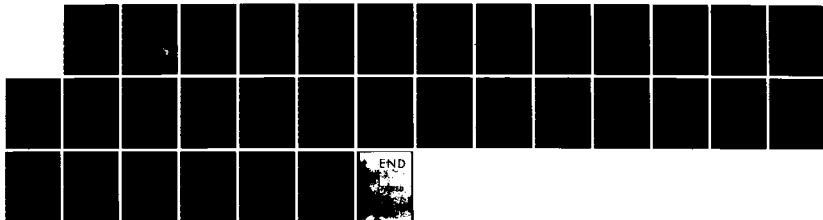


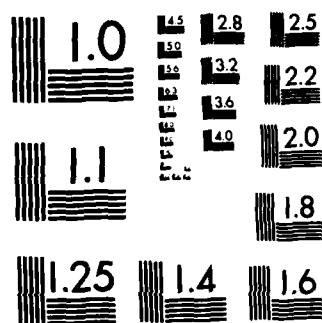
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NAVAL WAR COLLEGE
Newport, RI

DOES THE WAR POWERS ACT
PROVIDE FOR THE COMMON DEFENSE?

by
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Commander, Civil Engineer Corps,
United States Navy

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The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College of the Department of the Navy.

Signature: *John S. Leech*

11 May 1984

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Faculty Research Advisor Date

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INTRODUCTION

To a remarkable extent, our way of life in the United States depends upon our Constitution. Far from being a sterile document, it grows, changes, and adapts to fit new circumstances. The purposes stated in its Preamble are valid today. The phrase, "to provide for the common defense," in the Preamble retains legitimacy in 1984, as it did nearly 200 years ago. Today, however, one of the laws passed pursuant to the Constitution, the War Powers Resolution, undermines the security of the United States.

This essay is a critique of the War Powers Resolution of 1973, Public Law 93-148 (commonly called the "War Powers Act"). The stated purpose of the War Powers Act is to

"fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgement 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."¹

The premise of this essay is that the War Powers Act fails to provide adequately for the common defense, because the Act is based on fundamentally incorrect assumptions concerning force and its effective use. The War Powers Act and its implementation will be analyzed, in terms of its practical effects, and through consideration of the circumstances that gave rise to its passage. The uses by several U.S. Presidents before 1973 of the Armed Forces short of formal declarations of war will be traced in order to place the War Powers Act in the context of our history. A brief examination of war powers in other nations and times

forms the third portion of the essay. The fatal flaws in the War Powers Act will then be discussed. The essay concludes with a proposal for reform, and with some remarks on America's future in a dangerous world.

WHAT IS THE WAR POWERS ACT?

The War Powers Act passed over President Nixon's veto on November 7, 1973. Congress attempted to achieve something in the Act that the Constitution could not: to define the power of the President as Commander-in-Chief. The War Powers Act states that the President may not introduce United States Armed Forces into hostile situations for longer than 60 days (or 90 days if the President certifies military necessity) without obtaining approval of the Congress; Section 4(a)(1) of the Act prohibits use of force without approval

"in the absence of a declaration of war, in any case in which United States Armed Forces are introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."

The language of Section 4a(2) is especially significant in terms of naval forces; the prohibition extends

"into the territory, airspace or waters of a foreign nation, equipped for combat, except for deployments which relate solely to supply, replacement, repair or training of such forces."

If Congress fails to approve the President's action in introducing U.S. Armed Forces into hostilities within the 60-day period, even through its own inaction, the President must withdraw the forces. The President is authorized to act in a national emergency created by an attack on the United States. But he is directed to consult with Congress "in every possible instance" before introducing our forces into hostilities. He also must report in writing within 48 hours to the Speaker of the House

and the President pro tempore of the Senate on the circumstances necessitating any use of force. Finally, the President is required to provide periodic reports to Congress on the situation. Congress may direct the removal of U.S. Armed Forces at any time through passage of a concurrent resolution. A concurrent resolution differs from a joint resolution in that the former does not require a presidential signature, while the latter does. Other provisions include expedited procedures for Congressional consideration of matters relating to the incident.

Presidential compliance has been less than enthusiastic. There have been 16 instances since the War Powers Act was passed where U.S. Armed Forces were used abroad. In only ten was some form of reporting under the Act made. A chronological review of these incidents follows:

1. Cyprus Hostilities, July 22-23, 1974:

Evacuation of 500 Americans from Cyprus. In the waning days of his Administration, President Nixon filed no report.

2. Vietnam Refugees, April 4, 1975:

Evacuation of South Vietnamese from Danang. First report under the War Powers Act was submitted by President Ford "under the President's constitutional authority as Chief Executive in conducting foreign relations and Commander-in-Chief of U.S. Armed Forces." He cited no specific provision of the Act.

3. Cambodia Evacuation, April 12, 1975:

Evacuation of 82 Americans, 159 Cambodians and 35 third-country nationals from Phnom Penh. President Ford reported, citing the President's executive powers and authority as Commander-in-Chief.

4. Saigon Evacuation, April 30, 1975:

Evacuation of 1,400 Americans and 5,500 Vietnamese and third-country nationals from Saigon. President Ford's constitutional executive powers and his authority as Commander-in-Chief were cited in his report.

5. Mayaguez Incident, May 12, 1975:

Rescue of the 39 members of the crew of the American merchant ship, Mayaguez, seized by Cambodians. Forty-one American servicemen were killed and 50 wounded in the action. President Ford cited the President's executive powers and authority as Commander-in-Chief in his report.

6. Lebanon Evacuation, June 20, 1976:

Two hundred and sixty-three Americans and Europeans were evacuated from Lebanon by a Navy landing craft. No report was made by President Ford.

7. Korean Tree-Cutting Incident, August 18, 1976:

Additional U.S. military personnel were sent to Korea during a period of heightened tensions, following North Korea's killing of two U.S. Army soldiers in the demilitarized zone. No report was made by President Ford.

8. Zaire Rescue Operations, May-June, 1978:

French and Belgian nationals were rescued by U.S. military transport aircraft from Zaire in May and June 1978. President Carter filed no report.

9. Iran Rescue Attempt, April 24, 1980:

President Carter ordered U.S. Armed Forces to rescue American hostages in Tehran, Iran. The attempt failed. The President cited Section 8(d)(1) of the War Powers Act and his powers as Chief Executive and as Commander-in-Chief in his report.

10. Gulf of Sidra, August 19, 1981:

A pair of U.S. naval F-14's, elements of naval units exercising in international waters in the Gulf of Sidra near the coast of Libya, shot down two Libyan aircraft which had fired at them. President Reagan was not required to file a report under the War Powers Act because the mission was for training purposes and it did not occur in the waters of a foreign nation.

11. Multinational Forces and Observers in the Sinai, March 19, 1982:

U.S. observers were sent to the Sinai to help carry out the peace treaty between Egypt and Israel. President Reagan cited Section 4(a)(2) of the War Powers Act in his report.

12. PLO Withdrawal from Lebanon, August 21, 1982:

Eight hundred Marines were sent to Lebanon in the multinational force to assist PLO forces withdrawing from Lebanon. President Reagan cited his "constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief."

13. Marines in Lebanon, September 29, 1982:

One thousand two hundred Marines were re-introduced in Lebanon as part of a temporary multinational force to restore the Lebanese government. President Reagan submitted a report to

Congress "consistent with" the War Powers Act, but cited no section. Subsequently, Congress debated applicability of the War Powers Act in the case of Lebanon. After many months of consideration, a compromise was reached on October 12, 1983, when President Reagan signed Senate Joint Resolution 159, the Multinational Force in Lebanon Resolution. It provided for the Marines to continue in Lebanon for 18 months. But following a terrorist bombing of the Marines' Headquarters at the Beirut Airport on October 24, 1983, and the collapse of Congressional support, President Reagan announced withdrawal of the Marines on February 7, 1984.

14. Assistance to Chad, August 8, 1983:

Deployment of AWACS and F-15's to assist Chad repel invasion by Libya. President Reagan stated his report was submitted "consistent with Section 4," and the action was taken under the President's constitutional authority with respect to foreign relations and as Commander-in-Chief.

15. Grenada Rescue Mission, October 25, 1983:

President Reagan dispatched about 6,000 U.S. troops to rescue American students threatened by anarchy and potential danger following the collapse of the government in Grenada, and imminent civil war incited by Cuban and Soviet-backed Marxists. President Reagan reported the action to Congress, but cited no specific provision of the War Powers Act. The House of Representatives on November 1, 1983, passed a resolution to require troop withdrawal within 60 days unless Congress approved an extension.

16. Central America, 1983 and 1984:

U.S. military and naval personnel are now engaged in large-scale, continuous training exercises with the armed forces of Honduras. The Central Intelligence Agency is involved in covert action to support the Contras fighting Nicaragua, including mining of Nicaraguan ports. Surveillance flights are taking place over El Salvador and Nicaragua. President Reagan has filed no reports under the War Powers Act. Congressional critics have charged the President is in violation of the Act.

This brief review of the events of the past decade underscores both the complexities and dangers of world events. The forces of communism, ancient religious factions and rivalries, state-supported terrorism, and local insurrections threaten U.S. lives and property around the globe. The United States must be prepared to respond to a crisis on short notice. Presidents have proven ready to act, the War Powers Resolution notwithstanding.

Why did Congress undertake the extraordinary step of legislating war powers? Many people believe it was caused by two events: Congressional and public distaste for Executive War in Southeast Asia, and a weakened presidency, diminished by the revelations of Watergate.

The legislative forerunner of the War Powers Act was the National Commitments Resolution, passed on June 25, 1969.² It was a Senate Resolution, and did not require concurrence by the House of Representatives. This "sense of the Senate" resolution was a reaction to

Secretary of State Dean Rusk's repeated references to a United States "commitment" to Vietnam. The resolution stated that a commitment results only pursuant to a treaty, statute or concurrent resolution of both Houses of Congress specifically providing for such commitment.

As the Vietnam War dragged on, with an expansion into Cambodia and massive bombing of Hanoi and other military targets in North Vietnam, public opinion and the mood of Congress solidified behind placing tighter restraints on the President. Congress struggled with war powers legislation in the 91st, 92nd, and 93rd Congresses.

After the Paris Peace Agreement, and following the return of U.S. prisoners of war in 1973, Congress was in a decidedly anti-war and isolationist mood. This fact, coupled with the drastic decline in President Nixon's popularity as the result of the Watergate hearings, made passage of some form of war powers legislation almost inevitable. President Nixon's veto of the War Powers Resolution was overridden by a belligerent Congress. The vote to override came less than three weeks after the "Saturday Night Massacre," when Attorney General Richardson and Deputy Attorney General Ruckelshaus resigned rather than carry out President Nixon's order to fire Archibald Cox, the Watergate Special Prosecutor.⁴ This episode provoked severe public criticism. Thus a domestically weakened President was unable to prevent a severe Congressional encroachment on the Chief Executive's power.

PRESIDENTIAL USES OF FORCE BEFORE THE WAR POWERS ACT

A review of some highlights of American history involving presidential uses of force in the absence of a declaration of war may help clarify the issue. There is an unbroken series of precedents for the Chief Executive to order U.S. Armed Forces into hostilities without specific Congressional consent.

As we have seen, Vietnam precipitated the War Powers Act. Key events in that long saga illuminate the President's war powers. While the U.S. presence in Vietnam began as long ago as World War II, the so-called American "commitment" did not start in earnest until after the fall of French colonial forces in 1954. Presidents Eisenhower and Kennedy sanctioned use of U.S. advisors there on a relatively small scale.⁵

In August 1964, President Johnson secured Congressional approval for what both the President and Congress hoped would be a limited military response. This was contained in the Tonkin Gulf Resolution, in which "Congress approves and supports the determination of the President, as Commander-in-Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression."⁶ President Johnson neither requested a declaration of war nor activated the reserves. By failing to mobilize U.S. public opinion, he eventually lost the support of the American people. But Presidents Johnson and Nixon believed they had the right to prosecute the war based on their authority as Commander-in-Chief.

They had the weight of historical precedent to bolster their case. While the use of force in some instances lead to unhappy results, other presidential actions have been notably successful. These bear mention

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because they illustrate a succession of presidential actions by some of our most outstanding leaders of both political parties reaching back to the first Chief Executive.

1. Cuban Missile Crisis, October 1962:

Following the introduction of offensive nuclear-tipped missiles in Cuba, President Kennedy averted nuclear war with the Soviet Union through a timely show of naval force. The President and his advisors met in secret during the crisis; Congress was not consulted. The naval blockade of Cuba (euphemistically termed a "quarantine") was arguably an act of war.⁷

2. Lebanon, 1958:

President Eisenhower ordered 5,000 combat-equipped Marines ashore in Lebanon to avert war. The U.S. presence in these large numbers deterred potential adversaries from war. The use of force was quick and credible. Congress did not participate in the decision.⁸

3. The Korean War, June, 1950:

President Truman sent U.S. Armed Forces to secure the Pusan, Korea area after South Korean forces were beaten by North Koreans. The President weighed asking for Congressional approval, but decided against it on the advice of Secretary of State Dean Acheson, who felt Congressional debate would undercut the U.S. position.⁹

4. The Berlin Airlift, June 1948 - May 1949:

President Truman ordered U.S. air forces to resupply the two million inhabitants of West Berlin after the Soviets cut off ground transportation to the City. This action risked hostilities at the outset of the Cold War. Congress was not consulted in the decision to redeploy U.S. Armed Forces, including 60 long-range bombers of the U.S. Air Force.¹⁰

5. Operations in the North Atlantic, 1941:

President Franklin D. Roosevelt faced an overwhelmingly isolationist and anti-war Congress in 1940 and 1941. Renewal of the draft in 1940 was approved by only one vote. But in the months before the declaration of war following Pearl Harbor, Roosevelt placed U.S. troops in Greenland, stationed 8,000 Marines in Iceland to help defend a British base, and ordered the Navy to capture or destroy Axis-controlled submarines and surface raiders in the North Atlantic.¹¹

6. Veracruz, 1916:

President Wilson struggled for over two years to bring Peace to Europe during World War I. He is often thought of as being a mildly isolationist President who was reluctant to commit U.S. troops. However, he acted decisively and without Congressional approval to commit U.S. Armed Forces at Veracruz, Mexico, in 1914 in an abortive attempt to interdict German arms shipments to Mexico.¹²

7. The Confederate Rebellion, April 1861:

Shortly after his inauguration, President Lincoln ordered federal forces to hold their fortifications despite Southern demands for surrender. Acting without the benefit of Congressional direction, because Congress was not in session at the time, President Lincoln's actions rallied Northern opinion behind the Union cause when Ft. Sumter was fired upon on April 12 to 14, 1861.¹³

8. The Whisky Rebellion, 1794:

President Washington ordered a militia force of 12,900 men to confront the "Whiskey Rebels" of western Pennsylvania, which he believed threatened the safety of the Union. Washington ordered this action without specific Congressional authorization. This was the only occasion in American history when a President actually took the field with his troops; Washington accompanied the Army as far as Bedford, Pennsylvania, before returning to Philadelphia.¹⁴

Presidents are accountable to the electorate just as are Members of Congress; they must act when necessary as conscience and reason dictate in the interest of their country.

In addition to the handful of examples cited here, historians have recorded two hundred presidentially ordered uses of force without Congressional declarations of war between 1787 and 1973. Actual usage clearly demonstrates that a declaration of war is more formality than clear requirement.¹⁵

IN SEARCH OF FUNDAMENTALS

Fortunately, our perspective need not be limited to the lessons of American history alone. In matters of great importance, consideration of ideas from the great political and historical writers of Western civilization are needed. In this spirit, the following observations are made.

In Book I of Plato's Laws, Cleinias, a Cretan, declares that the lawgiver of Crete

"seems ... to have thought the world foolish in not understanding that all men are always at war with one another For what men in general term peace would be said by him to be only a name; in reality every city is in a natural state of war with every other, not indeed proclaimed by heralds, but everlasting ... no possessions or institutions are of any value to him who is defeated in battle; for all the good things of the conquered pass into the hands of the conqueror."¹⁶

In the Melian Dialogue, in Thucydides' History of the Peloponnesian War, the representative of Athens said to the Melians, whom the Athenians have come to conquer:

"We recommend that you should try to get what it is possible for you to get ... The standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept. ... Our knowledge of men leads us to conclude that it is a general and necessary law of nature to rule wherever one can. This is not a law that we made ourselves, nor were we the first to act upon it when it was made. We found it already in existence, and we shall leave it to exist for ever among those who come after us. We are merely acting in accordance with it, and we know that you or anybody else with the same power as ours would be acting in precisely the same way."

The Council of the Melians refused to submit to the power of Athens. In the ensuing seige, the Melians surrendered unconditionally to the Athenians, who put to death all the men of military age, and sold the

women and children into slavery.¹⁷ This is not to argue that might makes right. However, it points out that the strong are often ruthless, and defense must be the principal concern of every statesman--wishful thinking is inadequate.

The American experience with war powers suggests that an examination of some of the specific influences on the United States Constitution, including ideas current during the lives of the Framers and Ratifiers, would be productive. American Colonial thought was shaped by a powerful event in English History: the 17th English Civil War. Although this event seems obscure to us in 1984, it was no more remote to the Founding Fathers than the American Civil War is to us. The English Civil War was a struggle over the rights and privileges of the Crown and Parliament, including war powers. For this reason, consideration of the influence of this period on the American thought is important.

In A History of the English-Speaking Peoples, Winston Churchill describes the test of wills between Charles I and Parliament over the question of raising taxes to support foreign wars and the Navy.¹⁸ The King dissolved Parliament in 1629 and initiated the period of austere Personal Rule for eleven years. Eventually Charles found it necessary to summon Parliament, again to raise funds for the military. The Short Parliament reacted furiously to the King's demands; consequently, the King dissolved it in a few days. Intrigue, religious strife, and invading Scots propelled England into the Civil War. Between 1643 and 1648, war between the Roundheads (Republicans) and the Cavaliers (Royalists) tore

the fabric of English society. An obscure Member of Parliament, Oliver Cromwell, was appointed General of the Horse in June 1645, "the only man who combined high military position with an outstanding Parliamentary position."¹⁹

"By the end of 1648 all was over. Cromwell was Dictator. The Royalists were crushed; Parliament was a tool; the Constitution was a figment; the Scots were rebuffed, the Welsh back in their mountains; the Fleet was reorganized, London overawed."²⁰

On January 30, 1649, Charles I was beheaded. Cromwell and his Army divided England and Wales into eleven military districts, appointed a Major-General over each, and ruled by martial law. Cromwell next assumed the title, Lord Protector. He tried to rule with a succession of Parliaments, none of which proved sufficiently obedient; eventually he abandoned the attempts and ruled through his "New Model" Army alone. But the Protectorate as an institution proved too weak to outlive Cromwell - the monarchy was restored in 1660 on Parliament's invitation to Charles II to return.

"This was not only the restoration of the monarchy; it was the restoration of Parliament. Indeed, it was the greatest hour in Parliamentary history. The House of Commons had broken the Crown in the field; it had at length mastered the terrible Army it had created for that purpose. It had purged its own excesses, and now stood forth beyond all challenge, or even need of argument, as the dominant institution of the realm."²¹

By the time of the Restoration, "everyone now took for granted that the Crown was the instrument of Parliament and the King the servant of his people." Finally,

"both the Crown and Parliament were to be free of the Army. That force, which had grown to forty thousand men, unequalled in fighting quality in the world, was to be dispersed, and nothing like it was on any account to be raised ever again. 'No standing Army,' was to be the common watchword of all parties."²²

Montesquieu was another leading influence on the Framers and Ratifiers of the Constitution. In The Spirit of Laws, Montesquieu discussed law in relation to both defensive and offensive force.

"The life of governments is like that of man. The latter has the right to kill in case of natural defense: the former have a right to wage war for their own preservation."

"In the case of natural defense, I have a right to kill, because my life is in respect to me what the life of my antagonist is to him: in the same manner a state wages war because its preservation is like that of any other being."

"With individuals the right of natural defense does not imply a necessity of attacking. Instead of attacking they need only have recourse to proper tribunals. They cannot therefore exercise this right of defense but in sudden cases, when immediate death would be the consequence of waiting for the assistance of the law. But with states the right of natural defense carries along with it sometimes the necessity of attacking; as for instance, when one nation sees that a continuance of peace will enable another to destroy her, and that to attack that nation instantly is the only way to prevent her own destruction."

The right of war, therefore, is derived from necessity and strict justice. If those who direct the conscience and councils of princes do not abide by this maxim, the consequence is dreadful: when they proceed on arbitrary principles of glory, convenience, and utility, torrents of blood must overspread the earth."²³ (emphasis added).

If Congress, in directing "the conscience and council" of our President in matters of war, fails to use force in strict justice both offensively and defensively--but proceeds arbitrarily for convenience and utility--the result may indeed be terrible.

The interaction of politics and warfare was illuminated by Clausewitz. One brief quotation serves to reveal their relationship:

"Only if statesmen look to certain military moves and actions to produce effects that are foreign to their nature do political decisions influence operations for the worse. In the same way as a man who has not fully mastered a foreign language sometimes fails to express himself correctly, so statesmen often issue orders that defeat the purpose they are meant to serve. Time and again that has happened, which demonstrates that a certain grasp of military affairs is vital for those in charge of general policy."²⁴

According to a recent biographer, Marcus Cunliffe, General Washington frequently complained during the Revolutionary War of the support provided the Continental Congress.

"But in general, he trusted and deferred to Congress, and Congress--we must emphasize--reciprocated. How else, even allowing for the nervousness of the moment, are we to account for Congress's extraordinary gesture in December 1776? For a period then unspecified--which turned out to be six months--it conferred almost dictatorial powers upon George Washington, as far as the raising and maintenance of his army were concerned. Indeed, he was commonly mentioned at the time as the "Dictator"--not always in a hostile sense--and some people, with or without the precedent of Oliver Cromwell in mind, spoke of him as "Lord Protector."²⁵

The ill-fated Articles of Confederation, which proved ineffective, stated in part in Article Nine,

"The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war--of establishing rules for deciding, in all cases, what captures on land or water shall be legal ... of granting letters of marque and reprisal in times of peace."²⁶

Among the many differences between the Articles of Confederation and the Constitution was the addition of the position, Commander-in-Chief.

In Article Two, Section 2:

"The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States."²⁷

The Constitution enumerated several Powers of the Congress in Article One, Section 8, including the critical phrases,

"Congress shall have power ... to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; to provide and maintain a navy."²⁸

W. Taylor Reveley, III, in his detailed study, War Powers of the President and Congress, has analyzed the historical debate, to the extent it has been explicitly preserved, among the Framers and Ratifiers of the Constitution, on how the war powers should be divided between the Executive and the Legislative Branches.²⁹ Reveley states

"The Framers and Ratifiers were adamant that the war powers not encourage federal usurpation. ... [They] feared blatant instances of this evil: armed steps by federal politicians to oppress states and individuals, even to set aside the Constitution and replace it with congressional dictatorship or an executive prince."³⁰

Much has been made of the substitution of the word "declare" for "make" in the declaration of war clause. Whether this was an explicit recognition that Congress was less capable than the Commander-in-Chief of prosecuting a war once declared, or was merely a formality is debatable. Alexander Hamilton in The Federalist, No. 25, observed "The ceremony of a formal denunciation of war has of late fallen into disuse."³¹

The Constitution was crafted by men who were keenly aware of the widespread fear of standing armies, who were jealous of their liberties, and who were skeptical of central authority. The memory of bloody civil strife, with the Executive locked in a life and death struggle with the Legislature, clearly informed their deliberations. But in their wisdom, they allowed the powers of the Commander-in-Chief to remain ambiguous, knowing that the use of force is always a political question.

America in the 1980's is not America in the 1780's. The dangers we face today are not from within, nor from border raids by hostile Indian Tribes, the Spanish or the British. We are closer to the world described by Plato in which we are "foolish in not understanding that all men are

always at war with one another," by Thucidides in which "the standard of justice depends on the equality of power to compel," and by Montesquieu in which "the right of natural defense carries along with it sometimes the necessity of attacking." The lessons of history, including one hundred eighty-six years of our past before the War Powers Act, and a decade of American experience under the War Powers Act, are the essential examples which must guide us today.

WHY THE WAR POWERS ACT IS FLAWED

The War Powers Act is fatally flawed. It is based on inadequate and fundamentally incorrect assumptions regarding the nature of force as an instrument of policy. It is counterproductive because it automatically concedes to the enemy many of the tools a statesman needs to defeat his adversaries. In short, the War Powers Act by its nature plays into the hands of every potential adversary of the United States.

The flaws we shall examine include:

- Lack of speed;
- Lack of secrecy;
- Ambiguity on requirement for consultation;
- Appearance of disunity;
- Unconstitutional aspects;
- Surrender of strategic and tactical advantages.

1. Lack of Speed

Congressional debates take time. Even under expedited rules of procedure, important matters may consume days or weeks of debate. In matters of war and peace, time is of the essence. One leader can act quickly and decisively. Congress normally can not.

John Jay in The Federalist, No. 64, pointed to this difficulty in these words:

"There frequently are occasions when days, nay, even when hours, are precious. The loss of a battle, the death of a prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either, should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of secrecy and despatch, that the Constitution would have been inexcusably defective if no attention had been paid to those objects. Those matters which in negotiations usually require the most secrecy and the most despatch, are those preparatory and auxiliary matters which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation. For these the President will find no difficulty to provide; and should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them."³² (emphasis added).

2. Lack of Secrecy

While the Constitution provides for secret Congressional sessions, in practice Congress as a whole has seldom held closed sessions (except for closed committee hearings). There is now a large and dedicated fraternity of Congress-watchers--media, lobbyists, and staff--who make it their business to follow the minute details of Congressional action. House proceedings are televised. Can we realistically suppose that in time of

crisis the details of a closed session of Congress will not soon become known? If decisions affecting war and peace are made by only a few leaders or members of select committees, won't the remainder protest at their exclusion?

Even speculation on what the United States might do in hypothetical cases is cause for concern. In the days just before President Carter's ill-fated Iran Rescue attempt, Senators Church and Javits wrote the Secretary of State requesting consultation under the War Powers Act on what the Administration intended to do in a military sense in the Persian Gulf region.³³

3. Ambiguous Requirement for Consultation

The matter of prior consultation, "in every possible instance" before introducing U.S. Armed Forces into hostilities, is of pressing concern. The War Powers Act fails to specify precisely who is to be consulted. All 535 members? The House and Senate leadership? Chairmen of key committees? If Congress is not in session, should the President reconvene it?

In the Lebanon evacuation incident in 1976, President Ford attempted to reach certain Members of Congress during a recess. To communicate with one key Congressman, the White House operator was reduced to having the local police leave a note on a beach cottage door reading "Please call the White House."³⁴

Does consultation mean obtaining prior concurrence, obtaining advice without consent, or informing Members of Congress concerning decisions the President has already made? There are no clear answers to these questions.

4. Appearance of Disunity

While the advocates of the War Powers Act maintain it is value-neutral, providing only an objective process to achieve presidential-congressional consensus on matters of war, its detractors point out that it automatically engenders divisive debate. Perhaps this debate is healthy, in keeping with democratic ideals, and necessary for the preservation of our liberties. But it also encourages our potential adversaries to stall, to commit terrorist acts, and to generate opposition for its own sake. Congressional deliberation may become dangerous in matters of foreign policy and especially war. The debate could encourage our enemies to act, inspire them in war, and offer them hope during negotiations. The War Powers Act is the unintended ally of every potential foe.

Many will not appreciate the importance of these points. To them, war is a question of numbers, of forces, and of weapons technologies. But as Clausewitz showed us, and as we proved again in Vietnam, the moral aspect of war can be decisive. The national will to win, the side with vital interests at stake, the nation with time on its side, the appearance of national unity--these are frequently matters of the utmost importance. The War Powers Act introduced a new element in U.S. policy: it guaranteed that the use of force by the United States will be accompanied by Congressional debate in all cases.

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5. Unconstitutional Aspects

Some critics of the War Powers Act feel the entire Act is unconstitutional, because through it Congress attempted to limit the power of the Commander-in-Chief granted by the Constitution in Article II. This was the basis of President Nixon's veto in 1973. President Ford maintains that the Act as a whole is unconstitutional.³⁵ His view should be accorded great weight since he is in a unique position--as former Minority Leader of the U.S. House of Representative, he knows Congress as an institution well, and as the first President to experience the constraints of the Act, he felt its chilling influence on presidential war policy.

A narrower view of the constitutionality question concerns the Chada decision. In June 1983, the Supreme Court ruled that the so-called legislative veto is unconstitutional.³⁶ This is significant because the War Powers Act provides for the Congress to withdraw U.S. Armed Forces through passage of a concurrent resolution. A concurrent resolution, like a legislative veto, does not require presentation to the President for signature or veto, and thus it does not attain the status of a law. Some lawmakers dismiss this objection to the War Powers Act by pointing out the separability clause in the Act, Section 9, which states if any one provision of the Act is held invalid, the remainder is not affected. Still, this matter clouds the Act.

6. Surrender of Strategic and Tactical Advantages

The War Powers Act introduces restraints of time and space on the Commander-in-Chief. He is legally prevented from moving troops into certain places, and he may not maintain them after certain specified times. The Act guarantees that the enemy knows in advance that the U.S. Armed Forces are limited. He may even learn details of our deployment, our numbers, and our political intentions by reading the Congressional Record (or by watching the evening news)! This is a malevolent act, well intentioned, but harmful, dangerous and potentially tragic.

Congress should have and does have power to affect war policy. Congress can declare war; it need not await a Presidential request to do so. Congress can investigate through oversight hearings. Congress can request testimony from cabinet officers, from the Chairman of the Joint Chiefs of Staff, and from other military officers on matters of state. Congress has the power to stop a war--through the power of the purse. If the President breaks the law, Congress has the power to impeach. But Congress should not micromanage strategy and tactics, nor gratuitously surrender our advantages.

WHAT CAN BE DONE?

The simplest solution to the dilemma presented by the War Powers Act is for Congress to repeal or modify the Act to eliminate its most objectionable and dangerous features. Unfortunately, this is the least likely outcome.

A second alternative is to adjudicate the matter in the Courts. However, this approach is unlikely to receive a warm reception. The Supreme Court historically has been reluctant to rule on political matters, especially matters involving disputes between the other two co-equal branches of the Federal Government.

Another alternative presents itself. A constitutional amendment to curb Congressional limitations on the President's war powers would restore needed balance. Normally, a constitutional amendment requires the approval of Congress, thus raising the same objections stated above.

The Framers and Ratifiers wisely provided in Article V for a new Constitutional Convention to be called upon the application of two-thirds of the States. As of this writing, 30 of the necessary 34 have done so. Some legal scholars maintain this process was specifically intended to be free from Congressional interference, and that unlimited consideration of possible amendments may take place in a new Constitutional Convention.³⁷ In the event a Convention is called, it seems prudent to propose an amendment stating,

"Congress shall make no law limiting the power of the President as Commander-in-Chief of the Armed Forces of the United States."

This amendment would avoid the necessity of defining precisely the powers of Commander-in-Chief, a task the Framers and Ratifiers believed they could not perform. It would nullify the harmful consequences attending the War Powers Act. It would restore the President's rightful role as Commander-in-Chief among his other duties--Chief Executive, Head of State, and elected representative of all the People.

It is not inappropriate for military and naval officers to advocate such an amendment, since it is consistent with Constitutional processes, and it clearly relates to the use of military force to further the national interest.

CONCLUSION

There is little doubt but that the Reagan Administration and our most senior military officers have grave misgivings over the War Powers Act. Recent statements bear this out. On March 28, 1984, Admiral Watkins, Chief of Naval Operations, stated

"Recently in Lebanon, we executed a mission called "presence." "Presence" is supposed to signal our interest in an area or a situation. But this signal was weakened by time limitations imposed under the War Powers Resolution. ... This nation must be ready, and must be seen as being ready, to use military power when forced to do so by our adversaries. We must show American power--not American paralysis."³⁸

Secretary of State George Shultz said on April 3, 1984:

"The War Powers Resolution sets arbitrary 60-day deadlines that practically invite an adversary to wait us out. Our Commander-in-Chief is locked in battle at home at the same time he is trying to act effectively abroad. Congress has the right, indeed the duty, to debate and criticize, to authorize and appropriate funds and share in setting the broad lines of policy. But micromanagement by a committee of 535 independent-minded individuals is a grossly inefficient and ineffective way to run any important enterprise."³⁹

And President Reagan echoed these remarks in a speech on April 7, 1984, before a national leadership forum of Georgetown University's Center for Strategic and International Studies. Mr. Reagan said,

"The most far-reaching consequence of the past decade's Congressional activism has become a central responsibility of Congressional leadership as well as executive leadership. If we are to have a sustainable foreign policy, the Congress must support the practical details of policy, not just the general goals."⁴⁰

Many members of Congress have expressed serious misgivings as to the constitutionality as well as the wisdom of the War Powers Act.

In this unstable and dangerous world that we can not control but must live in, the lessons of history and realities attending the potential use of force suggest that a clearheaded re-examination of the war powers, including passage of a constitutional amendment to restore balance, is urgently needed.

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