarton Oaks, included the reservation in Article 43 that each special agreement would be subject to ratification in accordance with the member states' constitutional processes.[261]

The official U.N. Charter was drafted at the San Francisco Conference in 1945. When Article 43 was discussed, it was agreed that members would not have to furnish military assistance in excess of any special agreement. A treatise on the U.N. concludes: "This leads to the inference that a member is under no obligation to take military action under Article 42 until it has concluded

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[259] Robert C. Hilderbrand, Dumbarton Oaks (Chapel Hill: University of North Carolina Press, 1990), p. 57.

[260] Ibid., p. 150.

[261] Ibid., p. 156.

a special agreement under Article 43."[262] When discussing the creation of a United Nations Guard in 1948, Secretary-General Trygve Lie similarly stated that action under Article 42 could only be taken in accordance with a special agreement under Article 43.[263]

In the absence of a special agreement, then, the president must either go to Congress for a declaration or use his inherent, yet limited, constitutional authority to "repel sudden attacks."[264]

A. SENATE RATIFICATION

Article 43 became crucial during the ratification debates in the Senate. Senator Arthur Vandenberg, one of the delegates to the U.N. conference in San Francisco which adopted the final version of the U.N. Charter, emphasized to the Senate that the Charter preserved American "constitutional processes."[265] He did acknowledge, however, that the president could use preliminary force in small-scale police actions which did not amount to war.[266] In speeches favoring ratification, Senators Burton Wheeler, Barkley, and White stated that the special agreements

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[262] Goodrich, Hambro and Simmons, p. 316.

[263] Quoted in Glennon, "The Constitution and Chapter VII of the United Nations Charter," p. 77.

[264] Stromseth, p. 92.

[265] 91 Congressional Record 7957 (1945).

[266] Ibid., p. 7992.

detailing military commitments to the U.N. would return to the Senate for confirmation.[267] Senator Wheeler added that at the time the agreements were presented the Senate could determine their policy regarding sending troops to foreign countries.[268]

The debate indicates that the overwhelming majority of Senators believed Congress would play its constitutional role in determining U.S. military commitments to the U.N. The major controversy in the Senate concerned only whether the special agreements were to be ratified by 2/3's of the Senate as treaties were or whether they would be ratified by joint legislation of both Houses.

Another delegate to the San Francisco conference, Senator Connelly, interpreted the "constitutional processes" by which the special agreements would be adopted to be Senate ratification.[269] Senator Hill argued, on the other hand, that the amount of military forces to be supplied should be decided by both houses of Congress.[270]

During the Senate discussion over how troops would be provided to the U.N., San Francisco delegate John Foster Dulles testimony before the Senate Foreign Relations Committee was reviewed and emphasized. When asked if the

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[267] Ibid., p. 7970-71; 7987; 7993.

[268] Ibid., p. 7987.

[269] Ibid., p. 7987.

[270] Ibid., p. 7988.

Senate would have a chance to ratify the special agreements, Dulles had stated, "it is not only my opinion, but it is expressly stated in the charter that the agreements are subject to ratification by the states in accordance with their constitutional processes."[271] According to Dulles, constitutional processes signified treaty ratification by 2/3's of the Senate.

Dulles continued that it was the view of the entire American delegation to San Francisco that the agreements would consist of a supplemental treaty rather than an executive agreement.[272] Senator Vandenburg concurred that furnishing troops to the U.N. under the Charter could not be done by executive agreement.[273] Senator Wheeler similarly stated that the American people would never support the U.N. treaty if it meant the president could send troops anywhere and take power away from Congress.[274] It was understood by the Senate that if the president wanted to deploy more troops to the U.N. than specified in the special agreement, Congress would have to separately authorize it.[275]

Legal scholar John Hart Ely concludes that the argument that authorization from the Security Council replaces

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[271] Ibid., p. 7990.

[272] Ibid., p. 7990.

[273] Ibid., p. 7991.

[274] Ibid., p. 7988.

[275] Stromseth, p. 86.

authorization from Congress not only violates the specific grounds on which Congress accepted membership, it also violates the Constitution.[276] Edward Corwin adds that a treaty cannot be read to augment the war power of the president.[277] Other commentators suggest that even if the Senate had intended to delegate its warmaking role to the president under the U.N. Charter, it could not do so alone by treaty.[278] The House of Representatives must concur in any decision to go to war and it would be unconstitutional for any treaty to purport to divest them of this right.[279]

B. THE UNITED NATIONS PARTICIPATION ACT

Any remaining questions regarding the appropriate method of providing troops for U.N. operations were answered when Congress passed the United Nations Participation Act (UNPA) in December 1945. The UNPA, which outlined the terms of American participation in the U.N., specifically states:

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[276] Ely, War and Responsibility, p. 11.

[277] Edward S. Corwin, Total War and the Constitution (Freeport, N.Y.: Books for Libraries Press, 1970), p. 152.

[278] Berger, p. 86; Stromseth, p. 92.

[279] Glennon, "The Constitution and Chapter VII of the United Nations Charter," pp. 84-85.

> The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution, providing for the numbers and types of armed forces, their degree of readiness and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with article 43 of said Charter. . . . Provided, That nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements.[280]

The legislative debate over the UNPA was strikingly similar to the Senate discussion regarding the U.N. Charter. After reiterating that the legislators' powers were protected by the requirement that Congress pass upon any special agreement before military assistance would be provided to the U.N., Representative Bloom (N.Y.) concluded: "the traditional relationship between the executive and legislative branches of our government is fully preserved."[281] Representative Jarman (Ala.) added in response to the question of whether issues of war would come back to Congress: "In no respect does Congress divest itself of the right to declare war or not to declare war."[282] These comments, and the statements of senators

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[280] Quoted by Corwin, p. 221

[281] 91 Cong. Rec. 12267 (1945).

[282] Ibid., p. 12288.

during the U.N. Charter debates, are representative of the majority of legislators who believed that their constitutional role in initiating war would be preserved under the U.N. system. Although there were several legislators who worried that adopting the Charter and UNPA would confer war-making power on the president, they were a small minority.[283]

Just as both Houses of Congress must concur in the critical decision over going to war, both Houses must determine whether U.S. troops will be made available to the U.N. for military enforcement actions. The text of the UNPA and reports from the House and Senate underscored the fact that neither the Act nor the Charter conferred any authority on the president to provide troops to the Security Council under anything but an Article 43 agreement ratified by Congress.[284] Professor Corwin concludes that, "the controlling theory of the act is that American participation

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[283] The House vote on the UNPA was 344 Yeas, 15 Nays, 72 Not Voting, and 1 Voting Present. (91 Cong. Rec. 12288 (1945)).

[284] The reports stated in part:

> At the same time it was considered important to make it clear that nothing contained in the statue should be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose, armed forces in addition to such as may be provided for in the military (special) agreements. (Glennon, "The Constitution and Chapter VII of the United Nations Charter," p. 79, italics supplied).

Amendments to the UNPA do provide that the President can deploy up to 1000 troops as peacekeepers.

in the United Nations shall rest on the principle of departmental collaboration, and not on an exclusive presidential prerogative in the diplomatic field."[285] Professor Louis Fisher concurs: "Pursuant to this statute, the President can commit armed forces to the United Nations only after Congress grants its approval."[286]

III. KOREA

Although the U.N. has existed since 1945, the Security Council has only authorized the use of force to restore peace twice--in Korea and Kuwait. When North Korea attacked South Korea on June 25, 1950, the Security Council immediately passed a resolution which determined that a breach of the peace had occurred and called on North Korea to cease hostilities and withdraw. When North Korea failed to respond, the Security Council "called on" its members to implement the resolution.

On June 27, 1950, President Harry Truman ordered troops to Korea without consulting Congress. In his statement announcing the deployment, he quoted from the Security Council's resolution demanding North Korea withdraw.[287] Truman's Secretary of State Dean Acheson stated: "All action taken by the United States to restore peace in Korea

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[285] Ibid.

[286] Fisher, "The Power of Commander in Chief," p. 54.

[287] Lofgren, p. 208.

has been under the aegis of the United Nations."[288] It should be noted, however, that the Security Council did not pass a specific resolution recommending members furnish military assistance until the day after President Truman committed U.S. troops.

In his memoirs, Dean Acheson explains that President Truman did meet with congressional leaders to brief them about the situation in Korea on June 27th and June 30th. At the second meeting, Senator H. Alexander Smith suggested that a joint resolution be introduced supporting the President's actions. President Truman referred the matter to Acheson for a recommendation. On July 3, Acheson recommended that the President rely on his power as commander-in-chief and as president rather than requesting congressional authorization. The State Department then prepared a bulletin outling 87 instances in which president's had responded militarily on their own initiative.[289]

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[288] Fisher, "The Power of Commander in Chief," p. 55.

[289] Dean Acheson, Present at the Creation (New York: W.W. Norton & Co., 1969), pp. 413-14.

In a recently published article in the National Security Law Report, legal scholar Robert Turner challenges the conventional wisdom that Truman ignored Congress. Turner discusses several recently declassefied documents which indicate that Truman immediately met with congressional leaders after the North Korean invasion to discuss deploying troops. According to these documents, it was Truman who suggested introducing a joint resolution supporting his actions but was told by several members of congress that it was not necessary. Turner concludes that Truman attempted to keep Congress informed and left it to Congress to determine

Although some in Congress decried this unilateral use of presidential military power, Cold War considerations led the majority to pass legislation facilitating the Korean War. In discussing Korea later, however, legal scholar Charles Lofgren summarized the feelings of many legislators and scholars: "Quite clearly the resolutions of the Security Council provided no substitute for a declaration of war in terms of domestic constitutional law."[290]

If Korea did provide a precedent for Kuwait, it is certainly an anomalous one. In the U.N.'s 50 year history, Korea and Kuwait are the only instances of U.N. sanctioned large-scale military action. One anomalous war cannot serve as the basis for reinterpreting America's treaty obligations

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whether additional authorization was necessary. (Robert F. Turner, "Truman Didn't Ignore Congress," National Security Law Report 16 (September 1994), pp. 1-6).

Although these new documents shed additional light on the events surrounding the Korean War, they do not alter the relevance of comparisons between the Gulf War and Korean War. The Korean War remains pivotal in any examination of the expansion of presidential war powers. Like the Persian Gulf War, President Truman relied on U.N. authorization and his power as commander-in-chief to defend his military actions. President Truman and Bush both then left it to Congress to challenge their actions.

[290] Ibid., p. 211. Law professors Ann Van Wynen Thomas and A.J. Thomas disagree. They argue that where the use of force is recommended such as Korea, the president has the power to employ force short of legal war to enforce the U.N. Charter's treaty provisions. This argument, however, seems ridiculous on its face. Even if the president does posess constitutional authority to deploy small numbers of troops in situations short of war, the magnitude of the American military involvement in Korea indicates that it was clearly not such a case.

to the U.N., nor can it provide sufficient precedent to redefine the constitutional allocation of war powers.

IV. THE WAR POWERS RESOLUTION

The contention that the Security Council could not authorize President Bush to go to war is also supported by the text of the War Powers Resolution (WPR). The WPR expressly states that authority for the president to introduce armed forces into hostilities cannot be inferred from any treaty or any statute.[291] Although section 8(d)(1) of the WPR does state that nothing in the statute should alter the terms of existing treaties, Glennon quotes the Senate Foreign Relations Committee report which states: "Thus, by requiring statutory action, . . . the War Powers Resolution would perform the important function of defining that elusive and controversial phrase--'constitutional

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[291] Section 8(a) provides:

> Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred--
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> 1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in a appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities . . .
>
> 2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

processes'--which is contained in our security treaties."[292] In other words, the WPR does not attempt to alter the U.N. Charter, it just explains that the Charter has always been interpreted by Congress as preserving its constitutional role in decisions over war.

Assuming arguendo that the Charter had conferred additional warmaking authority on the president, the WPR then would nullify it. The "last in time doctrine" holds that the latest congressional pronouncement on a given issue will govern.[293] Professor Edwin Firmage states: "The War Powers Resolution, as an act of Congress subsequent to the formation of the United Nations, precludes United Nations authorization of United States military action absent congressional approval."[294] Congress clearly intended the WPR to reiterate the necessity of congressional authorization prior to military action such as the Persian Gulf War.[295]

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[292] Glennon, "The Constitution and Chapter VII of the United Nations Charter," p. 83.

[293] This position is also supported by Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 937 (D.D.C. 1988), which held that a treaty obligation is legally subordinate to subsequent congressional authorization.

[294] Edwin B. Firmage and Joseph E. Wrona, p. 1708. Professor James Nathan concurs that the WPR excludes any inference of authority for presidential war-making, "including the U.N." (Nathan, "Curbing the Distress of War," p. 608).

[295] Thomas Franck disagrees with this interpretation of the WPR. He argues that provision 8(d)(1) which states that nothing in the Resolution is "intended to alter . . . the provisions of existing treaties" is internally inconsistent

V. AUTHORIZATION OR OBLIGATION

Even if the U.N. Charter or UNPA granted the president the right to provide troops to enforce U.N. resolutions, Resolution 678 only "authorized" the U.S. to use "all necessary means;" it did not require it.[296] Resolution 678 states in pertinent part:

> AUTHORIZES member states cooperating with the Government of Kuwait, unless Iraq on or before Jan. 15, 1991, fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement the Security Council Resolution 660 and all subsequent relevant Resolutions and to restore international peace and security in the area . . .

Glennon emphasizes that there is a significant legal distinction between obligatory and permissive Security Council decisions concerning the use of force.[297] Glennon concludes that a permissive Security Council decision such as Resolution 678 has no effect on the domestic constitutional allocation of power; "that a right exists under international law to take certain action says nothing about whether a power exists under domestic law to exercise

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with section 8(a) which negates any inference of presidential authority. Franck contends that because the WPR is ambiguous, the U.S. is still required to fulfill its obligations under the U.N. charter. (Thomas M. Franck and Faiza Patel, "UN Police Action in Lieu of War: The Old Order Changeth," American Journal of International Law 85 (January 1991), pp. 72-73).

[296] Stromseth, p. 92.

[297] Glennon, p. 75.

that right."[298] Thus, the resolution "imposed no treaty obligation at all."[299] Fisher similarly asserts that U.S. actions after the resolution were permissive and subject to America's constitutional processes.[300] Secretary of State James Baker seemed to acknowledge this when he conceded that Resolution 678 merely authorized the use of force, it did not obligate it.[301]

Moreover, the Resolution did not require member states to use military force--only "all necessary means." Berger argues: "The option of war in support of Resolution 678 was a 'discretionary national decision,' subject to the constitutional processes of each member nation."[302] President Bush's decision to implement the Resolution with troops was wholly his own.

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[298] Ibid., p. 81.

[299] Raven-Hansen, p.10.

[300] Fisher, p. 57.

[301] Glennon, "The Gulf War and the Constitution," p. 90.

[302] Berger, p. 89. International legal scholar Jorge Castaneda concludes that although the Security Council can create a military force when breaches of the peace occur without complying with the procedures in Chapter 7, they may recommend but not require troops to establish it. (Jorge Castaneda, Legal Effects of United Nations Resolutions, trans. Alba Amoia, eds. Leland M. Goodrich and William T.R. Fox, no. 6 (New York: Columbia University Press, 1969), p. 108.

In fact, Baker drafted the resolution deliberately using the words "all necessary means" to appease the Russians who did not want the use of military force to be specified in the resolution. (Lawrence Freedman and Efraim Karsch, The Gulf Conflict: 1990-1991 (Princeton: Princeton University Press, 1993), p. 229).

VI. CONCLUSION

As U.N. sponsored military enforcement action becomes more prevalent, it is important to clarify the appropriate avenue of U.S. participation. Since the Gulf War, the U.N. has authorized peace enforcement measures in Somalia, Bosnia, and Haiti. In fact, U.N. Ambassador Madeleine Albright recently concluded: "At this stage in world history practically every foreign-policy issue has something to do with the U.N."[303] With the ending of the Cold War deadlock in the Security Council, the U.N. now possesses the unique ability to marshall international consensus to promote collective security. The U.S. should play a significant role in this "new world order."[304]

It must be remembered, however, that the Constitution prescribes a role for Congress before U.S. troops are committed to a massive offensive such as the one launched in Kuwait. The U.N. Charter did not, and could not, change the constitutional allocation of war powers. International support cannot serve as a substitute for domestic support. As a member of the U.N., the president is not empowered to deploy more troops than his constitutional designation as commander-in-chief allows. Unfortunately, this conclusion

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[303] Kevin Fedarko, "Clinton's Blunt Instrument," Time (October 31, 1994), p. 31.

[304] President Bush's speech to Congress on September 15, 1990, quoted in Freedman and Karsch, p. 215.

leads back to the endlessly debated larger discussion over the appropriate constitutional division of war powers.

CHAPTER 5

CONCLUSION

The events surrounding the Persian Gulf War emphasized, and perhaps widened, the gulf between Congress and the president over the appropriate exercise of constitutional war powers. Although legal scholars utilize original intent arguments to justify vastly different positions on presidential war powers, the Framers' statements indicate several things.

First, based on their experience with the English king, they feared the executive branch would be most prone to war and thus could not be trusted with the power to embroil the nation in hostilities. The number of American unilateral presidential military committments abroad seem to prove their fears were not unfounded. Second, the Framers wanted it to be difficult for the nation to go to war, so they favored giving this power to Congress to promote deliberation and debate. They believed Congress could more appropriately determine what military involvments would be in the national interest and considered delay a benefit not a detriment. Third, the Framers intended congressional authority over war to be a significant power and a necessary

curb on the executive. Given the weight the Framers gave to Congress' war power, it seems disengenuous to argue that the Framers intended the declaration clause to be obsolete or to apply to such a miniscule number of cases that it would be practically irrelevant.

Moreover, the Framers lived in a dangerous time. They had experienced war and understood the threats that faced the nation. Although the world situation has changed over 200 years, the implications of military involvment have not. The provisions for war the Framers drafted are equally applicable today. Finally, the constitutional safeguards found in the separation of war powers are more vital to America's security than the ability of any president to intervene at will in international crises.

Constitutional considerations aside, there are more political benefits to vesting war powers in Congress than there are costs. Certainly Congress cannot act a rapidly as the president, however, history indicates that hasty military committments often have unintended negative repurcussions and may provide little long-term benefit. A few modern examples illustrate this point.[305] Presidential action was responsible for arguably America's largest military and foreign policy disaster: the war in Vietnam. President Nixon then bombed Laos and invaded Cambodia.

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[305] It should be noted that I am not asserting that Congress' foreign policy and military record has been free from blemishes.

President Reagan committed American marines to a disastrous attempt to stop the civil war in Lebanon. President Bush invaded Panama to depose President Noriega, a former American friend. Bush and Prsident Clinton also committed American troops to Somalia who came under fire and were later withdrawn with little appreciable benefit.

There are countless international situations that do not threaten American national interests. American prestige abroad is as damaged by ill-conceived military policy, as it is by a president whose power is checked by Congress. Although restrictions on presidential authority over war may contribute to less efficient government, they are part of and protect the democratic process.

The WPR can potentially facilitate such a legislative safeguard. If amended to eliminate several vague provisions, the WPR can provide a blueprint for both the president and Congress in future military entanglements. The Resolution can specify a group of congressional leaders with whom the president can consult to provide a ready forum for executive-legislative discussions. If the reporting loophole is eliminated, the president will be required to report to Congress who will then have to vote on large-scale military committments and will be required to make the difficult decisions it has often evaded. Certainly, no war powers legislation can completely address every situation. However, an amended resolution will encourage presidential

compliance and will signal Congress' determination to play a larger role in war powers issues.

Congress will certainly need to protect its war-making prerogatives as the U.S. becomes increasingly involved in U.N. engagements. The U.N. can be, and has been, an effective tool for the U.S. to protect its national interests abroad. However, the U.N. Security Council cannot authorize the U.S. president to go to war. Asserting that U.N. membership changes the separation of war powers contravenes the text of the Charter, the intent of the senators who ratified the document, and the Constitution. Articles 42 and 43 specify that U.S. troops would be provided to the U.N. only by separate agreements ratified by Congress. The senators adopted the Charter based upon their belief that these provisions protected their constitutional power to determine when American troops would be deployed. An international consensus for war cannot, and should not, serve as a substitute for a domestic consensus for war.

The constitution's separated and shared war powers are an "invitation to struggle." That appears to be the point. The Framers were more concerned with the debate itself than the outcome. As the executive branch has increasingly utilyzed the military abroad and the legislative branch has largely remained silent, democracy has suffered because the debate has become less vigorous. The struggle over war powers should not just be fought by academics.

Notwithstanding the differences among legal scholars and the executive and legislative branches over the extent of presidential authority, the Persian Gulf War should be an easy case. Here nearly 500,000 American troops were deployed into an extremely hostile situation. They began an offensive, sustained casualties, killed an estimated 100,000 Iraqi soldiers,[306] and drove the Iraqi army from Kuwait. This scenario constituted war under any definition of the term. If, as President Bush and others contended, Congress had no role here, it will never have a role in committing the nation to war. Only Congress can protect its prerogatives. If Congress continues to let the president exercise such unilateral control over American military engagements, then the Constitution did not prevail during the Persian Gulf War, it became the first casualty.

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[306] Pfiffner, p. 18.

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