

# The War Power of Congress and Revision of the War Powers Resolution\*

*Edwin B. Firmage\*\**

## I. INTRODUCTION

The United States Congress enacted the War Powers Resolution to restore its constitutionally mandated control over the war-making process. By forcing the President to seek congressional approval for military activity in volatile situations, Congress hoped to avoid the abuse of the war power by the executive branch that led to the Vietnam War. However, the War Powers Resolution is deeply flawed. It functionally delegates congressional war power to the President for at least sixty days. This is wrong for two reasons. First, if the President commences hostilities and concludes them within the sixty day window, it is unlikely that Congress will challenge the presidential initiative. The President in such a situation will have been delegated the war power given by the Constitution solely to Congress. This constitutes an unconstitutional delegation of the power to decide for war to the President, absent the necessity of self-defense in the face of an attack on this country. Second, once American troops are committed to combat, it becomes difficult—often practically impossible—for Congress to oppose the President and extricate American forces. Both scenarios have occurred repeatedly, and despite a recent cooling of tension between the Soviet Union and the United States, presidential abuse of the war power threatens to continue.

Despite popular opinion, the recently concluded Gulf War was not a demonstration of how well the congressional war power worked.<sup>1</sup> While it is true that Congress voted to authorize the use of force on January 12, 1991,<sup>2</sup> the events leading up to the congressional authori-

---

\* This Article was originally given as testimony before the Senate Foreign Relations Committee Special Subcommittee on War Powers on September 29, 1988. It has been revised and updated for this publication. Thanks are expressed to Margaret Miller and Joseph Wrona for their help in the preparation of this manuscript.

\*\* Samuel Thurman Professor of Law, University of Utah College of Law; J.D. 1963, LL.M. 1964, J.S.D. 1964, University of Chicago; Author, with Frank Wormuth, of *TO CHAIN THE DOG OF WAR* (U. Ill. Press 1988).

<sup>1</sup> See Glennon, *The Gulf War and the Constitution*, *FOREIGN AFF.*, Spring 1991, at 84.

<sup>2</sup> *Confrontation in the Gulf; Text of Congressional Resolution on Use of Force in the Persian Gulf*, *N.Y. Times*, Jan. 14, 1991, § A, at 11, col. 1. "Congress grants President Bush the

zation once again demonstrate presidential disregard for the terms of the War Power Resolution.<sup>3</sup> Even as President Bush sought Congress' approval on January 8, 1991, he continued to maintain that he had authority to act without legislative authorization.<sup>4</sup> In fact, the War Powers Resolution should have been invoked on August 7, 1990, when the U.S. announced its commitment to defend Saudi Arabia if attacked by Iraq.<sup>5</sup> Later, when the U.S. announced it would double its troop deployment on November 8, 1990, the need for congressional authorization became even more apparent.<sup>6</sup> However, Congress could not muster support to challenge the President.<sup>7</sup> When Congress finally voted to authorize the use of force, over 400,000 troops had been deployed and withdrawing any troops would question American credibility around the globe. Therefore, to protect American credibility, Congress was compelled to vote for war. If the Resolution authorizing use of force is to have any meaning, it must be invoked and debated when the President commits U.S. forces.

Thus, the events leading up to the Gulf War demonstrate once again that the War Powers Resolution must be revised. Even though the War Powers Resolution has many flaws, it still represents this nation's best chance to restore a degree of constitutional restraint over executive warmaking if it can be made to function effectively. This Article examines the evolution of the War Powers Resolution and its flaws, and proposes some modifications to make it work more effectively. Part II of this Article will provide a brief historical background explaining the congressional power to make war as it is contained in the United States Constitution. Part III will review the erosion of the congressional war power during the second half of this

---

authority to wage war against Iraq. Senate approves resolution 52-47, with 45 Democrats and 2 Republicans voting no. House votes 250 to 183, with 179 Democrats, one Republican and one Independent opposing." *Chronology of War*, The Washington Times, March 1, 1991, § B, at B4.

<sup>3</sup> See *Chronology of War*, The Washington Times, March 1, 1991, § B, at B4; Mathews, *War In The Gulf; The Road To The War*, NEWSWEEK, Jan. 28, 1991, at 54.

<sup>4</sup> See Gorey & Voorst, *On the Fence; The President says he can take America to war without asking Congress. The lawmakers disagree—but most would rather not take a public stand at all*, TIME, Jan. 14, 1991, at 12.

<sup>5</sup> Dawson, *U.S. Congressional Leaders Back Military Action Against Iraq*, Reuters, Aug. 7, 1990 (AM Cycle) ("Bush Tuesday escalated the U.S. response to Iraq's invasion of Kuwait by ordering thousands of troops and combat aircrafts to Saudi Arabia"); *Chronology of War*, The Washington Times, March 1, 1991, § B, at B4.

<sup>6</sup> Broder, *Move Widens Range of U.S. Offensive Options; Strategy: It's Also An Acknowledgement That Iraq's Forces Cannot Be Defeated By Air Power Alone*, Los Angeles Times, Nov. 9, 1990, § A, at 1, col. 4.

<sup>7</sup> Gorey & Voorst, *On the Fence; The President says he can take America to war without asking Congress. The lawmakers disagree -- but most would rather not take a public stand at all*, TIME, Jan. 14, 1991, at 12.

century. Part IV will examine the executive branch's use of covert warfare in the past to sidestep constitutional limitations on the President's power to make war. Part V will discuss the enactment of the War Powers Resolution as an attempt by Congress to restore its constitutional controls over the war power. Part VI will focus on problems with the Resolution as demonstrated by its inability to curb executive war making in the last decade. In part VII, I will suggest some revisions that are needed to make the Resolution an effective check on presidential abuse. Finally, this Article concludes that only a revised War Powers Resolution that requires action by both the executive branch and Congress can effectively ensure the establishment of a "new world order" based on peace and mutual trust.

## II. THE WAR POWER<sup>8</sup>

The Constitution of the United States confers on Congress the power "[t]o declare War" and to "grant Letters of Marque and Reprisal."<sup>9</sup> Historical research indicates that the original intent of the Framers of the Constitution was to vest in the Congress the complete power to decide on war or peace, with the sole exception that the President could respond to sudden attack on the United States without congressional authorization.<sup>10</sup>

Statements and writings by the founding fathers support this position with absolute clarity. During the Constitutional Convention, debates in the Committee on Detail centered around an original draft of the war power, which provided that "[t]he Legislature of the United States shall have the . . . power . . . to make War."<sup>11</sup> One member of the Committee, Charles Pinckney, opposed giving this power to Congress, claiming that congressional action would be too slow.<sup>12</sup> Another member, Pierce Butler, said that "he was voting for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support

---

<sup>8</sup> Portions of this argument are taken from F. WORMUTH & E. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* (2d ed. 1989); The Reynolds Lecture, Address by Edwin B. Firmage, University of Utah, Salt Lake City, Utah (Oct. 15, 1987) (Reynolds Lecture); Firmage, *Rogue Presidents & the War Power of Congress*, 11 *GEO. MASON L. REV.* 79 (1988) (presented before the American Bar Association Standing Committee on Law & National Security, Conference on Separation of Powers (Mar. 30, 1988)); Firmage, *Covert War and the Democratic State: An Essay on Ends and Means*, 15 *PRESENT TENSE* 55 (1988).

The term "war power" as used here refers to the power to initiate war in American constitutional law. See WORMUTH & FIRMAGE, *supra*, at vii.

<sup>9</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>10</sup> F. WORMUTH & E. FIRMAGE, *supra* note 8, at 22-31.

<sup>11</sup> 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 167-68 (1911).

<sup>12</sup> *Id.* at 318.

it."<sup>13</sup> Butler's motion received no second, and Butler himself later abandoned this view.<sup>14</sup>

Instead, James Madison and Elbridge Gerry, unsatisfied with the Committee's proposal that the legislature be given the sole "power to make war," moved to substitute the term *declare* for the term *make*, "leaving to the Executive the power to repel sudden attacks."<sup>15</sup> The passage of this motion by a vote of seven states to two, made it clear that Congress would have the power to initiate war, and the power to repel sudden attacks on the United States would be reserved for the President.<sup>16</sup> This view is further substantiated by Thomas Jefferson's insightful statement in 1789 in which he said: "We have already given . . . one effectual check to the dog of war by transferring the power of letting him loose, from the executive to the legislative body, from those who are to spend to those who are to pay."<sup>17</sup>

The power given Congress to "declare War and grant Letters of Marque and Reprisal"<sup>18</sup> entails the power to decide for war declared or undeclared, whether fought with regular public forces or by privateers under governmental mandate. While letters of marque and reprisal originally covered specific acts,<sup>19</sup> by the eighteenth century letters of marque and reprisal referred to sovereign use of private, and sometimes public, forces to injure another state. It was within this context that the Framers of the Constitution vested Congress with the power to issue letters of marque and reprisal.<sup>20</sup> Clearly, only Congress has the constitutional power to wage war whether by private parties or by the United States armed forces.

### III. THE EROSION OF CONSTITUTIONAL WAR POWER

A growing sense of globalism and the increasing international power of the United States made enforcing constitutional constraints against reckless war making more difficult during the twentieth century.<sup>21</sup> With the emergence of a global foreign policy, influential

---

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See *id.* at 313, 318; F. WORMUTH & E. FIRMAGE *supra* note 8, at 18. Whether the vote was actually seven to two, or eight to one is unclear from the records of the Federal Convention. See M. FARRAND, *supra* note 11, at 313-14, 318.

<sup>17</sup> XV T. JEFFERSON, *THE PAPERS OF THOMAS JEFFERSON* 397 (J. Boyd ed. 1978), quoted in F. WORMUTH & E. FIRMAGE, *supra* note 8, at 179.

<sup>18</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>19</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>20</sup> Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986).

<sup>21</sup> See F. WORMUTH & E. FIRMAGE, *supra* note 8, at 180.

thinkers began to advocate a change in the balance of the war powers away from congressional control and toward vesting more power in the President.<sup>22</sup> Any doubts about a change in the separation of the war power were ended by the development and use of atomic weapons initiated with the dropping of "Fat Man" and "Little Boy." Full-scale war was no longer a viable policy tool as some had envisioned.<sup>23</sup> The development of mass destruction weapons and sophisticated delivery systems, combined with the growing economic and defensive interdependence of nations worldwide, made war an unacceptable alternative to diplomacy.

The development of nuclear weapons and the increasing international interdependence of nations, unfortunately, did not lead to an era of world peace. The rise of Communism in Europe was perceived as threatening to swallow the world including the United States. American policy makers, in an effort to control what they perceived as a global security risk, began looking at the entire free world as "American soil" for the purposes of national security.<sup>24</sup>

The U.S. Government reflected this change in perspective in rather Orwellian fashion by renaming the Department of War the Department of Defense and by creating the National Security Council (NSC). The executive branch's growing sense of fear was epitomized by NSC Paper 68, which, by forecasting the global situation as an "indefinite period of tension and danger,"<sup>25</sup> in effect, created a psychological state of war. Consequently, the fear of being attacked by a "diabolically aggressive" opponent has become a driving force of war in Korea, Vietnam, Lebanon, Grenada, Nicaragua, Libya, Panama, and the Persian Gulf States.<sup>26</sup> Few of these small, far flung places ever posed a real military threat to the United States, yet, in each instance, the executive branch perceived that "defensive" military action was required and chose to respond with military engagements.

Another result of our fearful perceptions was the dangerous erosion of the constitutional restraints on war making. During the Korean War, the executive branch began usurping congressional war power by invoking the Commander-in-Chief clause of the Constitution.

---

<sup>22</sup> Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1398-99 (1989) (citing W. Wilson, *Constitutional Government in the United States* 59 (1908)).

<sup>23</sup> C. CLAUSEWITZ, *ON WAR* 86-89 (M. Howard & P. Paret trans. 1976).

<sup>24</sup> See Lobel, *supra* note 22 at 1399-1407.

<sup>25</sup> *Id.* at 1400-01 (quoting S. AMBROSE, *RISE TO GLOBALISM* 190 (1971)).

<sup>26</sup> See White, *Psychology and Alternative Security: Needs, Perceptions, and Misperceptions*, in *ALTERNATIVE SECURITY: LIVING WITHOUT NUCLEAR DETERRENCE* 180-81 (B. Weston ed. 1990).

With the development of a nuclear first strike capability by the Soviet Union, the power of the Commander-in-Chief clause reached its zenith. Senator Barry Goldwater argued that the President required the ability to launch a first strike when necessary to defend our nation from nuclear attack.<sup>27</sup> However, such a position would render the War Clause of the Constitution ineffectual because the President would then have the power to authorize *any* use of military force by making a determination as to what is "necessary," and what constitutes a "defense."

Despite the obvious constitutional dangers of giving the President such broad discretion to make war, advocates of an Executive war power have been successful in gaining support for their position by relying on the Commander-in-Chief clause of the Constitution. They claim the Commander-in-Chief clause draws its power from historical precedent and assert that throughout U.S. history the executive branch initiated acts of war without congressional authorization.<sup>28</sup> To support this view, the State Department compiled an official list of 137 instances where it asserted that the President, as the Commander-in-Chief of the Armed Forces, committed acts of war on his own authority beyond the borders of the United States.<sup>29</sup>

A close examination of the listed examples, however, discredit the State Department's conclusion. Eight of the acts involved enforcement of the law against piracy, for which no congressional authorization is required. Sixty-nine of the acts, many of which were statutorily authorized, were landings to protect American citizens. Twenty of the acts which, although illegal, were not acts of war so long as the United States claimed the territory, concerned invasions of foreign or disputed territories. Six of the acts were minatory demonstrations without combat; another six involved protracted occupation of various Caribbean states, which occupations were authorized by treaty. At least one of the acts was an act of naval self-defense, which is justified under both international and national law.<sup>30</sup> Even in the one or two dozen instances where the President has acted without con-

---

<sup>27</sup> See Goldwater, *The Presidents' Constitutional Primacy in Foreign Relations and National Defense*, 13 VA. J. INT. L. 463, 473 (1973).

<sup>28</sup> See Monaghan, *Presidential War-Making*, 50 B.U.L. REV. 19, 23-27 (1970).

<sup>29</sup> F. WORMUTH & E. FIRMAGE, *supra* note 8, at 144-46 (citing DEP'T OF STATE HISTORICAL STUDIES DIV., ARMED ACTIONS TAKEN BY THE UNITED STATES WITHOUT A DECLARATION OF WAR, 1789-1967 (1967)); Secretary of State James Baker and Defense Secretary Cheney in testimony before Congress on January 10, 1991 noted that armed force has been used more than 200 times, and that war had been declared only five times. See 137 CONG. REC. S130-S135 (daily ed. Jan. 10, 1991).

<sup>30</sup> See F. WORMUTH & E. FIRMAGE, *supra* note 8, at 144-51.

gressional authorization, he has done so by relying, however correctly or incorrectly, on either a statute, a treaty, or international law, and never on his power as Commander-in-Chief or as the chief executive.<sup>31</sup>

Thus, by invoking the Commander-in-Chief clause of the Constitution and by citing a list of debatable instances where the President committed acts of war on his own authority beyond the borders of the United States, the executive branch has slowly eaten away at Congress' power to control when the country goes to war. In fact, neither the Constitution nor historical precedent empower the President to initiate a state of war or engage in an act of war on his own authority beyond the borders of the United States. The Commander-in-Chief clause was framed by a Constitutional Convention that understood "Commander-in-Chief" to mean Congress' general.<sup>32</sup> Textually, the presidential war-making power is strictly limited to defending against sudden attack<sup>33</sup> and its empowerment in the late twentieth century represents a dramatic shift in constitutional war making power.

#### IV. COVERT WAR MAKING BY THE PRESIDENT

The development of covert warfare has been one of the adverse effects of the nuclear era. Since drawing a nuclear opponent into open war presented unacceptable consequences, both the U.S. and the U.S.S.R. employed other means to carry out their policies. Both states turned to covert military action as one method of achieving its policy goals. Since the dawn of the nuclear era, this nation has conducted full-scale war; initiated coups; mined harbors; encouraged political assassinations; aided insurrection and sabotage; trained, equipped, and set loose brigands and terrorists; and responded to terrorist acts against our citizens by Executive approved reprisals.<sup>34</sup> All of these activities were carried out under *Presidential directive*, in violation of the Constitution, in disregard of the laws and prerogatives of Congress, and in open defiance of international law and morality. Both the scope and the notoriety of these activities conducted by the Executive has changed the meaning of covert war from "secret war" to "formally unacknowledged war."<sup>35</sup>

---

<sup>31</sup> *Id.* at 151.

<sup>32</sup> *Id.* at 107-112.

<sup>33</sup> *Id.* at 133-51.

<sup>34</sup> See F. WORMUTH & E. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER HISTORY AND LAW* 253-69 (2d ed. 1989).

<sup>35</sup> See S. REP. No. 755, 94th Cong., 2nd Sess. 131 (1977) (defining covert action as clandestine

Covert war by the Executive is not clearly authorized by any congressional statute.<sup>36</sup> The National Security Act of 1947,<sup>37</sup> usually relied on by Presidents as justification for their illegal acts, makes no mention of covert action or paramilitary operations.<sup>38</sup> While the 1947 Act provides for gathering and analyzing intelligence, it also authorizes the CIA to perform only "such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct."<sup>39</sup> On its face, this phrase does not authorize paramilitary action, and most certainly does not authorize covert actions unrelated to the acquisition of intelligence.

The Intelligence Authorization Act for 1981,<sup>40</sup> on its face seems to authorize the president to engage in limited paramilitary operations without congressional control.<sup>41</sup> However, except in extraordinary circumstances, the director of the Central Intelligence Agency (CIA) must give prior notice to the Senate and House Select Committees on Intelligence when engaging in covert operations or significant intelligence operations abroad, including CIA covert operations.<sup>42</sup> The president need not give prior notice in extraordinary circumstances but must make a subsequent report to the leadership of each committee and explain why prior notice was not given.<sup>43</sup> Furthermore, the Act should be read as a supplement to constitutional and preexisting

---

activity designed to influence foreign governments, events, organizations or persons in such a way that the involvement of the United States government is not apparent). Today, covert operations cover a wide range of activities in foreign countries including political advice to foreign persons or organizations, financial support and assistance to foreign political parties, covert propaganda, and the direction of paramilitary operations designed to overthrow or support a foreign regime. Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1049 (1986).

<sup>36</sup> But see Intelligence Authorization Act, Fiscal Year 1990, Pub. L. No. 101-193, § 103, 103 Stat. 1701 (codified as amended at 50 U.S.C. § 413(a)(1) (1990)) (may permit the executive to conduct covert operations without congressional approval). The Hughes-Ryan Amendment was the predecessor of the Intelligence Authorization Act of 1990, clearly authorized certain covert operations. 22 U.S.C. § 2422 (a) (1990); see also *infra* notes 39-46 and accompanying text.

<sup>37</sup> Pub. L. No. 80-253, ch. 343, 61 Stat. 495 (1947) (codified as amended in scattered sections of 5, 10, and 50 U.S.C.) (established the CIA, and was seen as authorizing cover action).

<sup>38</sup> See S. REP. No. 755, 94th Cong., 2nd Sess. 476-92 (1977) (discussing whether the 1947 statute authorized the CIA to conduct covert action).

<sup>39</sup> 50 U.S.C. § 403(d)(5) (1990).

<sup>40</sup> 50 U.S.C. § 413(a)(1) (1990).

<sup>41</sup> See 50 U.S.C. § 413(a)-(b) (1990).

<sup>42</sup> See 50 U.S.C. § 413(a)(1) (1990).

<sup>43</sup> See *id.* (the committees must be kept "fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of . . . the United States"); Covert War, *supra* note 20, at 1094-96.

statutory limits on the executive use of covert operations.<sup>44</sup> The statute clearly states that it applies only "to the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government."<sup>45</sup> If the Act is read as a congressional delegation authorizing the President to initiate covert paramilitary operations, it is an unconstitutional delegation of congressional power.<sup>46</sup> The Constitution, on its face, vests in Congress alone the power to declare war.<sup>47</sup>

Nonetheless, the United States Government carries out various types of covert activity, including: intelligence gathering, indirect manipulation, and military intervention. Intelligence gathering and interpretation of intelligence is clearly within the presidential power under the authorizing statute of Congress.<sup>48</sup> Some of this activity will occur by covert means, and short of war, violence, or violation of international law or congressional act, this activity is within presidential power. Second, and more troubling conceptually, is covert action beyond intelligence-gathering but short of war, acts of war, or violence and illegality prohibited by statutes of Congress and international law. These are indirect acts of manipulation against another nation's media, electoral and governmental processes, or economy. If these act are deemed "important to the national security of the United States," they may arguably be within the President's authorized power.<sup>49</sup>

The last category, military intervention, is unequivocally within the war power of Congress and includes military aspects of covert war, reprisals, and other acts of violence. These acts usually share one or both of two criteria: (1) violence at such a level as to be forbidden by domestic and international law; and (2) direct intervention in another state designed to affect that state's sovereign autonomy.<sup>50</sup> Therefore, such activity is prohibited from presidential undertaking

---

<sup>44</sup> Lobel, *supra* note 35, at 1094-95.

<sup>45</sup> 50 U.S.C. § 413(a) (1990).

<sup>46</sup> Highsmith, *Policing Executive Adventurism: Congressional Oversight of Military and Paramilitary Operations*, 19 HARV. J. LEGIS. 327 (1982).

<sup>47</sup> *Id.*; see Lobel, *supra* note 35, at 1096.

<sup>48</sup> The CIA may expend no funds for operations abroad beyond pure intelligence gathering unless the president finds such an operation to be important to the national security of the United States. 22 U.S.C. § 2422 (1990).

<sup>49</sup> 22 U.S.C. § 2422 (1990).

<sup>50</sup> For example, in 1984 Nicaragua filed the action against the United States before the International Court of Justice which addressed questions of the legality under international law of private forces trained, organized, financed, or supplied by one state to attack another. See *Concerning Military and Paramilitary Activities In And Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 111 (Merits).

without congressional authority under Congress' constitutional power to "grant letters of marque and reprisal."<sup>51</sup> Even with congressional authorization, a large part of such activity is prohibited by international law.<sup>52</sup> Where a paramilitary action violates international law by using force against a foreign state, it falls within the Congress' exclusive control under the clause giving only Congress authority to grant letters of marque and reprisal.<sup>53</sup>

Conclusions can be drawn and lessons learned from the United States' experience with covert action since World War II. First, is an observation about the tension between a democratic society and covert operations. Decisions made openly in public debate provide the foundation of a democratic state.<sup>54</sup> The rationale for public debate is particularly compelling when questions of war and peace are at issue.<sup>55</sup> Consensus, so vital in the establishment and the conduct of foreign policy, can hardly occur when the executive branch deliberately keeps Congress ignorant of its covert activities. Covert action precludes debate and takes power away from the people.

Admittedly, open and public debate of paramilitary actions is in

---

<sup>51</sup> See Lobel, *supra* note 35, at 1059-1069.

<sup>52</sup> See *Military and Paramilitary Activities In And Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. Merits 14, 111 (June 27). In *Nicaragua v. U.S.*, the World Court listed certain activities that constitute violations of international law and stated:

(1) mere monetary aid to insurgents will not normally be considered an unlawful use of force under either standard, but will at most be considered unlawful intervention; (2) arming and training guerrillas will meet the third standard of the unlawful use of force against another country; and (3) the provision of arms or logistical or other support to guerrillas, standing alone, does not meet the second and highest standard of aggression involving an armed attack on another country. What remains unclear is what acts of a state will meet the United Nation standard of aggression involving an armed attack. That standard prohibits both the sending out and substantial participation in activities of armed bands activities against another state. While correctly finding against the United States claim that Nicaragua's provision of arms to El Salvador rebels constituted an armed attack, the court did not address Nicaragua's claim that the United States was "substantially participating" in the activities of the *contras*. The court instead rested its finding on the United States "participation" in acts of force involving the provision of arms and training. The court did find that the "contra force has, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military or paramilitary activities without the multi-faceted support of the United States," a finding the court termed "fundamental in the present case." *Id.* at 111.

Lobel, *supra* note 35, at 1057.

<sup>53</sup> THE FEDERALIST NO. 44, at 318 (J. Madison) (J. Cooke ed. 1961); see Lobel, *supra* note 35, at 1055-1058.

<sup>54</sup> Lobel, *supra* note 35, at 1078-1085.

<sup>55</sup> "The Framers gave the power to declare war and to issue letters of marque and reprisal to Congress to ensure that hostilities using private or public forces would not be initiated without public debate." Lobel, *supra* note 35, at 1078.

fundamental conflict with the perceived need for secrecy when covert actions are taken. Proponents of strong presidential leadership in foreign policy must distinguish between covert action kept secret from an opponent and covert action kept secret from Congress.<sup>56</sup> The first form of secrecy is a legitimate exercise of security power, the second form is nothing less than a repudiation of democracy.<sup>57</sup> Moreover, the Framers' purpose in giving Congress the authority to decide whether to use force was to ensure that hostilities would not be initiated without public debate. James Madison stated that, when American interests require the use of armed force, such hostilities should be undertaken " 'not in an underhand and illicit way, but in a way consistent with the laws of war and becoming our national character.' " <sup>58</sup> Currently, Congress plays almost no role, with "notification" at best going to a select few in Congress.<sup>59</sup> Even unilateral action by the Executive runs the risk of breakdown between the White House and the Departments of State and Defense. This danger was realized during the Iran-Contra affair where Executive control over the operations of clandestine activity went directly from the NSC to the CIA, excluding or ignoring the advice of Cabinet officers at State and Defense. The obvious risks of open communication are preferable to the corruption of our government that is inevitable in covert warfare.

The United States' record of covert war and acts of war is one of short-term embarrassment and long-term disaster. Any advantage that is achieved through military actions are overwhelmed by the violence done to other countries and to the United States. No system of congressional oversight realistically can meet this challenge. If acts of violence and war are contemplated, the country should debate the options in the open. The obvious risks of open communication are to be preferred over the inevitable corruption of the ideals and safeguards which accompany secret, covert warfare.

---

<sup>56</sup> See generally D. HOFFMAN, *GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS* (1981).

<sup>57</sup> See 128 CONG. REC. H9158 (daily ed. Dec. 8, 1982) (remarks of Rep. Bonoir stating that executive initiation of covert war "commit[s] us to a specific foreign policy that has never been openly defended and supported, and whose outcome cannot be guided by our own democratic institutions."); see also Lobel, *supra* note 35, at 1097 (citing *Should the U.S. Fight Secret Wars?*, HARPER'S MAGAZINE, Sept. 1984, at 37. (remarks of Morton Halperin stating that covert action commits the United States to warfare without public debate)).

<sup>58</sup> ROBERTSON, *FRANCISCO DE MIRANDA AND THE REVOLUTIONIZING OF SPANISH AMERICA*, H.R. Doc. No. 1282, 60th Cong., 2d Sess. 364 (1909) (quoting James Madison).

<sup>59</sup> The director of the CIA is required to give the Senate and House Select Committees on Intelligence prior notice of significant intelligence operations abroad. 50 U.S.C. § 413(a)(1) (1990).

## V. THE WAR POWERS RESOLUTION

The War Powers Resolution<sup>60</sup> was enacted as a result of the American experience in the Vietnam War. The Vietnam War was initiated as one more exercise in the policy to "contain" communism. The United States became increasingly involved in the ending of colonial rule in Southeast Asia, and in 1964 the Congress passed The Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia ("Gulf of Tonkin Resolution") authorizing the President, as he determined, "to take all necessary steps, including the use of armed force" to assist South Vietnam or other Southeast Asian allies requesting our assistance.<sup>61</sup> The United States' involvement in Vietnam steadily increased until full scale war was being waged. Eventually, in 1971 the Gulf of Tonkin Resolution was repealed calling into question the President's authority to conduct the war. After grappling with the consequences of the Gulf of Tonkin Resolution, and to avoid similar hasty and ambiguous delegations of the war power in the future, Congress enacted the War Powers Resolution.<sup>62</sup>

Congress' first statutory attempt to return to a constitutional model of war power was the National Commitments Resolution of 1969,<sup>63</sup> which stated that the use of armed forces in foreign lands required approval by both houses of Congress through "treaty, statute, or concurrent resolution." The Senate Foreign Relations Committee stated that the National Commitments Resolution was a response to the "passing of war power from Congress to the Executive [that had occurred] after WWII" and that the resolution amounted to a "restoration of constitutional balance."<sup>64</sup>

However, the Nixon Administration ignored the National Commitments Resolution, and in 1970 and 1971 the President expanded military activity into Laos and Cambodia without any approval from Congress.<sup>65</sup> Congress responded by drafting a more powerful resolu-

---

<sup>60</sup> The War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (1988)).

<sup>61</sup> H.R. J. Res. 1145, 88th Cong., 2d Sess., 78 Stat. 384 (1964). The Resolution provided that "the Congress approves and supports the determination of the President . . . to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." *Id.*

<sup>62</sup> See Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877 (1990); Ely, *Suppose Congress Wanted A War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1392 (1988).

<sup>63</sup> S. Res. 85, 90th Cong., 1st Sess., 115 CONG. REC. 17,245 (1969).

<sup>64</sup> S. Rep. No. 129, 91st Cong., 1st Sess. 15, 30 (1969).

<sup>65</sup> H. KISSINGER, WHITE HOUSE YEARS 496 (1979).

tion. After three years of rigorous debate, Congress submitted the War Powers Resolution to President Nixon in 1973 and subsequently overrode the President's veto to sign it into law on November 7, 1973.<sup>66</sup>

The intention of the Resolution as stated in section 1541 is "to fulfill the intent of the Framers of the Constitution of the United States . . . ."<sup>67</sup> The plain language of section 1541 ensures that any ambiguity in the Resolution itself will be resolved in favor of the Constitutional Framers' intent. In this respect, as noted above, the Framers' intent is clear: The power to declare war is vested in Congress.<sup>68</sup> The Framers also made it clear that Congress must authorize letters of marque and reprisal, a form of private war, which indicates that they intended Congress to authorize all military operations short of full scale war as well.<sup>69</sup> It is also clear that the Framers' intended that the President remain Commander-in-chief of the army and navy once hostilities commenced, and that he have the power to repel sudden attacks.<sup>70</sup> James Madison pointed out that the power of the Commander-in-Chief was to "conduct a war" and did not involve the decision of "whether a war ought to be commenced, continued, or concluded."<sup>71</sup> Any interpretation of the War Powers Resolution must, therefore, consider its provisions in light of the initial intent of the Framers.

Consistent with the intent of the Framers, the War Powers Resolution specifically limits the President's power as Commander-in-Chief to introduce U.S. Forces into imminently hostile situations. The Executive interprets the term "imminent hostilities" narrowly to avoid triggering the requirement under War Power Resolution. However, the House committee report clearly indicates that imminent hostilities include "any state of confrontation in which there is a clear and present danger of armed conflict."<sup>72</sup>

The President can only "introduce" troops "pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or

<sup>66</sup> The War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1990)).

<sup>67</sup> 50 U.S.C. § 1541.

<sup>68</sup> U.S. CONST. art. I, § 8, cl. 11; see *supra* notes 8-20 and accompanying text.

<sup>69</sup> *Id.*; see also Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1046, 1060-69 (1986); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1170 (1833).

<sup>70</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION 258, 292, 318-19 (M. Farrand ed. 1911).

<sup>71</sup> 6 THE WRITINGS OF JAMES MADISON 148 (G. Hunt ed. 1906).

<sup>72</sup> H.R. REP. No. 287, 93d Cong., 1st Sess. 7 (1973).

possessions, or its armed forces."<sup>73</sup> In section 2(c) of the Resolution, Congress has virtually reiterated the limited Commander-in-Chief powers set forth in the Constitution.<sup>74</sup>

However, section 2(c) of the Resolution goes beyond merely limiting Executive war making. It also requires the President to inform Congress and obtain approval for any and all military activity. Section 2(c) states: "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 . . . ."<sup>75</sup> When troops are deployed the President must, within forty-eight hours, formally report the circumstances and extent of deployment.<sup>76</sup> Section 5(b) of the Resolution places a time limit on troop deployment requiring that, "within sixty calendar days after a report is submitted or is required to be submitted . . . the President shall terminate any use of United States Armed Forces" unless the Congress has specifically authorized the action, extended the sixty day period, or is unable to meet because of an attack on the United States.<sup>77</sup> The President may extend the sixty day period for an additional thirty days to insure the safety of the United States Armed Forces during the withdrawal. The sixty/ninety day clock begins to run when the President submits the report or is required to submit the report under section 4(a)(1).<sup>78</sup> If Congress takes no action, the terms of the Resolution automatically take effect requiring the President to withdraw the troops.<sup>79</sup>

Section 5(c) of the Resolution gives Congress the power, by concurrent resolution, to direct the President to remove troops committed to hostilities within the sixty/ninety day period.<sup>80</sup> This provision acts like a legislative veto, which raises questions as to its constitutionality in light of the Supreme Court's decision in *INS v. Chadha*.<sup>81</sup> In *Chadha*, the Court found the use of a legislative veto to be an uncon-

---

<sup>73</sup> 50 U.S.C. § 1541(c).

<sup>74</sup> See *supra* notes 8-20 and accompanying text.

<sup>75</sup> 50 U.S.C. § 1541(c), 1542.

<sup>76</sup> 50 U.S.C. 1543(a)(1) (1990). The reports include: (1) why troops were deployed; (2) constitutional or legislative authority relied on in deploying the troops; and (3) the scope and duration of the deployment. *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the Subcommittee on International Security and Scientific Affairs of the House Committee on International Relations*, 94th Cong., 1st Sess. 69 (1975).

<sup>77</sup> 50 U.S.C. § 1544(b) (1990).

<sup>78</sup> 50 U.S.C. § 1544(b) (1990).

<sup>79</sup> See 119 CONG. REC. 33,550 (1973) (Senator Javits discusses § 1544).

<sup>80</sup> 50 U.S.C. § 1544(c) (1990).

<sup>81</sup> 462 U.S. 919 (1983).

stitutional infringement on the presidential veto power.

Finally, to prevent the President from using the War Powers Resolution as a sixty day delegation of the war power from Congress, the Resolution states that "nothing in this joint resolution shall be construed as granting any authority to the President . . . which authority he would not have had in the absence of this joint resolution."<sup>82</sup>

The War Powers Resolution became law in an attempt to restore congressional governance over the decision for war or peace. The Framers of the Constitution clearly intended for Congress to possess the sole power to decide for war, whether declared or undeclared, waged in secret or openly acknowledged, fought with the public forces of this nation or by private mercenaries. In granting the war power solely to Congress, the Framers' fundamentally accepted the notion that to give the President such a power would make him an "elective Monarchy," that the condition of peace—not war—was the norm, and that the Congress as the representatives of the people was to have the power to preserve the norm, Peace.<sup>83</sup> The goal of the War Powers Resolution was to return this nation to this peacetime status quo.

## VI. THE PROBLEMS WITH THE RESOLUTION

The late seventies provided no major test of the functional strength of the War Powers Resolution, perhaps due to a prolonged period of psychological recovery from the Vietnam experience. However, this changed with the election of Ronald Reagan. President Reagan revitalized the machinery of covert war and provided several opportunities for the War Powers Resolution to demonstrate its ability to check Executive war making in the 1980s.<sup>84</sup> The Resolution proved unable to meet the President's challenge.

President Reagan effectively reduced the War Powers Resolution to a political bargaining chip during the U.S. Marine deployment in Beirut, Lebanon in 1982-83. The President had ordered U.S. troops into Beirut in September of 1982, and by September of 1983 the Marines were suffering casualties, receiving hostile-fire pay, and car-

---

<sup>82</sup> 50 U.S.C. § 1547(d)(2).

<sup>83</sup> See F. WORMUTH & E. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 17-18, 30 (2d ed. 1989).

<sup>84</sup> *Id.* at 247-265 (discussing the use of advisors in El Salvador; covert war in Honduras, Guatemala, Costa Rica and Nicaragua; military activities in Grenada; and placing U.S. Marines in Lebanon); see also *Persian Gulf and Congress: A Chronology*, 45 CONG. Q. WEEKLY REP. 2597 (1987) (discussing the events of the reflagging of Kuwaiti tankers in the Persian Gulf).

rying out helicopter airstrikes.<sup>85</sup> Throughout the engagement, the President never mentioned the hostilities and never filed a report under section 4(a)(1) of the War Powers Resolution.<sup>86</sup> The President only agreed to file a War Powers report if Congress agreed to authorize continued deployment of forces in Lebanon for up to eighteen months.<sup>87</sup> Members of Congress were reluctant to condemn the actions and did not move to invoke the provisions of the War Powers Resolution.<sup>88</sup> Congress, therefore, gave its de facto approval, and eventually a suicide bomber killed 241 Marines.

The Lebanon deployment indicated that provisions of the War Powers Resolution would not be voluntarily invoked by the President, and that Congress would have a hard time politically if it tried to enforce the provisions. If the President could successfully use compliance with the Resolution as a bargaining chip to manipulate congressional approval, then the War Powers Resolution was already functionally powerless. Lebanon also pointed out the difficulty in determining when "hostilities" or "imminent hostilities" are present, and what actions would start a running of the sixty/ninety day clock if the President failed to file a report under section 4(a)(1). In the compromise reached between Congress and President Reagan over Lebanon, the "clear indication" of "imminent hostilities" under section 4(a)(1) were satisfied when four Marines were killed and 38 others wounded.<sup>89</sup>

Further erosion of the War Powers Resolution was soon to follow. On October 25, 1983, President Reagan ordered an invasion of the tiny island of Grenada and did not inform Congress until the next day.<sup>90</sup> Troops eventually secured the island on October 28. After the Administration guaranteed that troops would be withdrawn within sixty days, both houses of Congress failed to invoke the sixty day

---

<sup>85</sup> See *Multinational Forces in Lebanon: Hearing before the Senate Comm. on Foreign Relations*, 98th Cong., 1st Sess., (1983).

<sup>86</sup> See President's Letter to the Speaker of the House and the President Pro Tempore of the Senate, 18 WEEKLY COMP. PRES. DOC. 1232 (Sept. 29, 1982); President's Letter to the Speaker of the House and the President Pro Tempore of the Senate, 19 WEEKLY COMP. PRES. DOC. 1186 (Aug. 30, 1983).

<sup>87</sup> Zablocki, *The War Powers Resolution: Its Past Record and Future Promise*, 17 LOY. L.A.L. REV. 579, 593-594 (1984).

<sup>88</sup> F. WORMUTH & E. FIRMAGE, *supra* note 83, at 264-65.

<sup>89</sup> Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, § 2(b), 97 Stat. 805 (Oct. 12, 1983).

<sup>90</sup> See President's Letter to the Speaker of the House and the President Pro Tempore of the Senate, 19 WEEKLY COMP. PRES. DOC. 1493 (Oct. 25, 1983); Rubner, *The Reagan Administration, the 1973 War Powers Resolution, and the Invasion of Grenada*, 100 POL. SCI. Q. 627 (1986).

time clock by concurrent resolution.<sup>91</sup>

The Grenada invasion pointed out a second problem with the functioning of the War Powers Resolution. Despite the specific language in the Resolution stating that it does not delegate any power to the President beyond that already granted by the Constitution,<sup>92</sup> the Resolution served as a grant of "quick" war power to the President. The willingness of Congress to ignore the War Powers Resolution in situations where Executive war making is immediately successful, such as in Grenada, amounts to a concession of sixty day war power to the President. This is clearly an unconstitutional delegation of congressional war power to the President.

The Gulf of Sidra incident of 1986 exposed a third problem with the War Powers Resolution. Libya's Colonel Qadhafi had earlier declared a "line of death" across the Gulf of Sidra and threatened to attack any foreign military forces crossing this line. In March of 1986, the United States challenged Qadhafi with 375 sorties across "the line" and the positioning of a naval task force inside the Gulf of Sidra. As expected, Qadhafi opened fire on U.S. naval forces and the U.S. responded by destroying Libyan land and naval targets.<sup>93</sup>

The same day hostilities began, March 24, 1986, the Chairman of the House Subcommittee on Foreign Relations urged President Reagan to comply with the War Powers Resolution. The President responded by declaring that hostilities were not "imminent" in this situation.<sup>94</sup> This exchange between President Reagan and Chairman Fascell illustrates the executive branch's ability to dodge Resolution compliance by manipulating the term "imminent hostilities." In fact, throughout the history of the War Powers Resolution, the President has never been forced to adhere to a congressional determination of "imminent hostilities."<sup>95</sup>

The Reagan administration also considered the reflagging and escort of Kuwaiti oil tankers in the Persian Gulf as a situation where United States forces were not subject to "hostilities or imminent hos-

---

<sup>91</sup> See generally Quigley, *The United States Invasion of Grenada: Stranger Than Fiction*, 18 U. MIAMI INTER-AMER. L. REV. 271 (1986).

<sup>92</sup> 50 U.S.C. § 1547(d)(2).

<sup>93</sup> See *Hearings Before the Subcomm. on Arms Control, International Security and Science of the House Comm. on Foreign Affairs*, 99th Cong., 2d Sess. 40, War Powers, Libya, and State-Sponsored Terrorism (Comm. Print 1986) (Libya Hearings).

<sup>94</sup> See Letter from W. Ball (Assistant to President Reagan) to Chairman Fascell (March 26, 1986), reprinted in *Libya Hearings*, supra note 93, at 209.

<sup>95</sup> See generally Comment, *A Tug of War: The War Powers Resolution and the Meaning of "Hostilities"*, 15 PAC. L.J. 265 (1984) (asserting that a broad definition of hostilities would prevent Executive preemption of War Powers Resolution).

tilities," despite the fact that (1) an Iraqi attack jet fired two Exocet missiles at the *USS Stark* assigned to the Gulf killing thirty-seven navy crewmen;<sup>96</sup> (2) a U.S. fighter plane fired two missiles at a potentially threatening Iranian aircraft;<sup>97</sup> (3) American helicopters fired and destroyed mine-laying Iranian aircraft in self-defense;<sup>98</sup> (4) three U.S. helicopters fired on four Iranian patrol boats after the boats fired on a helicopter;<sup>99</sup> (5) an Iranian Silkworm missile hit a reflagged tanker off the Kuwaiti coast and American destroyers retaliated by attacking two Iranian off-shore oil platforms;<sup>100</sup> (6) an Iranian mine struck an American frigate and the U.S. attacked two more oil platforms;<sup>101</sup> and (7) the *USS Vincennes* shot down an Iranian airbus thought to be an F-14 fighter, killing 290 civilians.<sup>102</sup> Although the President consulted with congress before conducting military retaliations, he consistently stated that the troops escorting the tankers were not subject to "hostilities or imminent hostilities."<sup>103</sup>

President Bush has also manipulated the "imminent hostilities" language to avoid the War Powers Resolution. In May, 1989, President Bush responded to a rapidly escalating situation in Panama by sending 2,000 combat ready troops into the canal zone. Although this certainly qualified as an introduction of U.S. troops into an imminently hostile situation from an objective viewpoint, he did not comply with the War Powers Resolution at that time. The subsequent invasion of Panama on December 20, 1989, demonstrated the continued use of the War Powers Resolution as a delegation of "quick" war power to the Executive. The Panama invasion, like the Grenada invasion, was accomplished quickly, and as with Grenada, Congress did not invoke the War Powers Resolution.<sup>104</sup>

While these military events of the 1980s point out the shortcomings of the War Powers Resolution in its present form, the most glaring example of the failure of the Resolution has been the 1990-91 U.S. military intervention in the Persian Gulf. After Iraq invaded

---

<sup>96</sup> Wash. Post, May 18, 1987, at A1, col. 5.

<sup>97</sup> Wash. Post, Aug. 11, 1987, at A1, col. 6.

<sup>98</sup> *U.S. Takes Defensive Action in the Persian Gulf*, DEP'T ST. BULL., Nov. 1987, at 43-44.

<sup>99</sup> Wash. Post, Oct. 9, 1987, at A1, col. 4.

<sup>100</sup> *Persian Gulf and Congress: A Chronology*, 45 CONG. Q. WEEKLY REP. 2597 (1987).

<sup>101</sup> President Reagan's Letter to the Congress, April 19, 1988, reprinted in DEP'T ST. BULL., June 1988, at 36.

<sup>102</sup> N.Y. Times, July 4, 1988, at A4, col. 1.

<sup>103</sup> For a detailed examination of the Persian Gulf Reflagging operation see Comment, *The War Powers Resolution and the Persian Gulf: A Controversial Statute Proves Unworkable*, 8 WIS. INT'L L.J. 453, 464-485 (1990).

<sup>104</sup> See Rosenthal, *U.S. Forces Gain Wide Control in Panama*, N.Y. Times, Dec. 21, 1989, § A, at 1, col. 1.

Kuwait on August 2, 1990, President Bush unilaterally ordered a massive mobilization of combat ready troops and equipment to the Kuwaiti border.<sup>105</sup> This massive insertion of troops into the Saudi-Kuwaiti frontier, code-named Operation Desert Shield, should have triggered several components of the War Powers Resolution. First, the President should have been forced to report to Congress *in accordance* with the War Powers Resolution *prior* to sending troops or immediately afterwards. Second, the sixty day clock of the Resolution should have been *automatically* triggered. Third, once sixty days had elapsed Congress should have assumed control of the decision to continue massing for an offensive or to maintain a purely defensive force in the Gulf. However, the War Powers Resolution was again not functioning in the Gulf. Apparently, the credibility of the Resolution has been destroyed with the excesses of the past ten years. The incidents leading up to the war in the Gulf point out the need to revise the War Power Resolution to save it from presidential disregard and congressional indifference.

#### VII. CHANGES IN THE WAR POWERS ACT

Ideally, the legislative and executive branches should confer, consult and decide for war under the foreign relations powers given both political branches by the Framers. Under such circumstances, there would be no need for a War Powers Resolution. However, history and experience repudiate this ideal.<sup>106</sup> Indeed, some commentators and politicians doubt that the enormous power that has inured to the President over the past decades can be curtailed in any way short of a constitutional amendment.<sup>107</sup>

---

<sup>105</sup> Gordon, *Iraq Army Invades Capital of Kuwait in Fierce Fighting*, New York Times, Aug. 2, 1990, § A, at 1, col. 6; *Excerpts From Bush's Remarks on His Order to Enlarge U.S. Gulf Force*, New York Times, Nov. 8, 1990, § A, at 12, col. 1; Gordon, *Bush Sends New Units to Gulf to Provide 'offensive option'*; *U.S. Force Could Reach 380,000*, New York Times, Nov. 9, 1990, § A, at 1, col. 6.

<sup>106</sup> One commentator counted 199 military engagements that have occurred without a declaration of war. See Emerson, *War Powers Legislation*, 74 W. VA. L. REV. 53, 88-110 (1971); Emerson, *War Powers Legislation*, 74 W. VA. L. REV. at 367-68 (1972); see also *House Comm. on Foreign Aff., Background Information on the Use of United States Armed Forces in Foreign Countries*, H.R. Doc. No. 16, 91st Cong., 2d Sess. 50-57 (1970). For categorization of these undeclared wars, see E. KEYNES, *UNDECLARED WAR* 91 (1982); F. WORMUTH & E. FIRMAGE, *supra* note 83, at 125-63.

<sup>107</sup> See, e.g., Comment, *A Bicentennial View of the Role of the Congress, the President, and the Judiciary in Regard to the Power Over War*, 7 PACE L. REV. 695, 751-55 (1987) (proposing amendment to Commander-in-Chief clause "subject to any and all reasonable restrictions which may be imposed by Congress"); Goldstein, *The Failure of Constitutional Controls Over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment*, 40 STAN. L. REV. 1543 (1988).

A more realistic solution to the problem is to overhaul the War Powers Resolution of 1973. The experiences of the past decade have revealed that the President will use whatever means are at his disposal to circumvent the intent and purpose of the War Powers Resolution.<sup>108</sup> Many legal academicians and commentators agree that the War Powers Resolution, while correct in its viewpoint, needs significant strengthening to solidify congressional control over the use of our armed forces.<sup>109</sup> This preponderance of opinion seems to be based on two concepts: (1) the War Powers Resolution reflects the correct constitutional posture on congressional control of the military;<sup>110</sup> and (2) the War Powers Resolution, while having some deterrent effect on the executive branch, has been ignored all too often by presidents, and requires substantial revision to empower the Act.<sup>111</sup> In order to curb such circumvention, Congress should identify the weaknesses in

The Goldstein proposition is as follows:

Congress shall be required to supervise and oversee military planning, capabilities, and readiness. Congress, as part of its ordinary legislative powers and its extraordinary power to declare war, shall have absolute authority to govern, control, and direct all aspects of the structure and functioning of the armed forces. This power includes the right to issue orders to the Commander in Chief, as well as subordinate civilian and military authorities.

This power shall be delegable in whatever way Congress sees fit including, but not limited to, congressional committees and subcommittees, the Executive department, or to technical systems.

The failure of Congress to provide adequate oversight to war-planning shall be a justiciable cause of action against Congress as a whole. If the court hearing such a complaint finds that Congress has not adequately discharged its responsibility to consider fully all the requisite factors related to military planning, capabilities, and readiness, the court may grant an injunction directing Congress to consider the particular factors at issue and to come to a rationally based plan. No substantive outcome may be ordered by the court. The court's final order shall be appealable through normal judicial channels.

Goldstein, *supra*, at 1587.

<sup>108</sup> See Torricelli, *The War Powers Resolution After the Libya Crisis*, 7 PACE L. REV. 661, 672 (1987); Highsmith, *Policing Executive Adventurism: Congressional Oversight of Military and Paramilitary Operations*, 19 HARV. J. LEGIS. 327, 342 (1982).

<sup>109</sup> See, e.g., W. REVELEY, III, *WAR POWERS OF THE PRESIDENT AND CONGRESS* (1981); Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79 (1984); Note, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1410 (1984); Glennon, *The War Powers Resolution: Sad Record, Dismal Promise*, 17 LOY. L.A.L. REV. 657, 667 (1984); Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1392 (1988). Comment, *supra* note 103, at 464-485; *contra* R. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE* 107-33 (1983).

<sup>110</sup> See *supra* notes 8-19 and accompanying text; see generally Zablocki, *The War Powers Resolution: Its Past Record and Future Promise*, 17 LOY. L.A.L. REV. 579, 597 (1984); Note, *A Defense of the War Powers Resolution*, 93 YALE L.J. 1330 (1984); Buchanan, *In Defense of the War Powers Resolution: Chadha Does Not Apply*, 22 HOUS. L. REV. 1155 (1985).

<sup>111</sup> Vance, *supra* note 109, at 91-95; see generally *Symposium: War Powers Resolution*, 17 LOY. L.A.L. REV. 579-802 (1984).

the present Resolution, and amend the Act to cure them.

First, the requirements under the consultation clause in section 3<sup>112</sup> of the Resolution need to be clearly defined.<sup>113</sup> The purpose of the consultation clause is to promote *collective* decision-making. The term "consult" must be defined as a genuine collaborative decision-making process between the executive branch and the Congress *before* deploying troops or committing to deploy troops occurs.<sup>114</sup> One proposal would amend the War Powers Resolution to require the Executive to discuss fully and "seek the advice and counsel of Congress."<sup>115</sup> Whatever the change in the definition of the term "consult," it must clearly state that consultation requires genuine discussion with Congress to avoid the current practice where the Executive merely informs Congress of what has happened or is about to happen.<sup>116</sup>

Section 3 should also specify the exact group to be consulted. Clearly, consultation cannot practically involve the entire congress. When the President has bothered to consult "the Congress" in the past, he has generally selected various leaders from both houses of Congress. Clearly defining who is to be consulted will promote a better understanding of the congressional role in the governance of the armed forces and the decision for war. A bill introduced by Senator

<sup>112</sup> Section 3 of the Resolution states:

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 the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

50 U.S.C. § 1542 (1990).

<sup>113</sup> See, e.g., Vance, *supra* note 109; Highsmith, *supra* note 108, at 343.

<sup>114</sup> The events leading up to the Gulf War demonstrate that a commitment by the President to defend another country (Saudi Arabia) can lead to a *de facto* state of war.

<sup>115</sup> This phraseology was originally suggested by Senator Thomas Eagleton (D-Mo.), S. 1790, 94th Cong., 1st Sess. (1975). 121 CONG. REC. S. 15,580 (May 21, 1975); see also N.Y. Times, May 22, 1975, at 1, col. 2 (discussing the lack of support for Senator Eagleton's amendment).

<sup>116</sup> The House Foreign Affairs Committee originally addressed the proper definition of *consult* under the Resolution:

Rejected was the notion that consultation should be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available.

H.R. REP. No. 287, 93d Cong., 1st Sess. 6-7, reprinted in U.S. CODE CONG. & ADMIN. NEWS 2351 (1973).

Robert Byrd when he was Senate Majority Leader, specifies consultation with (1) a small group consisting of the Speaker of the House, the President Pro Tempore of the Senate, and the majority and minority leaders of both houses; and (2) a larger "permanent consultative group" consisting of the members of the small group plus twelve other congressional VIPs.<sup>117</sup> Others have suggested the President report to specially designed subgroups of Congress similar to those outlined in Senator Byrd's proposal.<sup>118</sup> Either definition would help clarify Congress' role in the consultation process.

The provisions of Section 3 identifying when the President should consult congress must also be clarified. Section 3 of the War Powers Resolution requires the President to consult with Congress "in every possible instance" before deploying troops.<sup>119</sup> The vagaries implicit in the phrase, "in every possible instance" needs to be removed to give the executive branch some specific guidance regarding its responsibility to consult. Presidents have generally failed to consult Congress before ordering military action abroad.<sup>120</sup> Currently, the executive branch decides what "in every possible instance" means and decides who should be consulted, and how far in advance. This results in limited or no consultation between Congress and the executive branch before forces are deployed. Therefore, to improve presidential compliance with the consultation requirements, and to prevent a useless debate on what the term "in every possible instance" means, which would signal weakness and inaction to potential adversaries, this term should be removed.

Another solution to the "in every possible instance" wording is to

---

<sup>117</sup> See S.J. Res. 323, 100th Cong., 2d Sess. § 2 (1988); See, e.g., 134 CONG. REC. S7167, S7169 (daily ed. June 6, 1988) (Senators Warner and McCain).

<sup>118</sup> See Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law*, 78 AM. J. INT'L L. 571, 581 (1984); Banks, *First Use of Nuclear Weapons: The Constitutional Leadership Committee*, 13 J. LEGIS. 1 (1986) (in the event of a first use of nuclear weapons subgroups of congress should be consulted); Vance, *supra* note 109, at 92.

Vance would require consultation with the Majority and Minority Leaders of both houses, the Speaker of the House of Representatives, and the Chairpersons and ranking minority members of the Armed Forces and Foreign Affairs Committees of both houses. Vance, *supra* note 109, at 92.

The Federation of American Scientists ("FAS") proposal would require a majority vote of a special committee to authorize presidential first use of nuclear weapons. The committee would be composed of the Speaker of the House, Majority and Minority Leaders of the House, the president pro-tempore, Majority and Minority Leaders of the Senate, and the Chair and ranking member of each of the House and Senate Committees on Armed Services, the Senate Committee on Foreign Relations and the House Committee on International Relations. Banks, *supra*, at 3.

<sup>119</sup> 50 U.S.C. § 1542 (1990).

<sup>120</sup> See Vance, *supra* note 109, at 90.

extend the consultation clause to cover all situations where the President is presently required to report under section 4(a)(1).<sup>121</sup> In essence, every event that is important enough to require a report under the War Powers Act should also require a consultation with the Congress or other appropriate sub-group. Such a change would prevent the President from ignoring the consultation provision when required to report under section 4(a)(1).<sup>122</sup> It would also assure consultation *before* the reportable event occurs, and will, therefore, promote fuller legislative understanding of the deployment, and greater control over presidential military or paramilitary activities. Each of these revisions to the consultation clause will clarify both the executive and congressional roles under the Resolution. Regardless of how it is accomplished, the consultation clause must be narrowly defined so that Congress once again shares in the decision process when this nation goes to war.

Second, the "imminent hostilities" portion of section 4(a)(1) of the War Power Resolution is far too ambiguous and must be amended or repealed. Section 4(a)<sup>123</sup> of the Resolution requires the President to report to Congress within forty-eight hours of introducing armed forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" and in certain other situations. By using his own definition of the term *hostilities*, a president may avoid the reporting requirement, and evade the entire premise of the War Powers Resolution.<sup>124</sup> Although the House report

---

<sup>121</sup> *Id.* at 92.

<sup>122</sup> See Highsmith, *supra* note 108, at 345; Glennon, *Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions*, 60 MINN. L. REV. 1, 36 (1975).

<sup>123</sup> Section 4(a) of the Resolution provides:

In the absence of a declaration of war, in any case in which the United States Armed Forces are introduced—

- (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
- (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
- (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

The President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

- (A) the circumstances necessitating the introduction of United States Armed Forces;
- (B) the constitutional and legislative authority under which such introduction took place; and
- (C) the estimated scope and duration of the hostilities or involvement.

<sup>124</sup> See Note, *The War Powers Resolution: A Tool for Balancing Power Through Negotia-*

on the war powers bill originally imparted broad meanings to the terms *hostilities* and *imminent hostilities*,<sup>125</sup> the executive branch traditionally interprets those terms narrowly.<sup>126</sup> The section is made even more ambiguous by the requirement that the imminent involvement in hostilities be "clearly indicated by the circumstances."<sup>127</sup> These undefined terms make it difficult to challenge the President's interpretation of when hostilities are present or imminent in a given situation. Under the current Resolution, the President can ignore the reporting requirement under section 4(a)(1) and never trigger either the sixty day period or the reporting requirements by claiming that hostilities were not present, imminent or clearly indicated by the circumstances.<sup>128</sup> A broader definition should be adopted requiring consultation before and reporting after the introducing forces into any situation where there is armed conflict. A broader framework would require the President to report any time armed conflict exists.

Section 4(a)(1) should also be amended to require the President to specify which provision of the Resolution is being invoked when it reports to congress. Because of the sixty/ninety day deployment limi-

---

tion, 70 VA. L. REV. 1037, 1049, 1052 (1984).

<sup>125</sup> The Report stated:

The word *hostilities* was substituted for the phrase *armed conflict* during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, *hostilities* also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. *Imminent hostilities* denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.

H.R. REP. NO. 287, 93d Cong., 1st Sess. 6-7 (1973).

<sup>126</sup> See, e.g., Comment, *A Tug of War: The War Powers Resolution and the Meaning of "Hostilities"*, 15 PAC. L.J. 265, 266 (1984); see generally Note, *The War Powers Resolution: An Act Facing "Imminent Hostilities" a Decade Later*, 16 VAND. J. TRANSNAT'L L. 915 (1983).

<sup>127</sup> 50 U.S.C. § 1543 (1990).

<sup>128</sup> After Iraq's August 2nd invasion of Kuwait, on August 10, 1990, President Bush reported to Congress under the War Powers Resolution but the sixty/ninety day clock was not triggered because he asserted that he did not "believe that involvement in hostilities is imminent." Apple, *U.S. Says Its Troops in the Gulf Could Reach 100,000 in Months*, New York Times, August 11, 1990, §1, at 1, col. 4.; Gordon, *Iraq Army Invades Capital of Kuwait in Fierce Fighting*, New York Times, Aug. 2, 1990, § A, at 1, col. 6. It should be noted, however, that at the time there was a genuine fear that Saudi Arabia would be attacked and President Bush even made the statement on September 16, that the U.S. and Iraq were "on the brink of war." Rosenthal, *Bush Tells Iraqis Leaders Put Them On 'Brink Of War'*, New York Times, Sept. 17, 1990, § A, at 1, col. 6; *Text of Bush's Television Message to Iraqi People*, New York Times, Sept. 17, 1990, § A, at 10, col. 3. Further, when Bush announced the deployment of additional troops on November 8, to give the U.S. an offensive option, the "imminent hostilities" reporting requirement was clearly applicable but was never complied with by the President. *Excerpts From Bush's Remarks on His Order to Enlarge U.S. Gulf Force*, New York Times, Nov. 8, 1990, § A, at 12, col. 1; Gordon, *Bush Sends New Units to Gulf to Provide 'Offensive Option'; U.S. Force Could Reach 380,000*, New York Times, Nov. 9, 1990, § A, at 1, col. 6.

tations, and the automatic withdrawal requirement of section 5(b) and (c), presidents have been reluctant to report under section 4(a)(1) for fear of starting the sixty/ninety day period. Presidential administrations have generally complied with the reporting provisions of the Resolution while stating that the reports were not made under section 4(a)(1) of the Resolution.<sup>129</sup> Requiring the President to state under which section of the resolution he is reporting, will put pressure on the President to comply with the resolution and start the sixty/ninety day clock. These problems would be solved by a clarified definition of what constitutes "hostilities or imminent hostilities" and a better method for invoking the provision if the President fails to report under section 4(a)(1).

Third, the three situations when the President can introduce armed forces into hostilities under section 2(c) are too limited. Commentators agree that the list is too inflexible and should have included a provision justifying the introduction of troops into hostilities to protect American citizens.<sup>130</sup> Moreover, the limitations are too difficult to enforce, and they deprive the President of the flexibility necessary to conduct foreign policy. Complete specification of all possible instances where the President may introduce troops is an impossible task.<sup>131</sup> Both Congress and the Reagan Administration have previously indicated that eliminating the enumerations under section 2(c) would improve compliance with the War Powers Resolution.<sup>132</sup>

<sup>129</sup> The President reported to congress but specifically did not invoke section 4(a)(1) in Lebanon, Grenada, Libya and the reflagging of Kuwaiti tankers in the Persian Gulf. In connection with the Lebanon troop deployment Congress challenged the Reagan Administration and eventually compromised on an eighteen month deployment. See Ides, *Congress, Constitutional Responsibility and the War Power*, 17 LOY. L.A.L. REV. 599, 642-52 (1984). In the Persian gulf reflagging effort, the Reagan Administration repeatedly escaped the section 4(a)(1) reporting provisions by indicating that hostilities were not imminent. See Comment, *The War Powers Resolution and the Persian Gulf: A Controversial Statute Proves Unworkable*, 8 WIS. INT'L L.J. 453, 496-97 (1990).

<sup>130</sup> Glennon, *The War Powers Resolution: Sad Record, Dismal Promise*, 17 LOY. L.A.L. REV. 657, 662 (1984); Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1393 (1988).

<sup>131</sup> Professor Ely suggests a list of situations where the President would appear to have constitutional authority to use the Armed Forces including:

to rescue American citizens abroad, to rescue foreign nationals where such action directly facilitates the rescue of U.S. citizens abroad, to protect U.S. Embassies and Legations abroad, to suppress civil insurrection, to implement and administer the terms of an armistice or cease-fire designed to terminate hostilities involving the United States, and to carry out the terms of security commitments contained in treaties."

See Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 887, 930 (1990).

<sup>132</sup> See Soafer, *The War Powers Resolution* (September 15, 1988) (statement before the Sen-

Fourth, section 5(c) of the Resolution should be repealed. Section 5(c) provides that Congress can direct the President to remove troops from hostilities within the sixty-day period by concurrent resolution. This provision is arguably subject to the proscriptions on legislative veto outlined in *INS v. Chadha*.<sup>133</sup> While the provision in the War Powers Resolution may be theoretically distinguishable from the legislative veto in *Chadha*, section 5(c) would likely be held unconstitutional if it were challenged. Both Justices Powell and White indicate that *Chadha* invalidates all legislative veto provisions,<sup>134</sup> and Justice White specifically referred to section 5(c) as an unconstitutional veto power.<sup>135</sup> Although many scholars believe that the War Powers Resolution survives the *Chadha* test,<sup>136</sup> prudence dictates that the legislative veto provision be made clearly severable from the rest of the Resolution, or that an alternative mechanism be devised to trigger congressional action.<sup>137</sup> Another alternative is to negotiate a binding agreement between the Congress and the Executive providing for the advise and consent of Congress before any troops are committed to hostilities. Because of these problems with section 5(c), and because it appears likely that Congress will never try to enforce the mandatory withdrawal provisions, both the Congress and the Reagan Administration have suggested that section 5(c) be removed from the

---

ate Foreign Relations Committee), printed in DEP'T ST. BULL., Nov. 1988, at 38; S.J. RES. 323, 100th Cong., 2nd Sess. § 2 (1988).

<sup>133</sup> 462 U.S. 919 (1983). The rationale for the proscription on a legislative veto found in the United States Constitution which provides at article I, § 7, cl. 3:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

<sup>134</sup> *Chadha*, 462 U.S. at 959, 974.

<sup>135</sup> *Id.* at 970-71.

<sup>136</sup> See generally Note, *The War Powers Resolution: Congress Seeks to Reassert Its Constitutional Role as a Partner in War Making*, 18 RUTGERS L.J. 405 (1987); Banks, *supra* note 118, at 11-20; Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984); Comment, *Congressional Control of Presidential War-Making Under the War Powers Act: The Status of the Legislative Veto After Chadha*, 132 U. PA. L. REV. 1217, 1237-40 (1984); *contra* Comment, *Applying Chadha: The Fate of the War Powers Resolution*, 24 SANTA CLARA L. REV. 697, 733 (1984); Ely, *supra* note 130, at 1395.

<sup>137</sup> One suggestion would amend the War Powers Resolution "to require Congress to pass a resolution declaring presidential compliance with the War Power Resolution whenever troops are deployed by a president onto foreign soil." Note, *The War Powers Resolution: After a Decade of Presidential Avoidance Congress Attempts to Reassert Its Authority*, 8 SUFFOLK TRANSNAT'L L.J. 75, 108 (1984).

resolution.<sup>138</sup>

Another problem related to the legislative veto provision of section 5(c), is the mandatory troop withdrawal provision under section 5(b). Section 5(b) provides that "the President shall terminate" the use of armed forces if the sixty day period runs without any action by Congress.<sup>139</sup> Congress can regain control over the war making power by passing an amendment to section 5(b) providing for funds to be withheld from unauthorized presidential use after the sixty day period has lapsed.<sup>140</sup> Congress has always wielded the power of the purse-strings and that power is unquestionably an *exclusive power* of Congress.<sup>141</sup> Absent compliance with the consultation and reporting requirements under the War Powers Resolution, funding should be subject to immediate cut-off by congressional resolution.<sup>142</sup>

Sixth, Congress needs to address the use of covert paramilitary operations and the war power.<sup>143</sup> The proliferation of covert war carried out under the guise of intelligence-gathering operations or through "private" enterprises suggests that certain paramilitary operations should be covered under any refurbished war powers resolution.<sup>144</sup> As Newell Highsmith suggested in a 1982 article:

A reformation of the WPR in light of Title V would also place

---

<sup>138</sup> See Soafer, *The War Powers Resolution* (September 15, 1988) (statement before the Senate Foreign Relations Committee), printed in DEP'T ST. BULL., Nov. 1988, at 38; S.J. RES. 323, 100th Cong., 2nd Sess., § 4 (1988).

<sup>139</sup> Section 5(b) does not necessarily fall under the prohibitions of *Chadha*. Professor Ely notes that the *Chadha* Court expressly stated that "other means of control, such as durational limits on authorizations and formal reporting requirements, lie well within Congress' constitutional power." *Chadha*, 462 U.S. at 955 n.19. Professor Carter has pointed out that section 5(b) is a not a legislative veto, but a "sunset law." Under this view, section 5(b) is the functional equivalent of a statute providing that troops simply may not be committed to combat for more than 60 days. Carter, *supra* note 136, at 133.

<sup>140</sup> Glennon, *supra* note 122, at 23-28.

<sup>141</sup> *Id.* at 32-33; U.S. CONST. art. I, § 8, cl. 1.; see also Glennon, *supra* note 122, at 37.

<sup>142</sup> Cyrus Vance, former Secretary of State during the Carter Administration, recommended an amendment to the War Powers Resolution providing, "notwithstanding any other law, no funds made available under any law may be obligated or expended for any use of United States forces prohibited by section 5(b) of the Resolution or by concurrent resolution of Congress under section 5(c) thereof." Vance, *supra* note 109, at 93-94; see also S. 1906, 98th Cong., 1st Sess., 129 CONG. REC. S.13,245 (1983).

<sup>143</sup> For an excellent discussion of the need for congressional control over covert war and paramilitary operations, see Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986).

<sup>144</sup> Glennon, *supra* note 118, at 581. One of the original sponsors of the War Powers Resolution, Senator Thomas Eagleton (D-Mo.), suggested that covert intelligence operations should be under the same standard as other military operations. 119 CONG. REC. S25,079-80 (1973) (daily ed. July 20, 1973) (statement of Senator Eagleton). See also Highsmith, *supra* note 108, at 368-76 (discussing the "paramilitary loophole" in the War Powers Resolution and other statutes).

paramilitary operations under the same standards as military operations. The committees specified in the WPR and Intelligence Committees would consult with the Executive Branch whenever possible before an operation and screen out operations that amounted to war. Operations of this type would be referred to the full Congress for expedited consideration and action. A declaration of war or specific statutory authorization would be required.<sup>145</sup>

Seventh, the possibility of nuclear warfare or nuclear conflicts should not force Congress from its constitutional role as sole decider for war and peace.<sup>146</sup> The eighteenth century framers of our Constitution considered war to be so terrible that peace was to be the norm, the status quo. Anyone who presumed to move us from a status quo of peace to war had the burden of first persuading the Nation. Nothing in the nature of nuclear weapons makes war more inviting. On the contrary, the utter devastation that would follow detonation of even a small portion of our nuclear stockpile, weighs heavily in favor of congressional approval before any use of nuclear weapons.<sup>147</sup> Clearly, first strike nuclear capability should be subject to congressional control.

Finally, Congress should amend the War Powers Resolution to make its provisions judicially enforceable by allowing adjudication for violations in a court of law. The amendment should create standing for congressional plaintiffs, clearly indicate that presidential non-compliance is sufficient to make the question ripe for review, and state that the political question doctrine, to the extent not mandated by the Constitution, may not be used as a grounds for dismissal.<sup>148</sup> "*Whether* we go to war is a political question to be decided by Congress, absent sudden attack. The *way* we go to war is not. It has been

---

<sup>145</sup> *Id.* at 379 (citation omitted).

<sup>146</sup> Banks, *supra* note 118.

<sup>147</sup> Physicians are becoming increasingly concerned about the devastating effects of nuclear war. The seminal, and still key, research in this area of the medical consequences of nuclear war is Ervin, *Human and Ecological Effects in Mass. of an Assumed Thermonuclear War*, 226 *NEW ENG. J. MED.* 1126, 1127-37 (1962); see also Hiatt, *The Final Epidemic: Prescriptions for Prevention*, 252 *J. A.M.A.* 635, 635-44 (1984). Long-term consequences of nuclear war, or "nuclear winter," are discussed in Sagan, *Nuclear Winter: Global Consequences of Multiple Nuclear Explosions*, 222 *SCI.* 128 (1983); Ehrlich, *Long-Term Biological Consequences of Nuclear War*, 222 *SCI.* 1293 (1983).

<sup>148</sup> See generally Firmage, *The War Powers and the Political Question Doctrine*, 49 *U. COLO. L. REV.* 65 (1977); F. WORMUTH & E. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 225-52 (ch. 15) (2d ed. 1989); Glennon, *supra* note 118, at 580; Glennon, *The Gulf War and the Constitution*, *FOREIGN AFF.*, Spring 1991, at 84; cf. Goldstein, *supra* note 107, at 1587 (proposing constitutional amendment allowing justiciability and standing for inadequate congressional oversight).

carefully prescribed by the Constitution. Currently, courts avoid adjudicating war powers controversies by referring to the political question doctrine.<sup>149</sup> Plaintiffs who are members of Congress may be prevented from bringing suit because they lack sufficient "standing."<sup>150</sup> Courts are also reluctant to enforce the War Powers Resolution without a vote from a majority of Congress in each case, thus forcing Congress to run a political gauntlet every time a crisis occurs.<sup>151</sup> Congress can rectify this situation by clearly granting the courts jurisdiction to hear war power disputes and granting congressional plaintiffs standing to sue for relief. Allowing courts to adjudicate disputes over violations will also promote presidential compliance with the statute.

### VIII. CONCLUSION

The temptation to resort to war and to covert action has remained with us, despite an end to the "communist threat" that motivated so much war power abuse in the past. However, our forty-five year "habit" with overt and covert warfare must not be allowed to distort and destroy our natural inclination toward peace and our constitutional commitment of the war power to Congress. A new era is at hand, and the United States has an opportunity to set a course not only for itself, but also for the nations of the world towards the mutually desirable state of open government and world peace. The end we seek, the enjoyment of peace and liberty, must be congruent with the means we select to ensure our liberty and our peace.

The lessons of history prove that the United States gains nothing and loses much when it hastily goes to war with other nations. By strengthening the War Powers Resolution to more closely resemble Constitutional War Power, Congress can ensure that the United States will not be haunted by the excesses of the last forty-five years as it enters the twenty-first century. As the United States attempts to lead all nations into a "New World Order," it must first demonstrate that it is able to comply with its own constitutional rules.

---

<sup>149</sup> See, e.g., *Crockett v. Reagan*, 720 F.2d 1355, 1356 (D.C. Cir. 1983), *aff'g* 558 F. Supp. 893 (D.D.C. 1982); *cf.* *Baker v. Carr*, 369 U.S. 186 (1962) (seminal case on nonjusticiability of political questions).

<sup>150</sup> See *Crockett*, 720 F.2d at 1357 (Bork, J., concurring); *but see* *Warth v. Seldin*, 422 U.S. 490, 500-01 (1979) (Congress may statutorily confer standing).

<sup>151</sup> *Lowry v. Reagan*, 676 F. Supp. 333, 340 (D.D.C. 1987) (noting that a judicial decision on either side of an issue where members of Congress were divided "necessarily would contradict legislative pronouncements on one side or the other."); *Dellums v. Bush*, No. 90-2866 (D.C.C. filed Nov. 20, 1990) (where 56 members of Congress sought to restrain President Bush from going to war with Iraq without prior congressional consent the court found the case was not ripe for review until a majority of Congress seeks judicial "relief from an infringement on its constitutional war-declaration power.").