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War Powers Revisited: The President, Congress and the Gulf War

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WAR POWERS REVISITED: THE PRESIDENT, CONGRESS, AND THE GULF WAR

by

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The Gulf War has reopened debate about the entire spectrum of war powers and the President's use of them in the execution of foreign policy. The tug of war between the Executive and Legislative branches over the allocation of war powers has been an on again off again struggle since the Constitution was adopted. The War Powers Resolution represents one of the most significant attempts by either branch to establish primacy over war powers. Since the early days of August 1990 when American warships were on full alert to the middle of January 1991 when the bombs first hit Baghdad, we experienced no shortage of rhetoric with regards to the War Powers Resolution. This paper explores the key phases of the Gulf War and determines if the Resolution finally served as Congress had intended or that it merely acted as a facilitator for Congress to have a nominal part in the Presidents' execution of foreign policy.

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WAR POWERS REVISITED: THE PRESIDENT, CONGRESS, AND THE GULF WAR

I don't like to see discussion of consultation between the president and the Congress get involved in legalisms. And it seems to me that an awful lot of the discussion with respect to the war powers act kind of degenerates, if you will, into complex legal questions. The important point is the consultation. I would think the president would eagerly seek out that consultation, and I would think he would want for his policy, support from the Congress. One of the good things about the war powers act is that it brings the Congress into the action. Congress is kind of reluctant to do that, I think often.¹

--Rep. Lee H. Hamilton(D-Indiana), 16 August 1987

The Gulf War has reopened debate about the entire spectrum of war powers and the Presidents' use of them in the execution of foreign policy. The tug of war between the Executive and Legislative branches over the allocation of war powers has been an on again off again struggle since the Constitution was adopted. The War Powers Resolution represents one of the most significant attempts by either branch to establish primacy over war powers. Since the early days of August 1990 when American warships were on full alert to the middle of January 1991 when the bombs first hit Baghdad, we experienced no shortage of rhetoric with regards to the War Powers Resolution. Did the War Powers Resolution finally serve as Congress had intended or was it merely a facilitator for Congress to have a nominal part in the Presidents' execution of foreign policy?

¹ Michelle Hall, "Showdown Over the War Powers Resolution?," Washington Post, 01 September 1987, p. A21.

GULF MILESTONES AND THE RESOLUTION

An examination of key events in the Persian Gulf crisis within the framework of the debate over war powers is in order. The initial focus will be on the commitment of American forces in the Gulf in early August, 1991. Attention will then concentrate on the shift from a defensive role to an offensive capability in November; and, finally, our focus will be upon those events that take place in the days just prior to the outbreak of hostilities. By inspecting these key milestones in the Gulf Crisis, we perhaps can answer an important question. Given the United States waged a full-scale conventional, undeclared war with Iraq, has the War Powers Resolution proved its worth in curbing the war powers of the President while providing Congress with a greater role?

Origins of the Resolution

The War Powers Resolution was enacted over President Nixon's veto in 1973. The Resolution represented the culmination of congressional concern over two issues. The first issue of concern focused on the perceived increase of presidential war-making powers during the Vietnam conflict. The second issue was the growing perception by congress of the establishment of an "Imperial Presidency" fueled by the events that took place during the Watergate scandal.

The sponsors of the statute told the American people that it would protect the nation from "another Vietnam" and piously restore the constitutional balance the Founding Fathers intended between Congress and the President with regard to the use of the national force.² There are four provisions of the Resolution that are considered significant. The first is a reporting requirement, within forty-eight hours to the House and Senate when our nations' armed forces are either introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated

² Eugene V. Rostow, Once More Unto the Breach: The War Powers Resolution Revisted, A paper based on two Edgar A. Seegers Lectures given at the Valparaiso University School of Law on March 18 and 19, 1986, p.1.

by the circumstances. The second major provision requires the president to terminate, within sixty days, the involvement of American troops unless Congress extends the period or declares war. The third significant provision allows Congress, by Concurrent Resolution, to terminate the use of force authorized by the President. Such action has been viewed as a form of legislative veto whereby Congress overturns an Executive action or decision without allowing the President an opportunity to approve or veto.

Fortunately, the Supreme Court in INS v. Chada, ruled in 1983 that Congressional action, in order to have legislative effect, must be subject to the President's veto. As such, the provision providing for the termination of force by Congressional Concurrent Resolution is considered constitutionally unenforceable. The fourth, and last major provision deemed that appropriation acts and treaties, heretofore or hereafter, shall not be inferred as congressional authorization to use force unless specifically authorized by Congress.

The Defense of Saudi Arabia

On August 6, 1991 the Secretary of Defense, Dick Cheney, announced that the United States would send forces to the Persian Gulf in the defense of Saudi Arabia. In the wake of the Iraqi invasion and occupation of Kuwait just days earlier, the administration made the largest commitment of American troops overseas since the Vietnam War. The president's decision renewed heated debate over the issue of war powers and in particular the War Powers Resolution.

The need for the President to act with dispatch is a fundamental principle held by the Framers and practiced by past Presidents. Speed, secrecy, and dispatch are the principle features of the "energy of the executive". If deliberation was the key word for designing the legislature, energy, the ability to act, was the central concept for the Presidency.³ As we observed in the Gulf, Iraq demonstrated, at least initially, through the massing of troops at the Saudi/Kuwait border that it had bigger designs than just the annexing of Kuwait. The President, acting upon a real threat to an ally considered important to our national interests, chose to rapidly respond to naked aggression. That President Bush acted as swiftly as he did in committing troops to the Gulf is not without recent precedent.

In particular, the Korean and Cuban Missile crises and Roosevelt's commitment of forces prior to American involvement in World War II are relevant examples of applying defensive forces to counter offensive action by an aggressor. In Korea, President Truman decided to commit forces in the defense of South Korea. Had he hesitated, the remaining South Korean forces opposing the onslaught of North Koreans faced annihilation. Senator Douglas defended Truman's decision by emphasizing the reality of sudden attack, the probability of delay in congressional decision making, and the possibility that countries important to American security could be overrun if the Executive were to wait for legislative approval.⁴ President Kennedy's decision to blockade Cuba was necessitated by Soviet ships rapidly approaching the island with additional offensive weaponry. George Ball, an advisor to President Kennedy, similarly argued:

...suppose that...instead of announcing...that a quarantine had been instituted, the President had been compelled to say that he was calling Congress back so that within the next 2 or 3 days they might authorize a quarantine. Almost certainly the effectiveness of the action would have been far diminished, the Soviets would have felt under much less pressure, and it is at least possible that the Soviet reaction would have been very different from the reaction that indeed

³ U.S. Congress, 100th Cong., 1st sess., Report of the Congressional Committees Investigating the Iran-Contra Affair With Supplemental, Minority, and Additional Views, H. Report No. 100-433 and S. Report No. 100-216 (1987), Chapter 2, p.459.

⁴W. Taylor Reveley, War Powers of the President and Congress: Who Holds the Olive Branch?, (Charlottesville: University Press of Virginia, 1981), p.149.

actually occurred.⁵

The actions by these twentieth century presidents were viewed as justifiable defensive actions in the face of an aggressor...similar to what President Bush faced in the Gulf in 1990. One further point in support of Executive dispatch focuses on the fact that Congress was not in session at the time that President Bush decided on the initial troop commitment. The phrase, "the President is always in session", held true in those early days of August. Secretary Cheney was more than frank about the benefits of having Congress "out of town" at the onset of the crisis. "We could spend August doing what had to be done", said Cheney, "rather than explaining it to congressional committees".⁶

The Framers understood the need for swiftness in the conduct of foreign policy. That the president's ability to act with necessary speed not be hindered was a principal concern during the Constitutional Convention. The founders were aware of the experiences of the Revolutionary War wherein the Continental Congress would involve itself in the conduct of the war. Further, the lack of an executive under the Articles of Confederation left the Congress with the sole power to wage war. The Framers were dissatisfied with these arrangements and they served as motivators for the position of president being designated as commander-in-chief and the commensurate reduction of the legislature to regulating the armed forces and declaring war.⁷

Within the context of the decision to defend Saudi Arabia, the War Powers Resolution was ineffectual. Any debate by Congress on explicit authorization for the Gulf War was over long before it began.⁸ Professor Glennon reflects the view of many that any debate needed to be initiated immediately after the commitment of defensive troops in early August. Why didn't the debate develop? Essentially, the lack of debate in August stems from the mood of Congress that prevailed in the days just following the Iraqi invasion.

⁵ Ibid., p.149.

⁶ Walter Pincus, "Bush Consults on Use of Force in Gulf," Washington Post, 05 October 1990, p.A1.

⁷ Stephen L. Carter, "Going to War Over War Powers," Washington Post, 18 November 1990, p.C1.

⁸ Michael J. Glennon, "War and the Constitution," Foreign Affairs 70 (Spring 1991): p.85.

The relative silence of Congress in those early days of August was driven by several factors. First, the swiftness of the action, both the Iraqi invasion and the response by the Bush Administration, left little time for debate. Second, given the popular support for the decision to defend, congressional opposition would be viewed as partisan bickering and not well received by constituents back home. This scenario in August 1990 supports the premise of Arthur Schlesinger, Jr. that the provision in the War Powers Resolution, which limits the president to sixty days of hostilities, as serving as a check on the Presidency is a sham. Schlesinger states:

Most wars are popular in their first thirty days. In these thirty days the President who ordered the action would overwhelm Congress, the press and television with his own rendition of the facts and his own interpretation of the crisis.⁹

Another factor that played a role in congressional inaction was the fact that President Bush enjoyed broad-based support on Capitol Hill for his decision. That this unity not be disrupted by congressional debate was best expressed by Senator Boren(D-Okla.). When asked in September whether the President should have consulted Congress before sending troops to the Gulf he replied, "No, I think the president should be supported on that point. It is extremely important that we project absolute unity."¹⁰

The absence of congressional criticism on the commitment of defensive troops to Saudi Arabia essentially abrogated any statutory question on the issue. Further, the absence of Congress from the decision making process strengthened the ability of President Bush to take additional action in the months to come. Presidents have cited congressional silence as tacit approval of their action.¹¹ In this, the latest debate over war powers and the War Powers Resolution, round one went to the president.

⁹ Arthur M. Schlesinger, Jr., The Imperial Presidency (Boston: Houghton Mifflin Company, 1973), p.303.

¹⁰ Glennon, "War and the Constitution," p.86.

¹¹ Reveley, War Powers of the President and Congress, p.155.

The Commitment of Offensive Troops

On November 8, 1990, President Bush committed another 200,000 troops to the Gulf region, nearly doubling, to almost half a million, the U.S. forces in Saudi Arabia. The President supported this decision by explaining that he needed an "adequate offensive military option".¹² This expanded action by the Executive Branch succeeded in stirring what could best be described as a listless Congress in addressing the issue of war powers.

The Constitutional issue of who has the authority to involve the nation in war again was a focal point of discussion. As Professor Michael Glennon states:

Only on November 8...did congressional voices ask from what source the chief executive draw this extraordinary authority to place the nation at war without legislative approval.¹³

This "legislative approval", Glennon argues, stems from the declaration clause of the Constitution. Professor Glennon goes to great lengths to show that the declaration of war clause was inserted to ensure that the legislature was given the exclusive right to involve the nation in war. Quoting Jefferson, Hamilton, and Madison, Professor Glennon passionately portrays the Framers and Ratifiers as sensitive to executive despotism. Citing Madison as the principle architect of the Constitution he is quoted by Professor Glennon on the power to declare war:

...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...¹⁴

This view of the declaration of war clause in the Constitution, shared by Professor Glennon and many congressman is wrongly applied in the discussion of committing offensive troops to the Persian Gulf. The problem

¹² Glennon, "War and the Constitution," p.86.

¹³ Ibid., p.86.

¹⁴ Ibid., p.87.

with Glennon's argument is that not all conflicts involve a formal declaration of war. Our Government has involved itself in over 200 conflicts since the days of Washington's Presidency and only 5 have been declared wars. In fact, the majority of the conflicts occurred without any evidence of prior legislative authorization of any sort.¹⁵ In these cases, the President acted under his authority as Commander-in-Chief.

Professor Stephen Carter of Yale University offers yet another compelling argument that addresses the issue of declaring war in the Gulf. Carter makes the point that the declaration power in the Constitution was designed to provide a measure of control over the president's ability to launch an offensive war...to make America the belligerent who started things.¹⁶ While the debate in November 1990 focused on the commitment of offensive troops, Carter urges caution in drawing the conclusion that President Bush was positioning America for an offensive war. Carter reasons that it is not possible for President Bush to start a war in the Gulf as the Gulf war was already initiated by Iraq when it invaded Kuwait.¹⁷ Under this interpretation of the declaration of war clause the President's continued deployment of troops in November 1990 can be viewed as an extension of the right of self-defense. This interpretation also draws support from international law and the United Nations Charter.

Eugene Rostow offers the view that the doctrines of international law regarding self-defense are reasonably unambiguous. The dominant characteristic of such international uses of force in peacetime is that they should be limited and proportional responses to a prior illegal act of forceful character for which another state is responsible.¹⁸ The President's actions through November 1990 were in congruence with this doctrine. The troop buildup was both limited and proportional in response to an illegal act by an aggressor state. Rostow lends credence to this argument when he discusses the law of self-defense in international law when assisting friendly nations in

¹⁵ 100th Congress, 1st session, Iran-Contra Affair, p.466.

¹⁶ Carter, "Going to War Over War Powers," p.C4.

¹⁷ Ibid., p.C4.

¹⁸ Rostow, Once More Unto the Breach, p.11.

dealing with incursions from other states. A state, Rostow argues, has an absolute right to assist another state if it wishes to do so under such circumstances.¹⁹ Article 51 of the United Nations Charter refers to this right as the right of "collective self-defense" and provides that nothing in the Charter shall impair "the inherent right of individual and collective self-defense."²⁰

Thus, if one accepts Glennon's narrow interpretation of the Constitution such that the President may only respond to sudden attacks upon the United States, must we accept the view that Article 51 of the United Nations Charter is unconstitutional? Taken one more step, are we to infer that our rights under Article 51 are abrogated by Section 8 of the War Powers Resolution? I say no. Glennon's interpretation of the declaration of war clause is far too constrictive, particularly in view of historical precedent. Further, the conflict created by the War Powers Resolution wherein Congress attempts to legislate away the President's power to enforce treaties is itself constitutionally questionable.

The increased commitment of American troops in November 1990 precipitated criticism from Congress in terms of President's prudent use of the armed forces. Congressional intrusion in military operations has plagued this nation since pre-Constitution days. The Articles of Confederation provided for congressional oversight of the military. So ineffectual was the Continental Congress in regulating the armed forces that the Framers realized that the system had to be changed. The Framers recognized that Congress was meant to be a deliberative body, moving slowly and collectively to establish policy. As a "committee of 535" it is not intended to act quickly.

¹⁹ Ibid., p.13.

²⁰ Ibid., p.13.

As such, the insistence of Congress to involve itself in military operations not only interferes with the president's power as Commander-in-Chief but also leads the collective legislative body into an area that it is ill-suited to act. When Congress steps beyond its capacities, it takes traits that can be helpful to collective deliberation and turns them into a harmful blend of vacillation, credit claiming, blame avoidance, and indecision.²¹ Within the framework of the War Powers Resolution, Rostow points out that most Congressmen and Senators are unwilling to take responsibility for the President's use of the armed forces unless great national issues are at stake. According to Rostow:

It is a political risk they are happy to leave to the President. As Congressmen and Senators have often told me when, as a government official, I solicited their support for the President on the Hill, "The President has to do what has to be done. I want to be re-elected next year."²²

Aside from the usual debate involving the intent of the Framers and Ratifiers, as well as the discussion over the separation of powers, the decision to shift to an offensive capability through increasing the level of U.S. troops brings to focus the application of presidential power. Throughout the Fall of 1990, Congress appeared more than willing to leave the tough decisions to the president. The commitment of initial defensive troops in August was soon followed by the placing of an offensive force in the Gulf region. In both cases, the relative inaction of the Congress served to strengthen the presidential power.

If Congress is unwilling to become actively involved then the power of the president is greatly enhanced. A key factor in the exercise of this power is the willingness of many presidents, more so than Congress, to exercise their constitutional authority to the fullest and beyond. Thus, in the face of congressional ambivalence, President Bush pressed onward in his expanding commitment to the Gulf states. Jim Hoagland of the WASHINGTON POST sums it up best as follows:

²¹ Dick Cheney, "Congressional Overreaching in Foreign Policy," Foreign Policy and the Constitution (Washington, DC: The AEI Press, 1990), p. 103.

²² Rostow, Once More Unto the Breach, p. 26.

There are no gags over the mouths of Democrats in Congress that they have not placed there themselves out of political prudence. The Democrats prefer to criticize Bush for his fractured syntax and fuzzy rhetoric and let him take the heat. They lunge for the capillary.²³

The lack of political courage displayed by Congress has historically led to a broadening of presidential power. That President Bush successfully applied this power in the face of congressional inaction during the November troop buildup is not only justified but also serves to strengthen the hand of the president in future crises.

The debate over separation of powers in November was brought into focus when 56 members of Congress filed suit against President Bush in order to keep the president from going to war without congressional approval. In Dellums v. Bush, the congressmen argued that the president's earlier claim for a need for an "offensive option", combined with a pattern of presidential acts that raised a substantial possibility that the option would be executed, created a case or controversy justifying judicial intervention.²⁴ As such, the lawsuit sought to prevent the president from using offensive action in the Gulf without first obtaining the consent of Congress.

The wasn't the first time that supporters of the War Powers Resolution in Congress attempted to take on presidential war powers via the courts. In 1987, 110 members of Congress, through Lowry v. Reagan, sought to curb the president over the issue of reflagging Kuwaiti tankers. The focus of these legal challenges is the constitutionality of Congress forbidding the use of American forces without prior congressional approval which, in the minds of many, is a clear violation of the separation of powers. That Congress, through the War Powers Resolution, is in a position to intrude on the war powers of the president has been one of the major features of debate since 1973.

²³ Jim Hoagland, "Congress, Bush and the Generals," Washington Post, 22 November 1990, p.A31.

²⁴ Glennon, "War and the Constitution," p.92.

The Lowery case was dismissed because it was viewed as a political issue. The court decided that it had no jurisdiction as the constitutionality of the War Powers Resolution was not at issue. Rather, the suit was viewed as politically inspired, a small number of congressman disputing the actions of the president. Learning from this, according to Professor Glennon, the plaintiffs in the Dellums case avoided the tact of judicial enforcement and sought relief based on constitutional grounds.²⁵ The key point in the Dellums case is that the Supreme Court did not dismiss the suit on political grounds. Rather, the court seemed to support the merits of the case in stating:

If the executive had the sole power to determine that any particular offensive military operation, no matter how vast, does not constitute war-making but only an offensive military attack, the congressional power to declare war will be at the mercy of a semantic decision by the executive. Such an "interpretation" would evade the plain language of the Constitution, and it cannot stand... Here, the forces involved are of such magnitude and significance as to present no serious claim that a war would not ensue if they became engaged in combat, and it is therefore clear that congressional approval is required *if Congress desires to become involved*. (Emphasis added)²⁶

The Supreme Court, however, ruled that the case was premature as it was only a minority of Congress that sought judicial review in this instant case. "It is only if a majority of the Congress seeks relief from an infringement on its constitutional war-declaration power," the court said, "that it may be entitled to receive it."²⁷

THE DECISION FOR WAR

In mid-January 1990, coalition forces numbering in excess of five hundred thousand commenced the third and final phase of the Gulf crisis. By the time the bombs and cruise missiles first hit Baghdad, the war powers debate was largely over. Whereas the first two phases already examined were characterized by unilateral action on the part of the Executive Branch, this termination phase was unique in that it followed weeks of discussion culminating with consensus, both international and national.

²⁵ Ibid., p.99.

²⁶ Ibid., p.94.

²⁷ Ibid., p.95.

With the onset of the air war against Iraq the debate over war powers was essentially over. Constitutional interpretation had its day in the limelight. The discussion of separation of powers between the Executive and Legislative branches was superseded by focusing on the number of sorties flown. Presidential power received scant attention, generally limited to conduct of the war with specific emphasis on when and if the ground war should commence. Lastly, the War Powers Resolution again faded into the background but not without significant debate regarding its successful application in this crisis. Do not be deceived that the decision to use force came easily. From October 1990 to mid-January 1991 the mood in Washington is best captured by W. Taylor Reveley:

(The) argument over the allocation of war powers conjures up two of our most cherished political bugbears: the fear that American democracy will perish, choked by presidential tyranny, and the obverse dread that it will smother amid congressional indecision and parochialism.²⁸

The Bush Administration started early in laying the ground work for eventual armed conflict against Iraq. As early as September 1990, the president was engaged in private discussions with numerous congressional leaders. Senator Sam Nunn (D-Ga.) acknowledged that he and other Senate leaders had been involved in a consultation session in the White House.²⁹

Administration officials recognized the need for congressional support for hostilities. Defense Secretary Dick Cheney, himself a former House member, indicated that President Bush understood the need for a "joint venture" with Congress and stated, "If hostilities develop, it is important that Congress be on board and supportive".³⁰ Secretary Cheney stressed that the President is Commander-in-Chief and a decision to use force is "best made by him".³¹

²⁸ Reveley, War Powers of the President and Congress, p. 8.

²⁹ Walter Pincus, "Nunn Proposes Group For Gulf Consultation," Washington Post, 06 October 1990, p. A22.

³⁰ Pincus, "Bush Consults," p.A31.

³¹ *Ibid.*, p.A31.

Notwithstanding the informal discussions between the president and congressional leaders, the Bush Administration slowly placed Congress in an untenable situation through the introduction and approval of successive United Nations resolutions against Iraq. Initial resolutions which condemned Iraqi aggression and introduced economic sanctions received swift endorsement by Congress. Later, when the United Nations adopted the resolution calling for the deadline for Iraqi withdrawal by 15 January, 1991, Congress generally did not object to such action permitting the use of force. Rather than outright objection to the idea of using force to remove the Iraqi menace, congressional membership focused more on whether or not economic sanctions would be given enough time to be successful. Without the direct objection of the possibility of armed intervention in January and the resultant arguments over how long the economic sanctions be given an opportunity to succeed, Congress lost another opportunity to forcefully assert its position regarding war powers.

With the start of the new year and the U.N. Security Council deadline only two weeks away, Congress could best be described as in a state of confusion. The usual January recess was cancelled as lawmakers gathered in Washington to begin debate on the issue of involving the country in war. Discussions ranged from whether or not to even start a debate in the face of upcoming discussions between Secretary of State Baker and Foreign Minister Aziz to debating on resolutions prohibiting President Bush from attacking Iraq without specific congressional authorization. After months of relative inaction by Capitol Hill, the realization that the country just might go to war awakened a drowsy Congress.

"We're all mixed up," quipped Senator Bob Dole (R-Ka.), "When we should have been debating, we were on vacation. Now that we should be quiet, we want to vote."³² The uncertainty with regards to congressional action was of great concern to the Bush Administration. A scenario of endless debate while the U.N. deadline came and went was a real possibility that

³²Helen Dewar and Tom Kenworthy, "Canceling Recess, Lawmakers Prepare to Debate War Powers," Washington Post, 04 January 1991, p.A19.

gnawed at the White House. Even Senator Nunn (D-Ga.) cautioned that any debate should not be dragged out:

The worst case would be if the president made up his mind and then we had several weeks of debate. That would make our constitutional procedures look ridiculous in the eyes of the world and of the people at home.³³

White House Chief of Staff John Sununu echoed the thoughts of Senator Nunn when he said:

If Congress wants to endorse the United Nations resolutions, and the president's responsibility to carry out their thrust, he (the president) would be very happy. If they want to stand up and be counted, he would be very happy. But if all they want to do is enter into an extended debate without a result, it would be counterproductive.³⁴

War powers became the focus of debate as the U.N. deadline drew nearer. Senator Harkin (D-Io.), a co-sponsor of the aforementioned resolution that would restrict the president from attacking Iraq without Congressional approval, expressed the view of many on Capitol Hill stating, "Now is the time and here is the place to debate this issue, not after the bullets start flying."³⁵ However, many Republican supporters of the White House criticized the debate over war powers as "hand-wringing" that obscured the central issue of forcing Iraq out of Kuwait.³⁶ "The issue isn't the Constitution," said Senator Alfonse D'Amato (R-N.Y.), "it's the vital, bottom-line, live-or-die, long-term national interests. Let's stop the hand-wringing."³⁷

³³Tom Kenworthy, "Hill Set to Open Full Debate on Gulf War Powers," Washington Post, 05 January 1991, p.A1.

³⁴ Dewar and Kenworthy, "War Powers," p.A20.

³⁵ Kenworthy, "Hill Set to Open Full Debate," p.A1.

³⁶ Ibid., p.A17.

³⁷ Ibid., p.A17.

On January 12, 1991, Congress voted to authorize the use of military force against Iraq. Some would say that Congress overcame the months of inaction and indecision with this decisive action. Some members of Congress were overly enthusiastic. In speaking of the allocation of war powers Congressman Dante Fascell (D-Fla.) exclaimed:

"He acknowledged the principle!...This is very important. By specific language, Congress authorized the war!"³⁸

Unfortunately, Congressman Fascell missed the point. He claims that by seeking congressional authorization to use military force in the Gulf that President Bush acknowledged the constitutionality of the War Powers Resolution. If anything, the President learned from Truman's experience in the Korean War. In that scenario, Congress was not formally "brought on board" at the outset of the Korean conflict. In that case it is understandable that time was not on the side of the Truman Administration when you consider the need to act with dispatch. Congressional debate would likely have been lengthy. However, the Truman Administration decision not to formally solicit congressional support proved fatal for the Administration two years later when it was referred to as "Mr. Truman's War".

Although President Bush had the authorization from the United Nations to use force in the Gulf he understood the risks of not letting Congress have their say. The need for congressional support for his actions was a decision the president made based on political expediency and not based on statutory compliance as spelled out in the War Powers Resolution. At no time did President Bush accept the legitimacy of the War Powers Resolution. In keeping with previous Chief Executives, the President explicitly indicated that his actions pertaining to the Gulf crisis were not governed by the Resolution. When it is politically possible for a President to do so, he prefers to obtain Congressional support for his military actions before or after the event.³⁹

³⁸ Glennon, "War and the Constitution," p. 84.

³⁹ Rostow, "Once More Unto the Breach," p. 25.

To reiterate, the Congressional authorization in January 1991 was nothing more than a political expedient for the President. The idea that the President consulted Congress out of statutory necessity as the result of the War Powers Resolution is absurd. Eugene Rostow sums it up best regarding the issue of mandated consultation:

The Constitution confers legislative powers on Congress, and it can have no other powers. Furthermore, Congress cannot command the President to "consult" with particular members of Congress any more than it can tell him who his Secretary of State or his most trusted advisor should be. Any such attempt would interfere with the President's Executive discretion.⁴⁰

Beyond the political aspects of the authorization by Congress to use force in the Gulf was the fact that Congress was effectively placed in a box with no other reasonable course of action to take. What could Congress do? If the vote were avoided and debate dragged on the collective resolve of the U.N. coalition would be undermined. Support for continued economic sanctions would have led to the questioning of retaining over half a million troops in Saudi Arabia. The ensuing withdrawal, even if only partial, would have destroyed any credibility that America had with the Gulf nations and within the U.N. The same would be true if Congress had somehow decided that after five months of preparation, that the use of force was unacceptable. All of the above scenarios only left one real alternative...war.

Armed conflict without formal declaration of war has been the rule rather than the exception since our Constitution was adopted. As previously stated, only five conflicts out of more than two hundred have resulted in a formal war declaration by Congress. Why then, should the Persian Gulf conflict be any different? Although the Framers had in mind at least a modicum of separation of war powers, the Executive Office has consistently increased its implied authority. In his book, *War Powers of the President and Congress*, W. T. Reveley cites three factors which have influenced Presidential advance:

-the evolving nature of those institutional characteristics of the

⁴⁰ Ibid., p. 67.

presidency and congress pertinent to the war powers.

-certain historical developments that have favored the Executive's characteristics over those of Congress.

-willingness of many Presidents, greater than that of Congress, to exercise their constitutional authority to the fullest and beyond.⁴¹

From an institutional viewpoint, there are several characteristics that have enhanced Presidential war powers. Unity of office is perhaps the most important in that, despite the large growth of both Executive and Legislative branches, the President still retains primary decision making authority within the Executive. Congress, on the other hand, continues to be encumbered by its size. That the President is always available to conduct business and exercise day-to-day control over the government bureaucracy is another important point. In particular, the President has at his disposal superior sources of information, such as the State and Defense Departments, which serve him well in the area of foreign policy. Further, the President, unlike Congress, possesses a national constituency that better enables him to avoid the special interests that plague the more parochial Congress.

Historically, the growing complexity of foreign affairs during the twentieth century has served to increase Presidential advance. America, since World War II has become increasingly involved with international affairs. With this increased involvement is the need for secrecy and dispatch, primary attributes of the President. Further, in the international arena, it is important that the President serve as the nation's sole organ of foreign policy. Finally, the communication advances have best served the President. The President, unlike Congress, can best present his case before the American people. As a single rather than a collective decision maker, the Executive provides an easy target for the public and the media to follow.⁴²

The final factor contributing to the growth of Presidential advance is the tendency for the Executive to use its Constitutional authority to the maximum extent. Presidential prerogative is not spelled out in the Constitution.

⁴¹ Reveley, War Powers of the President and Congress, p.161.

⁴² Ibid., p.167.

However, the powers from which Executive prerogative evolve, such as the commander-in-chief clause are found within Article II. As such, Presidents have been able to act according to discretion for the public good without prescription of law and sometimes against it when, in their judgement, such actions are necessary.⁴³ The successful exercise of Presidential prerogative is best described by Professor Joseph Goldberg of the National Defense University:

In almost all instances where presidents have acted in the name of the public good without expressed constitutional delegation of authority, they have justified their actions on constitutional grounds. These justifications have recognized the lack of expressed constitutional prohibition against the action; have contended that the preservation of the Constitution itself depended upon swift executive action; have justified discretionary action on the basis of their oath of office or on the wording of another portion of Article II such as the responsibility to take care that the laws be faithfully executed; or have supported such action in terms of their responsibilities as commander in chief of the army and the navy.⁴⁴

CONCLUSION

The Persian Gulf conflict was the most significant armed conflict that America engaged in since Vietnam. More importantly, the Gulf war represented the largest involvement of American troops in hostile action since the passage of the War Powers Resolution in 1973. Given the nature and scope of the conflict it can be said that the War Powers Resolution was ineffectual.

At no time during the Gulf crisis did the President explicitly comply with the provisions of the War Powers Resolution. By the same token, Congress failed to enforce its own legislation. Why was the Resolution a failure? Eugene Rostow offers three insights that I will draw upon:

⁴³ Joseph E. Goldberg, "Executive Prerogatives, the Constitution, and National Security," The Atlantic Community Quarterly 26 (Spring 1988): p.59.

⁴⁴ *Ibid.*, p.60.

- The Resolution denies the strong and active Presidency anticipated by the Constitution;
- The Resolution is unconstitutional as it is an attempt by Congress to take over executive powers fundamental to foreign policy execution;
- The Resolution represents a procedural solution to the complex, substantive problems of foreign affairs.⁴⁵

"In the conduct of war...the energy of the executive is the bulwark of national security."⁴⁶ So said Alexander Hamilton over two hundred years ago and the statement still rings true today. An energetic Executive, envisioned by the Framers, is hamstrung by the War Powers Resolution. The Resolution deprives the President of his capacity for prompt and decisive action which is critical to his effectiveness both in the conduct of foreign affairs and in the management of crises.⁴⁷ Compliance with the Resolution during the Gulf crisis, at every key phase discussed, would have seriously encumbered the President with every executive action the subject of contentious and time consuming debate. That the President was allowed to act quickly and decisively served to emphasize the inherent weakness of the Resolution while strengthening the argument for an energetic executive.

The War Powers Resolution is unconstitutional. The Resolution seeks to limit the powers of the Commander-in-Chief granted by the Constitution under Article II and was the basis for President Nixon's veto in 1973. Alexander Hamilton, in Federalist Paper No. 23, makes an important point:

the authorities essential to the common defense...ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power

⁴⁵ Eugene V. Rostow, "Repeal the War Powers Resolution," The Wall Street Journal, 27 June 1984, p.26.

⁴⁶ Alexander Hamilton, James Madison, and John Jay, The Federalist Papers, ed. Clinton Rossiter (New York: Mentor, 1961), No. 70, 427.

⁴⁷ Rostow, "Once More Unto the Breach," p.2.

to which the care of it is committed.⁴⁸

In the Gulf crisis, the idea that Congress could preempt a presidential decision to deploy troops or engage in hostilities serves to question the validity of the War Powers Resolution. Congress cannot constitutionally set up a framework that declares an inherent presidential power inoperative after a specific date.⁴⁹

The failure of the War Powers Resolution to be a factor in the Gulf war reflects the realization that the execution of American foreign policy, particularly with respect to war powers, cannot be subjected to procedural process. Foreign policy is dominated by case-by-case decisions, not general rules, and the aim is not to moderate internal pressures through deliberation, but to respond to external ones quickly and decisively.⁵⁰ Rostow summarizes the point best by stating:

We try to devise procedural solutions for problems like Vietnam because the leaders of our public opinion have not achieved a national consensus about the kind of foreign policy the safety of the nation requires at this stage of world history. Part of the responsibility rests on our educational institutions which do not often train our youth to understand history, the processes of politics, and the phenomenon of war. Another part represents a failure of leadership. When the war in Vietnam became unpopular, far too many Congressmen were willing to forget their own repeated votes for the war, denounce what they called a Presidential war, and assure their constituents that no President in the future would be able to lure America into war by "stealth".⁵¹

⁴⁸ Hamilton, Madison, and Jay, *The Federalist Papers*, No.23, p.153.

⁴⁹ Cheney, "Congressional Overreaching," p.119.

⁵⁰ 100th Congress, 1st Session, *Iran-Contra Affair*, p.460.

⁵¹ Rostow, "Once More Unto the Breach," p.87.

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