

# Mercer Law Review

---

Volume 43  
Number 2 *Lead Articles I - The Legal  
Implications of a Nation at War*

---

Article 4

3-1992

## The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm

John W. Rolph

Follow this and additional works at: [https://digitalcommons.law.mercer.edu/jour\\_mlr](https://digitalcommons.law.mercer.edu/jour_mlr)



Part of the [International Law Commons](#), and the [Military, War, and Peace Commons](#)

---

### Recommended Citation

Rolph, John W. (1992) "The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm," *Mercer Law Review*: Vol. 43 : No. 2 , Article 4.

Available at: [https://digitalcommons.law.mercer.edu/jour\\_mlr/vol43/iss2/4](https://digitalcommons.law.mercer.edu/jour_mlr/vol43/iss2/4)

This Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact [repository@law.mercer.edu](mailto:repository@law.mercer.edu).

# The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm

by John W. Rolph\*

## I. INTRODUCTION

On August 2, 1990, Iraqi armed forces stormed across their borders and invaded the neighboring country of Kuwait. Almost immediately thereafter, President Bush drew a "line in the sand"<sup>1</sup> against further Iraqi aggression by deploying approximately 230,000 American armed combat troops to the desert of Saudi Arabia as a deterrent shield. In so doing, the President rekindled a long standing controversy with Congress concerning the proper exercise of war powers under the Constitution and how those powers should be distributed between the executive and legislative branches. The President's "line in the sand" sparked unprecedented reevaluation of the much maligned War Powers Resolution<sup>2</sup> (the "Resolution") and immediately redrew the line that has historically divided the President and the Congress on the issue of who makes the decision to

---

\* Lieutenant Commander, Judge Advocate General's Corps, United States Navy. Associate Professor of Law, International Law Division, the Judge Advocate General's School, United States Army, Charlottesville, Virginia. University of Texas (B.A., 1978); Baylor University Law School (J.D., 1981); The Judge Advocate General's School (LL.M., 1991).

The opinions and conclusions expressed herein are those of the individual author and do not necessarily represent the views of the Judge Advocate General's School, United States Army, or any other governmental agency.

1. WASH. POST, Aug. 20, 1990, at A1, col. 1. President Bush coined this phrase in a White House statement he made on August 8, 1990, announcing that he had deployed troops to Saudi Arabia as a deterrent against possible Iraqi aggression into Saudi Arabia. *Id.*

2. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-48 (1982 & Supp. IV 1986)) [hereinafter Resolution].

wage war under the Constitution.<sup>3</sup> This Article reevaluates the vitality of the Resolution after Operation Desert Storm<sup>4</sup> and concludes that, despite the minor war powers concessions that Congress has wrestled from the President since the Resolution's enactment, the legislation has proven overall to be an abysmal failure. The political, constitutional, and procedural flaws that permeate the Resolution have crippled it to the extent that the President openly ignores it, the Congress is irresolute in asserting it, and the courts employ every conceivable tool of judicial abstention to avoid addressing it. Essentially, the Resolution has become a "dead letter."<sup>5</sup>

## II. BACKGROUND AND HISTORY OF THE WAR POWERS RESOLUTION

The Resolution was controversial from the outset. Drafted in the wake of the Vietnam War and the Watergate scandal, the Resolution was an attempt by Congress to reassert its constitutional prerogatives as a hedge on what it perceived as an "imperial presidency."<sup>6</sup> The Resolution's passage over President Nixon's veto in 1973 evidenced the combative relationship between the executive and legislative branches concerning distribution of the war powers.<sup>7</sup> The Constitution expressly states that

---

3. For a general overview of the debate over the war powers issue, see David A. Kaplan & Mark Miller, *A Tug of War Over War Powers*, NEWSWEEK, Dec. 10, 1990, at 36; George F. Will, *Once Again, Ike Was Right*, NEWSWEEK, Jan. 14, 1991, at 60; Major Garrett & Paul Bedard, *Bush Strokes House, OKs War Powers Act*, WASH. TIMES, Jan. 10, 1991, at A8, col. 1; Robert Shogan, *Gulf Confrontation Again Raises Issue of Legal Basis for Committing U.S. Forces*, L.A. TIMES, Sept. 19, 1990, at A6, col. 4; Will Marshall, *Going to War Should Be a Shared Decision; The War Powers Resolution Should Be Revamped so President's Won't Bypass It*, NEWSDAY, Dec. 12, 1990, at 125; and see Turner, *War Powers and the Gulf Crisis*, 12 LAW & NAT'L SEC. INTEL. REP. No. 12, at 1.

4. The Bush Administration originally called the massive troop deployment to Saudi Arabia on August 8, 1991 "Operation Desert Shield." On January 16, 1991, upon the commencement of offensive allied air attacks against targets in both Iraq and Kuwait, the President renamed the mission "Operation Desert Storm." WASH. POST, Jan. 17, 1991, at A1, col. 1.

5. Neil A. Lewis, *Sorting Out Legal War Concerning Real War*, N.Y. TIMES, Nov. 15, 1990, at A18, col. 1. Senator Daniel Patrick Moynihan (D. NY) recently referred to the Resolution as a "dead letter" and claimed, "It gets you involved in a fruitless standoff between Congress and the White House." *Id.*

6. See Whitman H. Ridgway, *After the Imperial Presidency*, 47 MD. L. REV. 52, 52 (1987); and Arthur M. Schlesinger, *The Constitution and Presidential Leadership*, 47 MD. L. REV. 54, 65 (1987).

7. Exceptional majorities in both houses of the Congress voted to override Nixon's veto. The Senate vote was 75 to 18 in favor of the override. 119 CONG. REC. 36,198 (1973). The House of Representatives vote was 284 to 135 in favor of the override. 119 CONG. REC. 36,221 (1973). In a terse and unambiguous veto message delivered to the Congress after the Resolution was defeated, President Nixon clearly indicated his contempt for the legislation when he stated "[t]he only way in which the Constitutional powers of a branch of the government

Congress shall be entrusted with the power "To declare War," "To raise and support Armies," "To provide and maintain a Navy," and "To make all Laws which shall be necessary and proper for carrying into execution the foregoing powers."<sup>8</sup> At the same time, however, the President is given a general grant of all executive powers and is expressly designated as Commander-in-Chief over the Army and Navy of the United States.<sup>9</sup> This constitutional division of powers was expressly intended as an invitation to struggle over the exercise of the war powers by the coordinate political branches.<sup>10</sup> This division was also a mandate that the President and Congress cooperate in matters involving foreign policy and the use of armed forces as an instrument thereof.<sup>11</sup> The framers of the Constitution apparently intended by this separation of powers to ensure that a decision to wage war would not be made precipitously, and certainly not by a single individual. Historical documents suggest that the authors of the Constitution sought to reserve for Congress the policy decision as to whether or not the nation should go to war, while at the same time reserving for the President the right and the power to deploy armed forces in response to a national emergency.<sup>12</sup> Unfortunately, what evolved from

---

can be altered is by amending the Constitution—and any attempt to make such alterations by legislation alone is clearly without force." See *President's Veto of War Powers Resolution*, 9 WEEKLY COMP. PRES. DOC. 1285, 1286 (Oct. 24, 1973); and see Note, *The War Powers Resolution: A Tool for Balancing Power Through Negotiation*, 70 VA. L. REV. 1037, 1044 (1984).

8. U.S. CONST. art. I, § 8.

9. U.S. CONST. art. II, §§ 1, 2.

10. See Patrick D. Robbins, *The War Powers Resolution After Fifteen Years: A Reassessment*, 38 AM. U.L. REV. 141, 173 (1988).

11. *Id.* at 173.

12. This is perhaps best evidenced by a change made to the original draft of the Constitution that, in delegating power to the Congress under article I, section eight, substituted the words "declare war" for what had previously read "make war." Most researchers concur that this change was intended to recognize the President's emergency power to respond to armed attacks against the United States, but to reserve to the legislature the decision to undertake an offensive war (i.e., to declare war as a tool of foreign policy). It was feared that the word "make" might be construed to mean "conduct," and the change was apparently made to clarify the fact that "[t]he president can 'make' (conduct) those wars that the Congress, in determining policy, initiates." See Will, *supra* note 3, at 60. There is no clear consensus on this matter, however, and persuasive authority exists for at least five separate interpretations as to the exact meaning of this change in relation to the distribution of the war powers. See Charles A. Lofgren, *War Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 694-95 (1972); Martin Wald, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1410 (1984); Bennet C. Rushkoff, *A Defense of the War Powers Resolution*, 93 YALE L.J. 1330, 1340 (1984); Joseph R. Biden & John B. Ritch III, *The War Power at a Constitutional Impasse: A "Joint Decision" Solution*, 77 GEO. L.J. 367, 374 (1988); John H. Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1387 (1988); and Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 108-09 (1984).

this less than clear division of the war powers is an elusive "zone of twilight" in which both the President and Congress have concurrent authority, but are unable to decide how it will be distributed and exercised.<sup>13</sup>

### III. AN ATTEMPT TO DEFINE THE "ZONE OF TWILIGHT"

Congress intended the Resolution as a methodology for giving definition to this twilight zone of shared war power. It envisioned the implementation of general rules aimed at making Congress a full partner with the executive branch in matters regarding the deployment of armed forces for United States foreign policy and national security objectives.<sup>14</sup> The Resolution states its goal with clarity:

It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of the United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.<sup>15</sup>

In furtherance of this goal, the legislation imposes upon the President various reporting<sup>16</sup> and consulting<sup>17</sup> obligations. It backs up these re-

13. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 673 (1952). The term "zone of twilight" was used by Justice Jackson in his concurring opinion in the famous Steel Seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, in describing what he viewed as fluctuating levels of presidential power:

When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a *zone of twilight* in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

*Id.* at 637 (Jackson, J., concurring) (emphasis added).

14. See Thomas M. Franck, *Rethinking War Powers: By Law or by "Thaumaturgic Invocation"?*, 83 AM. J. INT'L L. 766, 767 (1989); see also Robbins, *supra* note 10, at 141.

15. See Resolution, *supra* note 2, at § 1541(a).

16. Section 4(a) of the Resolution states that

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. In the absence of a declaration of war, this report must be submitted in any case in which United States Armed Forces are introduced: (1) into hostilities or into situations where imminent involvement in hostilities is clearly

quirements with a provision that allows Congress to force a troop withdrawal sixty to ninety days after the initial deployment.<sup>18</sup> All of these

---

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.

*Id.* § 1543(a)(1)-(3). Section 4(b) is a catch-all provision requiring the President to "provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad." *Id.* § 1543(b). Section 4(c) gives detailed instruction to the President for when reports shall be filed after armed forces have been introduced in a manner so as to trigger section 4(a).

[T]he President shall, so long as such Armed Forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

*Id.* § 1543(c).

17. Section (3) of the Resolution contains the consultative provisions and requires [t]he President in every possible instance . . . [to] 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.

*Id.* § 1542.

18. The time limitation imposed by sections 5(b) and 5(c) is the heart of the Congressional oversight mechanism in the Resolution and is triggered by the reporting requirements of section 4(a)(1). Section 5(b) states that

[w]ithin sixty calendar days after a report is submitted or is required to be submitted pursuant to section [4(a)(1)] of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

*Id.* § 1544(b). Taking into consideration the initial 48 hours the President is given to report under section 4(a), it is possible for the President to deploy armed forces for a total of 92 days before triggering section 5(b)'s mandatory withdrawal provisions by simply providing Congress the appropriate certification regarding "unavoidable military necessity" after 62 days have elapsed. *Id.* § 1543(a)(1). The only available check to the Congress in this regard comes from section 5(c). Section 5(c) states that, notwithstanding section 5(b), Congress may "at any time that United States Armed Forces are engaged in hostilities outside the territory of the territory of the United States . . . without a declaration of war or specific

provisions seek to put reins upon presidents who would act unilaterally on foreign policy matters involving deployment of United States armed forces. In practice, however, the Resolution has fallen far short of its intended goal and has proven totally unworkable. Debates over the exercise of war powers pursuant to the Resolution have become bogged down in procedural quagmires created by the legislation itself. Rarely, if ever, has dialogue between the political branches evolved to the point of full and frank discussion of the political wisdom of a foreign policy initiative being pursued with armed forces.<sup>19</sup> More often than not, presidents simply ignore the Resolution as an unconstitutional attempt to infringe upon the Constitution's delegation of the executive and Commander-in-Chief powers. No president has ever formally recognized or accepted the constitutionality of the Resolution, and the few attempts that have been made to comply with its terms were perfunctory at best.<sup>20</sup> Additionally, Congress

---

statutory authorization . . ." direct by concurrent resolution that the President remove those forces. *Id.* § 1544(c). The constitutionality of section 5(c)'s utilization of a concurrent resolution to force presidential action has been attacked as an unconstitutional legislative veto that violates the Presentment Clause of the Constitution. *See* Glennon, *infra* note 24, at 651-52.

19. Senator Joseph R. Biden, Jr. (D. Del.), described this problem well when he stated that in debates over the war powers issue, "intellectual energies needed for analysis of the national interest in [a war scenario] . . . [are] diverted . . . into frenzied arguments over legalisms [regarding the Resolution]." Biden & Ritch, *supra* note 12, at 369; *see also* Franck, *supra* note 14, in which the author states that one undesired result of the Resolution over its years of application has been that it has "enveloped foreign policy in a miasma of legalities[;] [transforming] . . . argument about the political wisdom of being involved in military encounters . . . into an arcane debate about the legality and constitutionality of various foreign policy initiatives." *Id.* at 770.

20. Presidential discontent with the Resolution is reflected in the few reports that have been submitted to Congress pursuant to its terms. In those letters, minimal reporting requirements have been met, and each submission indicated that it was being made "consistent with" the Resolution rather than "pursuant to" or "in accordance with." Rushkoff, *supra* note 12, at 1332. The slights appear intended to remind Congress that the constitutionality of the Resolution is not acknowledged by the executive branch. *Id.*; *see also* Carter, *supra* note 12, at 104. President Bush, in submitting a letter to Congress on August 9, 1990, advising them of the deployment of armed forces to Saudi Arabia in support of Operation Desert Shield, stated that the report was being made "consistent with" the War Powers Resolution. Letter from President George Bush to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, 26 WEEKLY COMP. PRES. DOC. 1229 (Aug. 9, 1990). In a similar letter dated November 16, 1990, the President notified Congress of massive additional troop and equipment deployments to Saudi Arabia, which he had initiated on November 8, 1990. In this letter he made no reference at all to the Resolution. Instead, the President stated: "In the spirit of consultation and cooperation between our two branches of Government and in the firm belief that working together as we have we can best protect and advance the Nation's interests, I wanted to update you on these developments." Letter from President George Bush to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, 26 WEEKLY COMP. PRES. DOC. 1834 (Nov. 16, 1990). Finally, in his letter to Congress informing them of the commencement of United

has demonstrated an unusual reluctance to assert itself on war powers issues. Since its inception in 1973, Congress has only invoked the Resolution once in response to a president's deployment of armed forces overseas, and even then it was in the context of a compromise with the executive branch.<sup>21</sup> Congressional "spinelessness" in the arena has done little to reinforce this crumbling legislation,<sup>22</sup> and it appears unlikely that the Resolution could ever be effectively utilized to halt the deployment of United States troops abroad.<sup>23</sup>

---

States and allied combat operations against military targets in Iraq and Kuwait on January 16, 1991, the President again stressed that he was making his report "[c]onsistent with the War Powers Resolution," and not in accordance with or pursuant to that legislation. Letter from President George Bush to Congressional Leaders, 27 WEEKLY COMP. PRES. DOC. 59 (Jan. 18, 1991).

21. The United States' participation in the multinational peacekeeping mission in Lebanon in 1982 and 1983 was the source of much war powers friction. President Reagan reported the deployment "consistent with" the Resolution (*see supra* note 20), but insisted that the operative provisions of the Resolution had not been triggered because "hostilities" did not actually exist, only a situation involving "random acts of violence" that were not targeting United States forces assigned to the mission. The President was able to avoid congressional oversight for over one year, but when four marines were killed and a number of others wounded during August and September of 1983, Congress became very vocal, and a vigorous debate ensued. When Congress threatened to invoke the Resolution's oversight provisions, President Reagan struck a compromise over the issue rather than face additional scrutiny and pressure. This compromise between the executive and legislative branches allowed the American peacekeeping troops to remain in Lebanon for an additional 18 months. In return Reagan specifically agreed to invoke the provisions of the Resolution, acknowledging that "hostilities" triggering the Resolution had become operative on August 29, 1983. *See Multinational Force in Lebanon Resolution*, Pub. L. No. 98-119, 97 Stat. 805 (1983) (codified at 50 U.S.C. § 1541 (1982 & Supp. IV 1986)); *see also Note, supra* note 7, at 1047. Many hailed the Lebanon war powers compromise as a "victory" for the Resolution. *Id.* In fact, the tortured logic and procedures employed in bringing about the compromise, along with the fact that Congress failed to independently initiate the Resolution's provisions, indicate that the legislation once again failed to work in the manner it was intended.

22. The point was well made by Professor Ely when he stated, "Congress' proclivity to hide on issues of war and peace [is] legendary . . . . Undergirding the War Powers Resolution was a recognition that most members of Congress, left to their own initiative, would dodge decisions of war and peace." Ely, *supra* note 12, at 1415. Professor Franck echoed this sentiment in an article he wrote, stating that when Congress' war powers ground rules had been violated, "Congress as a body has not notably risen to defend either its rules or its prerogatives . . . . [Congress] has acquiesced, specifically or tacitly, in unilateral presidential initiatives [in the war powers arena]." Franck, *supra* note 14, at 767. It appears that the only effective mechanisms Congress has available to enforce the Resolution's provisions are their powers over appropriations for war and their power to initiate impeachment proceedings against the President. Neither is a very realistic option.

23. One writer has suggested that the Resolution is a "paper tiger" that Congress would just as soon see dormant. He argues that "[l]egislators may actually like having it that way. If presidential strategy works, they applaud. If not then they make political hay." Kaplan & Miller, *supra* note 3, at 36. The argument that Congress demonstrates less resolve to invoke the Resolution's provisions when the President's deployment of armed forces has high pub-



## IV. FIVE FUNDAMENTAL FLAWS

The legitimate turmoil over the constitutionality of the Resolution in and of itself is a sufficient basis for many scholars to question its utility.<sup>24</sup> Generally speaking, the constitutional issues raised in the debate concern whether the Resolution usurps the President's inherent power under Article II of the Constitution to determine when and where armed forces will be deployed and how long they can stay.<sup>25</sup> Aside from this complicated deadlock, however, is an even more basic reason to challenge the Resolution—it simply does not work. Five fundamental procedural flaws central to the proper functioning of the Resolution have caused it to be circumvented or ignored with impunity by the executive branch. These procedural quagmires are so debilitating that Congress itself has acknowledged that the Resolution is simply unworkable—a dead letter—and will remain so until such time as significant corrective action is taken.<sup>26</sup> Experience has demonstrated time and time again that cosmetic repairs to this legis-

---

lic support appears substantiated. Congress, although handed with a *fait accompli*, failed to raise much concern over the 1983 invasion of Grenada or the 1989 invasion of Panama. Many believe the extensive public support for both of these deployments squelched those in Congress who might otherwise have complained. See Carter, *supra* note 12, at 106-07; and Tumulty, *Bush Gets Solid Backing From Congress*, L.A. TIMES, Aug. 9, 1990, at A8, col. 3. Upon the cessation of hostilities in Operation Desert Storm, President Bush's public approval rating shot up to the highest level of any President in American history. USA TODAY conducted a poll on Mar. 28, 1990, that showed Bush to have a 91% public approval rating. Johnson, *Poll: Bush Backed By Record 91%*, USA TODAY, Mar. 1, 1991, at A1, col. 2. If the above espoused theory is credible, little criticism will be forthcoming from the Congress on issues relating to the sharing of war powers in this conflict.

24. There are numerous law review articles and other scholarly writings that thoroughly scrutinize the difficult constitutional issues that have rendered the Resolution virtually impotent. See Alstyn, *The President's Powers as Commander-in-Chief Versus Congress' War Power and Appropriations Power*, 43 U. MIAMI L. REV. 17, 47-59 (1988); Moore, *Do We Have an Imperial Congress?*, 43 U. MIAMI L. REV. 139 (1988); Wald, *supra* note 12; 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); Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law*, 78 AM. J. INT'L L. 571 (1984); Note, *Realism, Liberalism, and the War Powers Resolution*, 102 HARV. L. REV. 637 (1989); Ely, *supra* note 12; Halperin, *Lawful Wars*, FOREIGN POL'Y, Fall 1988, at 173; Glennon, *The War Powers Resolution: Sad Record, Dismal Promise*, 17 LOY. L.A. L. REV. 657 (1984); Vance, *Striking A Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79 (1984); Carter, *supra* note 12; and Ridgway, *supra* note 6. This article only touches upon the constitutional issues that cripple the Resolution, concentrating more upon the procedural impediments to its effective utilization. For a more detailed analysis of the many constitutional concerns affecting the Resolution, consult the sources listed above.

25. See Geoffrey P. Miller, *The President's Power as Commander In Chief Versus Congress' War Power and Appropriation Power*, 43 U. MIAMI L. REV. 17, 33 (1988).

26. Biden & Ritch, *supra* note 12.

lative jalopy cannot alter the obvious; in every sense of the word, the Resolution is a "lemon." Thoughtful consideration of each of the defective provisions of the Resolution leads one to the inevitable conclusion that it is time for this dead letter to be buried.

A. *Section 2(c): Congressional Overstepping*

Section 2(c), which is located in the purpose and policy statement of the Resolution, attempts to delineate those circumstances under which the Constitution would permit the President to introduce armed forces in response to imminent or actual hostilities.<sup>27</sup> This section has been properly condemned because of its failure to recognize the President's "emergency" powers inherent in his authority as Executive, which include: (1) the power to protect or rescue imperiled American citizens abroad, (for example, against terrorist attacks or in hostage situations); and (2) the power to forestall an imminent attack against the United States.<sup>28</sup> This failure to recognize two circumstances in which the President has unasailable authority to use force illustrates the distorted view Congress has of its own authority in this area. An additional problem with section 2(c) is that it is written in prefatory language. It is more in the nature of a preamble than language intended to be a binding and exclusive listing of presidential authority.<sup>29</sup> In failing to acknowledge those areas in which the President has clear constitutional authority to respond with force pursuant to his powers as Executive, the Resolution suffers a severe "credibility gap" and gives the appearance of congressional overstepping.<sup>30</sup> Abraham D. Sofaer, while serving as Legal Advisor for the Depart-

27. Section 2(c) reads,

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only 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 possessions, or its armed forces.

Resolution, *supra* note 2, at § 1541(c).

28. Biden & Ritch, *supra* note 12, at 386; *see also* Ely, *supra* note 12, at 1392-95.

29. Franck, *supra* note 14, at 772.

30. [H]ad § 2(c) affirmed the President's constitutional authority to rescue Americans and to forestall attacks on the United States and its armed forces, it would be arguable that such presidential authorities to act abroad, though constitutionally derived, depend on the rationale of emergency and therefore are limited in time and scope . . . [and] the sixty-day clock could be defended as a mechanism to implement the principle that the President may respond to certain emergencies [without the participation of Congress] but may not transform them into a policy of protracted warfare without Congressional approval.

Biden & Ritch, *supra* note 12, at 387. Another interesting aspect of this drafting flaw is the following comment:

ment of State, denounced this obvious defect in rather powerful testimony before the Senate Foreign Relations Committee:

The list of circumstances in section 2(c) is clearly incomplete . . . [It] fails to include several types of situations in which the United States would clearly have the right under international law to use force and in which Presidents have used the armed forces without specific statutory authorization . . . Specifically, section 2(c) omits, for example, the protection or rescue from attack, including terrorist attacks, of U.S. nationals in difficulty abroad; the protection of ships and aircraft of U.S. registry from unlawful attack; responses to attacks on allied countries with which we may be participating in collective military security arrangements or activities, even where such attacks may threaten the security of the United States or its armed forces to unlawful attacks on friendly vessels or aircraft in their vicinity. Any attempt by Congress to define the constitutional rights of the President by statute is bound to be incomplete and to engender controversy between the branches . . . The only way that the character and limits of such fundamental constitutional powers can be defined and understood is through the actions of the two branches in coping with real world events over the years.<sup>31</sup>

Clearly, Congress was acting improperly if it was attempting through section 2(c) of the Resolution to deprive the President of authority he has traditionally exercised unilaterally under the Constitution and international law.

### *B. Section 3: The Consultation Requirement*

The consultation provisions contained in section 3 of the Resolution are vague and ambiguous, lending themselves to easy circumvention by the President.<sup>32</sup> Although it is clear that the drafters of this section anticipated that consultation would mean more than simple notification, in practice, no substantive exchange of information between the political

---

If the President's power to initiate hostilities without prior authorization stems from his executive power, then section 2(c), which refers to his Commander-in-Chief powers, does not enunciate any constitutional limitations on the President's operational capabilities. Instead, it identifies those situations with regard to which Congress cannot limit the President's discretion, since any statutory limitation would infringe upon the President's authority as Commander-in-Chief. By implication, in all other situations in which the President introduces forces into combat, he does so on the basis of his executive power, which is subject to restrictions imposed by war powers legislation.

Rushkoff, *supra* note 12, at 1352.

31. Sofaer, *The War Powers Resolution*, DEP'T ST. BULL., Nov. 1988, at 36, 37 (testimony given on Sept. 15, 1988).

32. See *supra* note 17, which contains text of section 3.

branches has occurred on war powers issues.<sup>33</sup> Congress generally only receives notice that military action has been taken by the President, and often that notice is presented to it in the form of a *fait accompli*. Section 3 fails to specify who the President is supposed to consult within Congress, leaving him to speculate whether he may approach a small number of congressional leaders or whether he must instead assemble the entire membership for what would no doubt be a very difficult and tedious consultation.<sup>34</sup> Absent political comity between Congress and the President, consultation will likely continue to be shrugged off. Although President Bush did in fact consult with select senior members in Congress regarding his actions aimed at compelling Iraq to forfeit its annexation of Kuwait, he was certainly not seeking approval of Congress for his foreign policy initiatives in this regard. The meager amount of consultation that occurred between the executive and legislative branches over the deployment of armed forces in support of Operation Desert Shield was often in the form of after-the-fact notification of executive branch actions already taken.<sup>35</sup> Far from encouraging presidents to involve Congress in difficult

---

33. Prior to the aerial bombardment of Tripoli, Libya in 1986, President Reagan only gave congressional leaders three hours advance notice of its occurrence. 44 CONG. Q. WKLY. REP. 1021 (1986). In regard to the failed 1980 Iran Rescue Mission, President Carter notified Congress two days after the fact. Although he declared his desire to report the incident "consistent with" the Resolution, the President claimed nevertheless that he was acting pursuant to his inherent authority as executive and Commander-in-Chief to rescue Americans abroad, hence no prior consultation was required. THOMAS & THOMAS, *THE WAR-MAKING POWERS OF THE PRESIDENT* 145 (1982). The October 1983 invasion of Grenada ordered by President Reagan was launched without consultation with Congress. Again, the President invoked his "emergency power" under the theory that troops had been launched to rescue American medical students trapped on the island. R. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE* 109 (1983).

34. Section (3) simply mandates that the President shall consult "with Congress" but does not specify the procedure to be utilized for doing so. Nobody doubts that it would be difficult, if not impossible, for the President to consult with Congress "in every possible instance," yet little has been done to clear up the obvious ambiguity. Wald, *supra* note 12, at 1420 n.78.

35. Professor Michael J. Glennon of the University of California, Davis, Law School, recognized this fact in a recent article he wrote on the failings of the Resolution in relation to the Gulf conflict. See Michael J. Glennon, *The Gulf War and the Constitution*, FOREIGN AFF., Spring, 1991, at 84.

The congressional debate on explicit authorization for the Gulf War was effectively over long before it began. It should have begun on August 7, 1990, the day after Secretary of Defense Dick Cheney announced the U.S. commitment to defend Saudi Arabia in the event of an attack by Iraq . . . . The commitment [to defend Saudi Arabia] was thus made as a sole executive agreement.

*Id.* at 85.

When on August 5 President Bush announced—again with no congressional consultation, let alone approval—that Iraq's invasion of Kuwait "will not stand," members of Congress applauded . . . . David Boren (D-Okla.), Chairman of the

foreign policy decisions involving use of armed forces, the Resolution's convoluted and confusing obligations concerning consultation virtually assure it will not occur.

One final aspect of this troubled section deserves consideration. The consultation requirement makes no mention of, or provision for, those military operations requiring a high degree of speed or secrecy. In this regard, it is unrealistic to seek a large measure of prior consultation with Congress when such action might very well compromise the military mission. Congress failed to recognize the legitimate requirements of military necessity when it drafted this provision in such an overreaching manner.<sup>36</sup>

### C. Section 4(a)(1): The Reporting Requirements

The Resolution never specifically defines what constitutes war for purposes of its oversight provisions. Instead, it attempts to describe the circumstances mandating congressional participation in the decision to use force. Section 4(a)(1), in combination with section 5(b),<sup>37</sup> represents the heart of the Resolution's operative framework. Section 4(a)(1) mandates that the President file a written report to both Houses of Congress within forty-eight hours of the introduction of United States armed forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated . . . ."<sup>38</sup> The reporting requirement under section 4(a)(1) triggers the sixty-day clock under section 5(b). Tied to this oversight provision is the presumption that the President, having started the sixty-day clock by filing a section 4(a)(1) report, will be obliged to then work closely with Congress. If he fails to do so, the President faces the threat of automatically being forced to withdraw the troops when the

---

Senate Intelligence Committee, was asked on September 12 whether the president should have at least consulted Congress before sending troops to the Gulf. "No, I think the president should be supported on that point," he said. "It is extremely important that we project absolute unity." Only on November 8, when the president claimed the need for an "adequate offensive military option" and decided to double to nearly half a million the number of U.S. troops in Saudi Arabia, did congressional voices ask from what source the chief executive drew this extraordinary authority to place the nation at war without legislative approval.

*Id.* at 86.

36. See Moore, *supra* note 24, at 148. In an interesting article that examines the consultation provisions of section 3 in the context of nuclear war, Professor Raven-Hansen elaborates on the deficiencies inherent in this section: In nuclear war, time does "not permit consultation with Congress by the executive. If there are only minutes in which to decide to use nuclear weapons, Congress cannot possibly participate. In these circumstances the President must be conceded inherent nuclear decision making authority." Raven-Hansen, *Nuclear War Powers*, 83 AM. J. INT'L L. 786, 790 (1989).

37. See *supra* text accompanying note 22.

38. *Id.*

clock runs out.<sup>39</sup> Thus, sections 4(a)(1) and 5(b) were intended as the engines of the Resolution, with power to drive significant congressional involvement within sixty days of any presidential deployment of forces for combat.<sup>40</sup>

The difficulties with section 4(a)(1) arise primarily out of Congress' optimistic assumption that the President would necessarily force congressional involvement in war powers issues by properly filing a report. This has not been the case. Every president since Richard Nixon has ignored or tactfully avoided filing "hostilities" reports in a manner that would trigger the sixty-day clock.<sup>41</sup> The Resolution does not require the President to specify which type of report he is filing under section 4(a). The only report that starts the sixty-day clock running is one filed specifically under section 4(a)(1).<sup>42</sup> The President can easily frustrate the entire oversight mechanism by failing to state the section under which he is filing his report.<sup>43</sup>

---

39. See Ely, *supra* note 12, at 1406.

40. See Franck, *supra* note 14, at 769.

41. See Robbins, *supra* note 10, at 175. The master of this tactic was President Reagan. Although he consistently reported his military actions to Congress (such as sending armed forces into Central America, deploying Marines to Lebanon as part of a multinational peacekeeping force, the invasion of Grenada, and the military actions in the Persian Gulf during the Iran-Iraq war), he carefully avoided triggering the sixty-day clock by consistently failing to indicate under which part of section 4(a) he was filing his report. *Id.* Similarly, the reports that President Bush has submitted to the Congress during his presidency (e.g., reporting the invasion of Panama on December 20, 1989; reporting the deployment of Marines to Monrovia, Liberia on August 5, 1990, in execution of a noncombatant evacuation operation; reporting the initial deployment of combat troops to Saudi Arabia on August 8, 1990, in support of Operation Desert Shield; and reporting the doubling of United States troop strength in the Gulf region on November 8, 1990) have all failed to indicate under which provision of section 4(a) they were being filed. Also, President Bush specifically denied that hostilities were "imminent." Letter from President George Bush to the Speaker of the House of Representatives and to the President Pro Tempore of the Senate, 25 WEEKLY COMP. PRES. DOC. 1984 (Dec. 21, 1989); Letter from President George Bush to the Speaker of the House of Representatives and to the President Pro Tempore of the Senate, 26 WEEKLY COMP. PRES. DOC. 1225 (Aug. 9, 1990); Letter from President George Bush to the Speaker of the House of Representatives and to the President Pro Tempore of the Senate, 26 WEEKLY COMP. PRES. DOC. 1229 (Aug. 9, 1990); and Letter from President George Bush to the Speaker of the House of Representatives and to the President Pro Tempore of the Senate, 26 WEEKLY COMP. PRES. DOC. 1837 (Nov. 16, 1990).

42. Section 5(b)'s sixty-day clock is triggered only by a "hostilities" report under section 4(a)(1). Reports under sections 4(a)(2) (introduction of troops into the territory, airspace, or waters of a foreign nation, while equipped for combat) or 4(a)(3) (introduction of troops in numbers that substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation) do not start the sixty-day clock. Resolution, *supra* note 2, at § 1544(a)(1)-(3).

43. See Ely, *supra* note 12, at 1404.

An equally effective method for presidents to avoid the sixty-day clock is simply to deny that hostilities exist or are imminent. Because the Resolution fails to define the term "hostilities," the President has been able to avoid section 4(a)(1) altogether by characterizing the situation as simply a random pattern of violence or something equally innocuous.<sup>44</sup> In reporting the deployment of approximately 230,000 armed combat troops to Saudi Arabia in response to Iraq's August 2, 1990 invasion of Kuwait, President Bush did not mention under which portion of section 4(a) he was filing his report. He also went one step further in avoiding the sixty-day clock by expressly stating in his report that "I do not believe involvement in hostilities is imminent."<sup>45</sup> No matter how ludicrous such an assertion may seem, Congress has shown great reluctance to challenge the President on these matters. When President Bush doubled troop strength on November 8, 1990, and made unequivocal statements to the media that the move was made to give the United States an adequate offensive capability, his overdue report to Congress, made on November 16, 1990, painted a different picture of his intentions:

I . . . want to emphasize that . . . the mission of our armed forces has not changed. Our Forces [sic] are in the Gulf region in the exercise of our inherent right of . . . self defense . . . . In my August 9 letter, I indicated that I did not believe that involvement in hostilities was imminent . . . . My view on these matters has not changed.<sup>46</sup>

On those occasions when Congress has attempted to force the triggering of the sixty-day clock, the result has most often been a hopeless dead-

---

44. A good example of this language maneuvering is the Reagan administration's characterization of the situation in Lebanon during August and September of 1982. United States Marine contingents were stationed in the thick of a city divided by civil strife. They were frequently shelled with live mortar rounds and exchanged automatic weapons fire with Lebanese militiamen. Two marines were killed and fourteen injured in an exchange of mortar fire with Druse and Shiite Moslems. Despite an environment of clear-cut warfare, President Reagan insisted that "hostilities" did not exist and were not "imminent." The cornerstone for this argument was that the violence was directed not at American forces but those in the vicinity of our troops. See N.Y. TIMES, Aug. 29, 1983, at A1, col. 4; N.Y. TIMES, Aug. 30, 1983, at A1, col. 6; and N.Y. TIMES, Sept. 17, 1983, at A1, col. 6. The Reagan administration also denied that "hostilities" or "imminent hostilities" existed in the Persian Gulf during United States reflagging operations. President Reagan insisted that the frequent confrontations United States forces had with Iranian forces were "isolated" and never rose to the level necessary to trigger section 4(a)(1). See Robbins, *supra* note 10, at 169.

45. Letter from President George Bush to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, 26 WEEKLY COMP. PRES. DOC. 1229 (Aug. 9, 1990).

46. Letter from President George Bush to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, 26 WEEKLY COMP. PRES. DOC. 1834 (Nov. 16, 1990).

lock.<sup>47</sup> Congress has clearly demonstrated that “in the heat of events it cannot be counted on to force its own accountability” by taking independent action to start the clock.<sup>48</sup> The abject failure of the Resolution is perhaps best demonstrated by the fact that since the legislation’s enactment in 1973, the sixty-day clock has never been clearly triggered by a specific reference to section 4(a)(1).<sup>49</sup>

#### D. Section 5(b): Terminating the Use of Armed Forces

This section of the Resolution requires the President

[w]ithin sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1) to terminate the use of armed forces unless Congress has either (1) declared war or given its specific authorization, (2) extended the sixty-day period, or (3) is physically unable to meet because of an armed attack on the United States.<sup>50</sup>

It is axiomatic that in order for section 5(b) to work as its drafters intended, section 4(a)(1) must also work as intended. As previously dis-

47. During the Persian Gulf reflagging operations in 1987, the Senate initiated action on a measure that would have required a report from the President 30 days after the initiation of reflagging operations. President Reagan had refused to submit a report previously claiming that hostilities did not exist and were not imminent. When a vote was attempted on the issue of triggering the sixty-day clock, it was defeated by a vigorous Republican filibuster. 46 CONG. Q. WKLY. REP. 2595, 2596 (1987). Senator Biden described the situation well when he stated,

[u]nfortunately, the ambiguities surrounding the concept of “hostilities” are similar to those raised by the term “war,” and the meaning of “clearly indicated by the circumstances” is equally subject to debate and obfuscation. Thus during [reflagging] operations in the Persian Gulf, even after American naval forces aboard USS Stark had been killed, even after American naval vessels had hit Iranian mines, even after United States forces had undertaken attacks against Iranian facilities—and even after then Vice-President Bush had criticized Iran for permitting its ill-fated civilian airliner to fly “over a [U.S.] war ship engaged in battle”—the Reagan administration was unwilling to acknowledge that the United States Navy had been involved in actions requiring a report under [section] 4(a)(1) of the War Powers Resolution.

Biden & Ritch, *supra* note 12, at 401 (footnotes omitted).

48. Ely, *supra* note 12, at 1406.

49. Only one President has made specific reference to section 4(a)(1) in a report to Congress, but it came in the form of a *fait accompli*. President Ford’s report in 1975 on the Mayaguez incident stated “[i]n accordance with my desire that the Congress be informed on this matter and taking note of Section 4(a)(1) of the War Powers Resolution.” 121 CONG. REC. 14,427, 14,427 (1975). However, the report was submitted after the incident, and Ford went out of his way to clarify that his use of force to free a merchant vessel seized by the Cambodians “was ordered and conducted pursuant to the President’s constitutional Executive power and his authority as Commander-in-Chief of the United States Armed Forces.” *Id.*; see also Biden & Ritch, *supra* note 12, at 390.

50. Resolution, *supra* note 2, at § 1544(b). See *supra* text accompanying note 16.



cussed, this has not been the case. The clock is unambiguously triggered only if the President actually transmits a report to Congress that specifically states that "hostilities" exist or "imminent involvement in hostilities" is clearly indicated by the circumstances.<sup>51</sup> This has never occurred in a manner that would allow section 5(b) to operate as intended. Additionally, Congress has failed to activate its own "safety valve" in section 5(b), which directs that the clock be triggered not only upon submission of a report under section 4(a)(1), but also when such a report is "required to be submitted."<sup>52</sup> Congress has yet to demonstrate the fortitude to challenge the President on this issue and independently start the clock running. The clock has only been started twice in its history, and both times it was the result of a compromise resolution.<sup>53</sup>

The sixty-day provision has also been roundly criticized as arbitrary in nature and as an indefensibly long period during which the President may act with unfettered discretion.<sup>54</sup> Often characterized as a "blank check" allowing the President to make and conduct war for any reason, wherever he pleases, the sixty-day clock does little to limit or define the President's authority as Commander-in-Chief.<sup>55</sup> Because of the various loopholes available to the President throughout the Resolution, it is possible for him to stretch this blank check out to include a total of ninety-two days of unencumbered war waging ability.<sup>56</sup> The lone mechanism built into the Resolution to prevent this abuse has probably been ren-

---

51. Resolution, *supra* note 2, at § 1543(a)(1).

52. Resolution, *supra* note 2, at § 1544(b).

53. A compromise negotiated with the Reagan administration resulted in the Multinational Force in Lebanon Resolution of October 12, 1983, in which Congress was quick to state that the United States forces in Lebanon "are now in hostilities requiring authorization of their continued presence under the War Powers Resolution" thereby triggering section 5(b). See Multinational Force in Lebanon Resolution, *supra* note 21, at 805. In a House joint resolution (H.J. Res. 77) passed on January 12, 1991, Congress specifically authorized President Bush to use United States Armed Forces in order to implement United Nations Security Council Resolutions against Iraq. See Authorization For Use of Military Force Against Iraq Resolution, Pub. L. No. 102-01, 105 Stat. 3 (1991). This Resolution conveyed to the President specific statutory authority under section 5(b) of the War Powers Resolution and required that "[a]t least once every 60 days, the President shall submit to the Congress a summary on the status of efforts to obtain compliance by Iraq with the [U.N.] resolutions . . ." *Id.* § 3.

54. See Ely, *supra* note 12, at 1398; Franck, *supra* note 14, at 770; and Robbins, *supra* note 10, at 157.

55. See Robbins, *supra* note 10, at 157.

56. The Resolution gives the President two days (48 hours) to report hostilities. Once having properly reported, section 5(b) allows an additional 60 days before automatic withdrawal is required. Thereafter, if the President properly certifies the necessity, an additional 30 days may be added to the total, giving him 92 days before troop removal could be mandated. See Resolution, *supra* note 18.

dered impotent by a 1984 decision of the United States Supreme Court.<sup>57</sup> On the other hand, mandatory withdrawal deadlines imposed by the Resolution could act to jeopardize United States security interests.<sup>58</sup> If a president is compelled by Congress to withdraw troops no matter what the situation, then the clock may be as arbitrary as the conduct it seeks to prevent. Some have expressed concern over the fact that informed enemy forces might be encouraged to hold out longer than they otherwise would so as to benefit from Congress cutting off the President's ability to continue the conflict.<sup>59</sup>

As a sunset provision, section 5(b) has failed to accomplish its objectives. It has proven unworkable and is useful only in generating tension between the legislative and executive branches.

#### *E. Section 5(c): The Concurrent Resolution Provision*

Notwithstanding the provisions of section 5(b), Congress designed a mechanism that would allow it to act before the clock stopped ticking to prevent presidential action it deemed illegal or improper. Section 5(c) enables Congress to compel the President to immediately terminate the engagement of United States armed forces when the military deployment has not been previously approved. The mechanism by which this is accomplished is a concurrent resolution of both Houses of Congress directing that the President remove all forces immediately.<sup>60</sup> Unlike a joint resolution, a concurrent resolution need not be presented to the President for consideration (and possible veto) before it is implemented as law.<sup>61</sup>

In 1983, the United States Supreme Court, in *Immigration and Naturalization Service v. Chada*,<sup>62</sup> held that legislative vetoes of executive branch actions must conform with the express procedures for legislative action contained in the Constitution; particularly, the Presentment Clause.<sup>63</sup> Section 5(c)'s mechanism for requiring the President to withdraw forces appears unquestionably to be in the form of a legislative veto

---

57. See text at *E. Section 5(c): The Concurrent Resolution Provision, infra* for discussion of section 5(c) and the constitutionality of its legislative veto provision.

58. See Glennon, *supra* note 24, at 651.

59. *Id.* at 652.

60. Robbins, *supra* note 10, at 156.

61. Because concurrent resolutions are "not legislative in nature," Congress does not present them to the President for his signature. On the other hand, joint resolutions are those that both Houses pass and submit for the President's approval or veto. Once signed, they have the force of law. Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 403, 95th Cong., 2d Sess. § 395 (1987).

62. 462 U.S. 919 (1983).

63. *Id.* at 956-57; U.S. CONST. art. I, §§ 1, 7. Article I of the Constitution requires that all legislation passed by both houses of Congress must be presented to the President for signature or veto.

and is most likely unconstitutional after the decision in *Chada*.<sup>64</sup> This ruling effectively eliminates Congress' ability to enforce the provisions of section 5(b) and reinforces the claim that the Resolution has become nothing more than a dead letter. After *Chada*, Congress will be required to take action under section 5(c) by joint resolution and present it to the President for his action. Because no president has willingly conceded the constitutionality of the Resolution, it appears likely that any joint resolution presented to him that calls for the termination of military action he has initiated will be quickly vetoed.<sup>65</sup> Because of the complex and confrontational mechanics now required to enforce its essential provisions, the Resolution is no longer a legitimate impediment to a president's authority to make war.

#### V. THE WAR POWERS RESOLUTION AFTER THE STORM

President Bush, in launching Operation Desert Storm on January 16, 1991, initiated the most significant American military campaign since the Vietnam War (the conflict that was the genesis of the Resolution). Although he reported to Congress the initial deployment of 230,000 troops to Saudi Arabia (Operation Desert Shield) on August 9, 1990, he did little more in the months leading up to the initiation of hostilities on January 16, 1991 to comply with the Resolution's provisions.<sup>66</sup> Despite ample time for consultation with Congress and for full and complete compliance with the terms of the Resolution, neither was accomplished. When American troop strength in the Saudi Arabian desert was doubled on November 8, 1990, the President continued to deny that hostilities were imminent and

---

64. See Moore, *supra* note 24, at 152; Robbins, *supra* note 10, at 183; Ely, *supra* note 12, at 1395-96; and Glennon, *supra* note 24, at 577.

The Resolution provides that Congress can veto the President's actions by passing a concurrent resolution that does not require the President's signature to become effective. This provision completely cuts the President out of the process of debate and deliberation concerning what should be done with regard to the military operations he initiated. This provision is clearly unconstitutional under [*Chada*].  
Miller, *supra* note 25, at 34.

65. See Robbins, *supra* note 10, at 158.

66. Letters from President George Bush to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, *supra* note 20. In this letter the President made it clear that he was only submitting the report "consistent with" the provisions of the Resolution, and not "in accordance with." As previously mentioned, he was careful not to specify which portion of section 4(a) the report was being submitted under, and he also specifically denied that "imminent involvement in hostilities is clearly indicated." *Id.* Like many Presidents before him, he capitalized on the numerous ambiguities within the Resolution in order not to trigger its operative sections.

provided no further compliance with the Resolution.<sup>67</sup> Despite unambiguously stating to the public and the media that the objective of the troop strength increase in November was to provide "an adequate offensive military option," the President did not ask for, or receive from the Congress, authority to take such action.<sup>68</sup>

On November 19, 1990, fifty-four members of Congress joined together in filing a lawsuit against the President in federal district court to compel his compliance with the Resolution.<sup>69</sup> The suit sought to enjoin the President from initiating an offensive attack against Iraq without first seeking and obtaining from Congress either "a declaration of war or other explicit congressional authorization for such action."<sup>70</sup> Although the court expressly recognized that imminent hostilities sufficient to trigger the Resolution existed as early as August 1990, it employed a tool of judicial abstinence to avoid deciding the case.<sup>71</sup> Despite this formal legal action, President Bush continued throughout 1990 to ignore the Resolution as well as Congress' insistence that he comply with its terms.<sup>72</sup>

It was not until January 1991, literally days before the war against Iraq was initiated, that President Bush took action to invoke the Resolution.

---

67. Marshall, *supra* note 3, at 121. The article quotes Senator Sam Nunn (D. Ga.), Chairman of the Senate Armed Services Committee, as stating in regard to the additional troop deployment, "I was informed. I was not consulted . . . [T]here is a big difference between being informed after a decision has already been made and getting your views [heard] before one is made." *Id.* President Bush's letter to Congress on November 16, 1990, reporting the November 8, 1990 doubling of United States troop strength in the Persian Gulf, made no attempt to comply with the Resolution's provisions. Most notably, the President clearly did not give notice "within 48 hours" of his deployment of troops "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation." Resolution, *supra* note 2, at § 1543(a)(3).

68. WASH. POST, Nov. 9, 1990, at A1, col. 4.

69. *Dellums v. Bush*, 752 F. Supp. 1141, 1143-44 (D.D.C. 1990).

70. *Id.* at 1143. The congressional plaintiffs alleged that military action in Iraq was "imminent" within the meaning of section 4(a)(1) of the Resolution and asserted that initiation of an offensive action by the United States absent a declaration of war and without the concurrence of Congress would deprive them of their voice under the Constitution. *Id.* at 1144.

71. Judge Greene wrote a strongly worded opinion assailing the administration's position in regard to the imminence of hostilities stating,

With close to 400,000 United States troops stationed in Saudi Arabia, with all troop rotation and leave provisions suspended, and with the President having acted vigorously on his own as well as through the Secretary of State to obtain from the United Nations Security Council a resolution authorizing the use of force, it is disingenuous . . . to characterize plaintiff's allegations as to the imminence of the threat of offensive military action . . . as "remote and conjectural . . ."

*Id.* at 38. Notwithstanding his feelings in this regard, Judge Greene dismissed the suit under the doctrine of ripeness (because the full Congress had not debated the issue and had not yet reached an impasse). *Id.*

72. See Marshall, *supra* note 3, at 121.

In what has been called "a gamble to shore up congressional support" for a House joint resolution authorizing the use of force against Iraq, the President specifically approved language in that resolution that invoked section 5(b).<sup>73</sup> While some were quick to hail this as a victory for the Resolution,<sup>74</sup> it in fact demonstrates how feeble the legislation has become. When the President feels compelled to implement the Resolution's provisions only as a ploy to win congressional concessions, a war powers victory can hardly be claimed. Indeed, almost immediately after the passage of the joint resolution authorizing him to use force against Iraq, President Bush issued a statement in which he made it clear that the war powers debate was far from being settled.<sup>75</sup> Following closely on the heels of that disclaimer came other rebuffs.<sup>76</sup> One astute observer of this scena-

---

73. See Garrett & Bedard, *supra* note 3, at col. 1. In the House joint resolution entitled *Authorization for Use of Military Force Against Iraq*, statutory authorization was given to the President to implement twelve United Nations Security Council Resolutions against Iraq (including Resolution 678, which authorized allied forces to utilize "all necessary means" to uphold and implement all of the U.N. Resolutions and "to restore international peace and security in the area"). The President, in section 2 of the joint resolution entitled *Authorization for Use of United States Armed Forces*, was specifically given the authority by Congress to use United States Armed Forces pursuant to U.N. Security Council Resolution 678 in order to achieve implementation of all other U.N. Resolutions. Prior to using this authority, the joint resolution required the President to first certify to both Houses of Congress that "all appropriate diplomatic and other peaceful means to obtain compliance" were tried and were unsuccessful. Section (c) of the joint resolution specifically invokes the War Powers Resolution by stating "this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution," and clarifies that "[n]othing in this Resolution supersedes any requirement of the War Powers Resolution." Finally, section 3 of the joint resolution requires the President to submit a report to Congress every 60 days summarizing the status of military efforts against Iraq. *Authorization for the Use of Military Force Against Iraq Resolution*, Pub. L. No. 102-1, 105 Stat. 3 (1991).

74. See Fascell, *War Powers Resolution Alive and Well*, 137 CONG. REC. 247 (1991).

75. In his statement issued on January 14, 1991, two days prior to initiation of war with Iraq, President Bush stated:

Today I am signing [House Joint Resolution 77], the "Authorization For Use Of Military Force Against Iraq Resolution." By passing [the resolution], the Congress of the United States has expressed its approval of the use of U.S. armed forces consistent with U.N. Security Council Resolution 678 . . . . As I made clear to congressional leaders at the outset, my request for congressional support did not, and my signing of this resolution does not, constitute any change in the long-standing position of the executive branch on either the president's constitutional authority to use the armed forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution.

Statements by President George Bush (Jan. 14, 1991), 137 CONG. REC. 247-48 (1991).

76. On January 18, 1991, two days after the air war with Iraq had been initiated, President Bush submitted a letter to Congress in compliance with the House joint resolution authorizing him to use United States Armed Forces against Iraq. In informing the Congress of his conclusion that "appropriate diplomatic and other peaceful means" had been ex-

rio commented appropriately that "Saddam Hussein's only virtue is that the War Powers Resolution seems to have been his first victim."<sup>77</sup> Operation Desert Storm proves that unless immediate remedial action is taken to come up with a workable alternative to the War Powers Resolution, future conflicts will be pursued not in accordance with its terms, but despite them.

## VI. CONCLUSION

America's war against Iraq unequivocally demonstrated how truly unreasonable the War Powers Resolution is. Born not out of congressional action, but rather, reaction, the years following the Resolution's Vietnam birth have substantiated the claim that the legislation is simply unworkable. At the heart of the problem is the lack of comity between the political branches, which Congress failed to realize was something that could not be legislated. Instead of encouraging candor and discourse, the confrontational provisions of the Resolution have ensured that such will not occur. Presidents shy away from compliance out of concern that to do so will amount to a tacit acknowledgment of the Resolution's constitutionality. Congress has lost sight of the bottom line and has become so bogged down in the legalisms of the Resolution that it often ignores the political wisdom of the foreign policy initiative being pursued by the military action at issue. The serious constitutional and procedural problems that have handicapped the Resolution since its enactment appear to be unsolvable. It is time for the Resolution to be repealed and for the executive and legislative branches to begin anew (within the framework of the Constitution) the examination of the proper distribution of war powers. This action would "set the stage for the building of a genuine bipartisan cooperative relationship based on comity and a mutual respect between coequal [branches] of government."<sup>78</sup>

---

hausted to get Iraq to comply with the various U.N. Security Council Resolutions, Bush made a specific point of indicating that his report was being filed "consistent with" the War Powers Resolution. Letter from President George Bush to Congressional Leaders, 27 WEEKLY COMP. PRES. DOC. 60 (Jan. 18, 1991).

77. See Crovitz, *War Powers Resolution Hasn't Saved Saddam Hussein—Yet*, WALL ST. J., Aug. 29, 1990, at A11, col. 3.

78. TURNER, *supra* note 33, at 5; see also Moore, *supra* note 24, in which it is also recommended that the Resolution be repealed. Moore condemns Congress' tinkering with the constitutional scheme of separation of powers in the Resolution. "It is the Constitution, not the Congress . . . that determines where the powers of the branches begin and end. Congress cannot, by its own enactment, change the lines drawn by the Constitution that separate congressional and executive powers." *Id.* at 152. Moore recommends that a bipartisan Presidential and Congressional Commission be established to evaluate issues of foreign policy, and in particular the matter of the exercise of war powers. *Id.* at 153. Many scholars have adopted a similar recommendation which would see the creation of a small consultative

The time has come to lay to rest the War Powers Resolution. The following epitaph is offered: Born of the distrust and political failure of Vietnam; Dead and buried as a result of the mutual cooperation, trust, and political consensus engendered by Operation Desert Storm.

---

committee composed of congressional leaders who would consult with the President on issues involving the war power. See Ely, *supra* note 12; Robbins, *supra* note 10; and Wald, *supra* note 12.