The US Army War College Quarterly: Parameters

Volume 31
Number 1 *Parameters Spring 2001*

Article 4

2-15-2001

The War Powers Resolution: A Rationale for Congressional Inaction

Timothy S. Boylan

Glenn A. Phelps

The War Powers Resolution: A Rationale for Congressional Inaction

TIMOTHY S. BOYLAN and GLENN A. PHELPS

From *Parameters*, Spring 2001, pp. 109-24.

Nearly three decades ago Congress overturned a veto by President Nixon and passed the War Powers Resolution of 1973. Supporters of the resolution took heart that Congress was, at last, challenging the increasingly unilateral exercise of presidential power in matters of war and peace. The most enthusiastic proponents of the resolution believed that it would reinvigorate a legislative branch which, through a half-century of depression, world war, and nuclear anxiety, had gradually ceded many of its constitutional prerogatives to an executive branch willing to take them on as its own. The Vietnam War had marked the nadir of congressional influence in foreign affairs. While few blamed Congress directly for involving the nation in that war, the conflict had highlighted the growing irrelevance of the first branch of government in foreign policy matters. The War Powers Resolution (also commonly called the War Powers Act) was supposed to change all that. Congress would no longer be satisfied with nipping at the heels of the leviathan as it strode uninterrupted toward an era of the "imperial presidency." It would stand as a full constitutional partner of the President and presumably ensure that future military interventions, because of the shared institutional responsibility, would be more rare, more consensual, and therefore more legitimate.

After almost 30 years and dozens of instances involving the use of the US military in hostile settings, how has the War Powers Resolution fared as way to bring about collective judgment and renew the participation of Congress in matters of military conflict? Have the requirements and mechanisms of the resolution fulfilled the intent of the Constitution? What results have been brought about by this decisionmaking framework? And were these the intended results?

The four requirements of the War Powers Resolution were intended to promote collective judgment when the nation was faced with issues of war or potential hostilities and to provide procedural mechanisms that would be activated in case of presidential noncompliance.[1] The resolution envisioned a sequence of events when military action was contemplated. First, a requirement for the President to consult with Congress would alert the latter that force had been used or was expected in a given context. Second, the specific reasons for the action and the justifications for it were to be provided to Congress through a report from the President. Whenever possible, the President was to make this report within 48 hours of taking any action or making a tactical decision, thus starting the "clock" for Congress.[2] Third, Congress would have 60 days to debate the President's action and decide on its legitimacy and legality. However, if Congress did not make any decisions or take action--even, in fact, if Congress ignored the issue for two months--there were still to be consequences. If no express authorization of presidential action were forthcoming, the military forces would have to be withdrawn at the end of 60 days, though the President might submit a request for a 30-day extension of this deadline. Fourth, Congress retained the power, through the passage of a concurrent resolution, to direct the President to remove military forces at any time during the 60-day period.[3]

Using the text of the War Powers Resolution and three important military engagements in the 1980s and 1990s, this article will evaluate the following three areas of concern: *communication*, and its implications for conducting policy involving the use of force; *timing*, both as it touches domestic debate and foreign actions; and the *representative mandate* of Congress, which should be at the core of any evaluation of the law.

The Persian Gulf, 1987: Procedural Mechanisms and Stubborn Realities

Looking at the history that preceded the passage of the War Powers Resolution and the intent of its framers, the communication requirement of consultation and reporting envisions only two parties: Congress and the President. The consultation provision sought to balance the need of the President for secrecy and unity in tactical command with the

need of Congress to debate, seek consensus, and provide authorization. This is the only requirement before the initiation of hostilities, yet its language stops short of providing the President with a pre-authorization for use of force. Section 3 reads:

> 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.[4]

Nevertheless, the 27-year history of the consultation requirement has been one of presidential lip-service and congressional acquiescence. During a June 1995 House debate over legislation to repeal the War Powers Resolution, one Representative noted that there had been 40 incidents since passage of the resolution in which there had been an identifiable consultation between the President and Congress over uses of force in foreign settings. The record of presidential communication had been extensive. However, it was also noted that these communications, for the most part, had been presidential exercises in telling the Congress what had been already decided and done, not invitations for Congress to join in the decisionmaking process.[5] The Representative's conclusion was that the consultation requirement, by itself, did little to inhibit presidents from unilaterally deploying armed forces into hostile settings.

The consultation requirement is coupled with the reporting requirement. As a legislative interpretation of the Constitution, the framers of the War Powers Resolution conceded that not all uses of force fell neatly into the declaration-of-war clause. Section 4 states:

> In the absence of a declaration of war, in any case in which the United States Armed Forces are introduced . . . 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;
>
> {C} the estimated scope and duration of the hostilities or involvement.[6]

Other subsections require that reporting be done regularly and be provided upon request to the Congress should hostilities persist.

There have been a number of criticisms of the 48-hour reporting requirement. One writer observed, "It takes little ingenuity to imagine that the President might be occupied during the first 48 hours of hostilities with his responsibilities as Commander-in-Chief, into which zone of responsibility Congress may not intrude."[7] Presidents have not ignored the reporting requirement as much as they have redirected it, using it to their best advantage. Instead of formally reporting to Congress, presidents have "gone public," reporting directly to the people, hoping to both promote and justify their actions.

One of the problems surrounding both the consultation and reporting requirements has been identifying the circumstances that activate them. For example, in March 1987 President Ronald Reagan ordered the military into the Persian Gulf. Two months later, the U.S.S. *Stark* was on patrol in international waters in the Gulf when an Iraqi F-1 Mirage, proceeding south along the Saudi Arabian coast, suddenly turned east, heading toward the *Stark.* As warnings were broadcast, the Mirage fired two Exocet air-to-surface missiles. Both hit the *Stark,* killing 37 sailors. The *Stark* did not return fire, either in its own defense or in retaliation for the attack. Months later, in September, US forces attacked an Iranian naval landing craft, the *Iran Ajr.* For months, the ship had been suspected of laying mines in the Gulf. After determining that crewmen on the deck were dropping objects overboard which appeared to be mines, the order was given to fire upon the ship. It was left disabled and on fire.

These events illustrate the statutory ambiguity found in the War Powers Resolution. US military forces were not deliberately or intentionally introduced into hostilities by order of the President until the 21 September attack upon the

Iran Ajr, five months after Kuwait agreed to accept US protection in the Gulf. It can be argued that US forces were involved in hostilities when the U.S.S. *Stark* was attacked on 17 May. Yet, even if the attack on the *Stark* qualified as a hostile act, it did not activate the War Powers Resolution mechanisms because the President had not intentionally introduced the *Stark* into hostilities. And, following the single incident, further hostilities were neither "imminent" nor "clearly indicated." There was no further order from the President to place more naval vessels in direct confrontation with potentially hostile forces. The naval vessels, while still in dangerous waters and vulnerable to attack, did not expect further confrontation and did not intend to initiate any. As a result, even if the 21 September attack on the *Iran Ajr* started the 60-day clock, the clock then stopped because the hostilities did not continue.

How does one make sense of these events and square them with the Section 3 and 4 provisions of the War Powers Resolution? Did the initial introduction of US naval forces into the Persian Gulf require consultation? Did the action fall into the category of "imminent involvement in hostilities"? Did either the Iraqi attack on the *Stark* or the firing on the *Iran Ajr* start the 60-day clock, and was a report from the President detailing these incidents necessary?

The debates surrounding the drafting and passage of the War Powers Resolution did not anticipate the possibility of a string of disconnected crises that could, over time, blend into an identifiable, extended conflict. One of the consequences of this lack of foresight has been the difficulty Congress has faced in determining when consultation and reporting become mandatory and when the 60-day clock is to be activated. Indeed, Congress had expended as much debate over this quandary as over the substantive issues surrounding specific military conflicts. Congress has been long on investigations and hearings and short on resolve in the midst of military action or crisis.[8] Eleven days following the attack on the *Stark*, a joint resolution was introduced seeking the start of the 60-day clock. While it could be argued that Congress knew little more was going to happen militarily in the Persian Gulf, it remains that some statutory action was necessary if the President was unwilling to bring Congress into the decisionmaking process. The resolution failed. A month after the *Iran Ajr* incident, another joint resolution was introduced. This resolution sought to provide specific authorization under the War Powers Resolution for a continued presence in the Persian Gulf. Although the term of the proposed authorization was indefinite, it would have required a report from the President every three months. Despite the benign wording of the resolution, it never emerged from the House Foreign Affairs and Rules committees.[9]

The intent of the two communication requirements was to bring Congress into the decisionmaking process over the use of force whenever the circumstances permitted. The hoped-for collective judgment stipulated in the preamble to the War Powers Resolution was to be achieved by presidential adherence to the provisions detailed in Sections 3 and 4 of the law. In each instance, according to the resolution, "the President shall" fulfill his obligations. However, the record of after-the-fact consultation and selective inattention to the written report requirement has brought about a result neither desired nor envisioned by the proponents of the resolution. Presidents have been given a 90-day carte blanche to introduce US troops into hostilities without congressional authorization. Rather than check and limit the executive, the overall structure of the resolution has augmented and enhanced the President's share of the war power.

The intent of the War Powers Resolution was to restore and to ensure collective judgment in using force in foreign settings. The intentions of the drafters of the resolution were sincere--the law was as much a decisional framework for Congress as it was for the President. It did not take long, however, for presidential action and assertiveness to take place--with the acquiescence and consent of the Congress. Missing from this strategy is a Congress fulfilling its constitutional mandate during the time a military action is taking place. This is not an excuse for Congress to intrude on the President's power as Commander in Chief, an enumerated power of the President and an area that is off limits to the reach of Congress.[10] It is, however, a matter of Congress fulfilling its constitutional responsibility, and doing so at the proper time.

Operations Desert Shield and Storm, 1990-1991: From Delay to Deadline

The 60-day clock provision of the War Powers Resolution, like the consultation and reporting requirement, was meant to strike a balance between the warmaking functions of each branch, as set forth in the preamble. The idea of balance can be seen in the recognition by Congress that the President does have some latitude under law to deploy and use military forces. The main points are found in Section 5:

> Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4[a](1), 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 . . . (2) has extended by law such sixty-day period, or (3) is physically unable to meet . . . . 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 . . . requires continued use of such armed forces.[11]

The 60-day clock has been one of the more controversial aspects of the War Powers Resolution. It was eliminated from the Byrd-Warner bill to amend the resolution in 1988, and it was absent from the National Security Revitalization Act debated in the House and the Peace Powers Act introduced in the Senate in 1995.[12] Its controversial standing and its ineffectiveness stem from the expectation that its provisions would trigger automatically, and that Congress would not need to determine when a report was due and when the clock started ticking. This is not just a technicality. To declare the clock running is to force the issue of congressional debate and decision. There is a vast difference between debating when the clock should begin and determining by statute whether to authorize a military operation.

The congressional response to the timing issue has been one of delay and deferment. Congress's focus on legal procedure at the expense of policy substance neutralizes its response and removes it from the decisionmaking process. Floor debate may eventually confront and evaluate an action taken or a policy formulated by the President, but such debate can become moot if it happens close to midnight on the policy clock. The Desert Shield and Desert Storm debates of 1990 and 1991 illustrate this problem.

On 2 August 1990, Iraq invaded Kuwait and presented the United States and its allies with its first post-Cold War crisis. In November the United Nations Security Council authorized the use of force if Iraq did not withdraw its forces from Kuwait by 15 January 1991. In the months leading up to the deadline, questions were revived about the power and prerogative of Congress to wage war. Debate took place in two stages. In October 1990, both chambers of Congress debated the meaning of the Constitution's warmaking provisions, the powers of the executive and legislative branches, and the applicability of the War Powers Resolution. No specific decisions were made before Congress recessed and went home for the holidays in late October. When the members of Congress returned to Washington in January 1991, the UN deadline was days away. On 8 January, President George Bush called on Congress to exercise its constitutional responsibility by authorizing military action against Iraq. Three days of long and intense debate followed, and on 12 January each chamber of Congress held two votes on the proposed military action. The first vote was on a proposed continuation of sanctions as an alternative to military force. The second sought to authorize use of force per UN Resolution 678. The second vote passed the House easily, and passed by a much narrower margin in the Senate. Less than three days before the UN deadline, the Congress of the United States decided to decide.

Three months earlier, on 1 October 1990, House Resolution 658 had been introduced, seeking to support the actions already taken by the President in the Middle East. Its sponsors pointed out that the resolution was not in conflict with the War Powers Resolution, since there had been numerous, ongoing meetings in August and September between House members and committees and the President and his senior advisors. Further, they were careful to show that HR 658 would not become another Gulf of Tonkin Resolution, as it held the President to the use of deterrent force only and did not grant an open-ended authorization.[13] The call for action on HR 658 reveals a familiar theme:

> Thus, the very spirit of War Powers is carried out by virtue of the fact that we bring this resolution to the floor so members can vote on it . . . or against it--because without that we have nothing.
>
> We would be saying, in effect, "Let the President take the lead and do whatever he wants to; we will sit back and see which way the wind blows and then decide what we are going to do or how we are going to do it or what we are going to say about it."[14]

Those opposed to HR 658 did not accept the "take action" challenge. Many who voiced agreement with its substance nonetheless opposed it because it "fails to meet the very specific requirements set down by the War Powers Act, and thereby undermines the law."[15] For others, the 9 August 1990 letter from President Bush detailing his actions in response to the Iraqi invasion did not constitute sufficient reporting. "President Bush should have and should now send

an update." The 60-day clock and timing requirement, which had been absent from the debate until this point, had been rediscovered--and some believed it was ticking:

> We are now within a week of the 60-day limit. Therefore, the War Powers Act requires us to take one of the specified actions, or the troops must be withdrawn. I believe we should now be voting, not on this resolution, but on a 60-day extension.[16]

> We cannot duck our responsibility. We must demand a 4(a)1 report from the President defining the scope, the duration, the objectives of our deployment in the gulf, and then we must vote aye or no on the written record.[17]

After months of extensive communication by the President, and after two months of regular meetings between congressional members and presidential advisors, some representatives still seemingly lacked enough information to cast an informed vote. It is not possible to tell from the written record whether the above-quoted Representative believed that more complete information was lacking, or that he absolutely needed a formal 4(a)1 report from the President, and that no other form of communication, no matter how plentiful and detailed, would suffice.

The October 1990 debates once again found members of Congress arguing over the fine points of procedure and interpretation, while seemingly oblivious to the fact that the term specified in the War Powers Resolution was fast drawing to a close and some affirmative action was expected. The issue of timing occupied the minds of many in these debates. Yet, the concern was over the President's adherence to the 60-day clock. Had he, in fact, reported? Had the clock begun?

The House and Senate debates of 10-12 January 1991 concerned the question of congressional authorization versus continued sanctions. One side argued that extending the deadline meant that Saddam Hussein and the Iraqis could improve their defenses and become better entrenched in Kuwait. If military action took place at a later date, this delay would translate into increased American casualties.[18] The opposing side did not rule out the use of force, but believed that continued sanctions would weaken Iraq's hand. A longer wait, it was thought, would better prepare coalition forces for warfare in the desert. Underlying this debate was a disquiet about the legitimacy and applicability of sending US military troops into battle by order of the United Nations.[19] But few members challenged the legitimacy of Congress in delaying this great debate until the last hour. One exception was Representative Bill Green, who concluded:

> By inserting ourselves into the process at this late date, our ability to participate in a meaningful way is severely limited and could severely cripple the recently begun process of providing for collective security through the United Nations . . . .

> The 101st Congress, in its waning days, did not lack opportunities to affect this process. By the time we had adjourned on October 28, 1990, we had approved a defense authorization and appropriations bill that provided funds for the stationing of troops in the Persian Gulf. Since that deployment had been in accordance with article 51 of the UN Charter and UN Resolution 655 concerning the naval and maritime blockade, our vote plainly endorsed that deployment.

> I supported those efforts, joining over 400 of my colleagues in approving an additional $978 million for Persian Gulf related operations.

> . . . [B]y waiting until this later hour, we have rendered ourselves extraneous to any positive policy role, unless we are prepared to try to force a change in the position taken by the United Nations.[20]

This admission highlights Congress's odd treatment of the War Powers Resolution. The weeks of late summer and early autumn of 1990 showed Congress wrangling over reporting and timing procedure, and delaying debate on the tough substantive issues surrounding the invasion of Kuwait. Rather than promoting consultation, the War Powers Resolution *helped to delay and inhibit debate and decision*. Perhaps Congress might have found a way to push a final decision to January without recourse to the War Powers Resolution. But the ability to find some other strategy of delay does not excuse the current one. This episode illustrates the larger theme--the history of the War Powers Resolution

has not been just one of surprises or consequences unintended by its framers. Congress has purposely used the resolution to offer the show of debate and deliberation, while avoiding engagement with substantive policy. This is not simply a question of political adaptation. It is a clear demonstration of constitutional abdication.

Kosovo, 1999: Authorize? Declare? Withdraw? Limit?

The Dayton Accords signed in December 1995 began a process that saw more than 16,000 US military troops stationed in Bosnia by the end of 1996. In the years that followed, Congress was not shy in its criticism and condemnation of Serbian repression in Kosovo. During 1998, the House and Senate passed resolutions condemning Serbian police actions in Kosovo, and passed a "sense of the Congress" resolution stating that Slobodan Milosevic was a war crimes suspect. Further, Congress sought to both involve itself in the ongoing process of peacekeeping and to keep some form of check upon the President. An amendment to a defense appropriations bill passed in late July barred funding for further deployment of US troops "unless the President certifies in a report to Congress that such a military presence is in the national security interest of the United States."[21] In September, a concurrent resolution was passed that called upon the President to "work with Congress to draft legislation and regulations" to provide monetary compensation for ethnic Albanian victims from Yugoslavian assets frozen in the United States.[22]

With serious doubts over the potential for success at the peace table, and the possibility of a NATO-led air campaign against Milosevic and his forces, both chambers of Congress engaged in extensive debates over the scope and limits of the war power. On 11 March 1999, the House debated House Resolution 103, which set forth the procedural rules for consideration of House Concurrent Resolution 42, regarding the use of US armed forces as a part of the NATO peacekeeping operation. The latter resolution, a sense of the Congress measure having no binding effect, was passed and placed on the Senate calendar. Two weeks later, the Senate debated and passed Senate Concurrent Resolution 21, which authorized the President to conduct military operations and missile strikes against the Federal Republic of Yugoslavia. The contexts of each of these early debates are noteworthy. On 11 March, peace negotiations were taking place and were scheduled to conclude on 15 March. President Clinton had stated that, if needed, US troops could be deployed within 48 hours of that deadline. The "debate now or debate later" question was clearly troubling to many members of Congress, and numerous voices questioned the wisdom of passing resolutions while the peace talks were in progress. On 23 March, the Senate debated the resolution while knowing it was highly likely that missile strikes would commence the following day. Again, the procedural question of when it is proper to debate and vote overshadowed the substantive issues of war and peace.

One month into the air campaign, four resolutions were considered in the House. During a marathon day of floor debate on 28 April, the House voted on proposals that (1) sought to prohibit any allocation of funds for ground troops without prior congressional authorization, (2) called for the removal of all military forces from their positions in Yugoslavia, (3) called for a declaration of war against Yugoslavia, and (4) sought to authorize the ongoing military air operations and missile strikes. Ultimately, the first resolution passed and the next three were defeated. The defeat of the fourth proposal, Senate Concurrent Resolution 21 (in a 213-213 tie vote), was controversial due to both the mixed signals that a somewhat suspect tie vote gave and the fact that it removed any affirmative action by Congress over the month-long military campaign.

All four proposals were rooted in the text and intent of the War Powers Resolution, and the floor debates over each resolution saw the War Powers Resolution frequently quoted and referenced. On the matter of timing, two important questions emerged from the proposed resolutions. First, was this a "war" which automatically triggered the procedural mechanisms of the War Powers Resolution? Second, was the timing of the debates and votes over the specific Kosovo resolutions appropriate?

A more intriguing part of the congressional response to the Kosovo conflict was the set of resolutions offered by Representative Tom Campbell. His proposals, the second and third of those debated on 28 April, sought the withdrawal of all military forces from Yugoslavia "pursuant to section 5(c) of the War Powers Resolution,"[23] and called for a declaration of war "pursuant to section 5(b) of the War Powers Resolution."[24] According to Representative Campbell, these resolutions conformed to the intent of the War Powers Resolution and provided avenues for Congress to fulfill its constitutional responsibility. In oft-repeated language during the House debates, one Representative proclaimed:

> Mr. Speaker, the Constitution is very clear. It is the United States Congress which has the power to determine issues of war and peace and to decide whether our young men and women are put in harm's way. It is the President who is Commander in Chief of the military; it is Congress which determines whether we use that military.
>
> It is time now for Congress to stop abrogating its constitutional responsibility to the White House and to start seriously addressing the issues of war and peace.[25]

The sponsors of these two bills did not expect them to pass. The lopsided margins against the bills (290-139 and 427-2, respectively) in some cases did not even receive the sponsors' own votes. Passing the resolutions was not the goal. Debating and voting on the issues within the 60-day time limit was. Said one proponent of the declaration-of-war resolution, "Our duty as Congressmen of the United States of America is to uphold the law of the land, and the law of the land, as passed in 1973 under the War Powers Act, requires this kind of action."[26]

What happened during this day of prolonged argument and debate? For half the day, members of the House debated resolutions that were seen by some as required by the War Powers Resolution. The unlikely possibilities of immediate troop withdrawal or moving to a state of war were painstakingly examined, debated, and then defeated. Did that, in fact, fulfill Congress's constitutional responsibility and representative mandate? A look at the other resolutions considered on that day points to a different conclusion.

The first resolution--the only one that passed--was anticipatory in nature. If ground troops were to be introduced into combat, congressional authorization for funding would be needed. Again, many of the proponents of this bill used familiar language arguing for its passage, stressing that it was "a proper response to where we now find ourselves in terms of asserting our congressional role under the Constitution, under the War Powers Resolution."[27] However, when it came to the final bill seeking authorization for the ongoing air campaign, the time to stand up and be counted resulted in a confusing and unsatisfactory tie vote. Three members who had been on the floor to vote on the first three bills were mysteriously absent from the final vote tally. Further, one Republican member changed her vote from "aye" to "nay," turning a slim margin of victory for President Clinton into an odd combination of defeat and stalemate. After a remarkable day of floor speeches and impassioned debate over congressional responsibility, the final vote--the one that really mattered--refused to authorize the missile strikes and yet also failed to clearly prohibit or condemn them. In the end, the House jumped through what it perceived to be the mandatory hoops set out by the War Powers Resolution--and failed to act. It failed to clearly communicate its will, and it failed to exercise its representative mandate over matters of war and peace.

A week later, the Senate found a way to table a long-standing bill that would have authorized the deployment of US armed forces in Yugoslavia. The final decision of the Senate was not to decide. One influential Senator--John McCain--was able to summarize both what had happened in the House and what was about to happen in his own chamber:

> Last week, a majority in the other body sent just such [an ambiguous] message to our servicemen and women, to the American public, and to the world. They voted against the war and against withdrawing our forces. Such a contradictory position does little credit to Congress. Can we in the Senate not see our duty a little clearer? Can we not match our deeds to our words?[28]

Apparently not. The vote to table the resolution on the following day provided the answer.

Conclusions: Procedure and Policy

The War Powers Resolution sought to reinsert Congress into the authorization and approval of the use of military force. It attempted to walk a fine line between the requirements of the Constitution and the political and security realities of the late 20th century. If the power vested through the appropriations process had passed into an age of automatic appropriations, then the War Powers Resolution emerged to guarantee after-the-fact control of military forces once deployed by the President. The intent was that the provisions and mechanisms introduced by the War Powers Resolution would redress the imbalance of power created by the nuclear age and the "*pax americana*."

It didn't. And that is the crux of most appraisals of the War Powers Resolution. We contend, however, that the

resolution's departure from its original intent and purpose has not been only a matter of "unintended consequences." Rather, the resolution has altered legislative and executive relations in ways that have been not only unintended, but detrimental. Presidents have reshaped the communications requirements to report decisions and actions already taken and to "go public" on television to solidify popular reaction and support. Congress has condemned this modification of the consultation and reporting requirements, but has done little to directly challenge it. Presidents have ignored the 60-day clock and have asserted their power as Commander in Chief to direct US forces abroad. Congress has condemned such actions, but has, through delay and deferment, resisted sending legislation to the President for possible veto. It has not exercised--and has seldom even threatened to exercise--the power of the purse once the President has taken action.

These are procedural issues that point us to a more core constitutional problem: that deference, delay, and lack of confrontation has substituted alliance with public opinion for fulfilling constitutional responsibilities. John Hart Ely has concluded that Congress

> . . . has left it at simply hemming and hawing, sidetracking resolutions to start the sixty-day clock with incomprehensible "points of order," passing resolutions to similar but not identical effect in the two houses and then being "unable" to reconcile them until the war was over, or more often, just doing nothing. Of course this is just a reversion to pre-resolution form--letting the President initiate military action while retaining for Congress the options (depending on how the war went) of pointing with pride or viewing with alarm.[29]

This is not simply a matter of unintended consequences. Congress has adapted itself to the War Powers Resolution and has found avenues of political benefit by having it available to wave around. The problem is not just that Congress has failed to discover constitutionally sound ways to fulfill its obligations. Instead, it has ignored and avoided those options, and substituted less risky alternatives. This has moved Congress from exercising its significant powers during an event or crisis to waiting to see how the event or crisis plays out. The mechanics of representation--debate, deliberation, and the passing of laws--have given way to after-the-fact alignment with public opinion. What has been lost can be called "present situation" action: engaging in debate and making decisions during the time when such actions are critical and relevant. In one of the most crucial policy areas, the conduct of war and the use of force, Congress has abdicated its representational duties. And it has been greatly aided and abetted by the War Powers Resolution of 1973.

So, how should theory translate into policy? What should be done in light of the preceding analysis? Realizing that policy prescriptions can easily be gathered in the crosshairs of either those who would disagree on practical ("you have oversimplified the problem") or interpretive ("you have misread the Constitution and the War Powers Resolution") grounds, we offer the following three proposals.

. First, *kick out the crutches: repeal the War Powers Resolution*. Many lawmakers and scholars have sought to revise and refine the War Powers Resolution to achieve collective judgment in matters of use of force. For some, repeal of the resolution would send the wrong message to an already assertive executive branch. The contention in this regard is that because the intent of the law was good, there must still be some benefit to keeping the law on the books. We disagree. Most of those who fear executive usurpation of the war power recognize but do not incorporate congressional avoidance into their assessments. The feared "green light" for presidential adventurism would start flashing only if the resolution were to be repealed with no substantive change to follow. Nature abhors a vacuum, and politics abhors a power vacuum. Congress needs to have something to offer if the resolution is repealed and laid to rest. While repeal would not guarantee such action, it would certainly take away one of the key impediments to meaningful change.

. Second, *count the cost of partnership and reprioritize*. One point that must be admitted when surveying the ways in which Congress has used the War Powers Resolution is that the overall strategy has worked quite well. Congress is not a chamber of idiots. What has evolved over the past three decades is a strategy for maintaining power while avoiding the attendant risks of taking a position. If the War Powers Resolution were to be repealed, Congress would soon face a national security challenge that would require something beyond criticism and problem-avoidance. Simply put, Congress must place its representative mandate before politics-as-usual. This essay has highlighted just how difficult such an about-face would be for Congress, but the difficulty of that is exceeded by its necessity. Congress should

either dramatically reprioritize its commitments to foreign policy and military actions abroad or step aside to allow and admit executive predominance. The structure and text of the Constitution require the first choice. The records of the 1787 Philadelphia convention confirm the need for the representative body to be active in issues of war and peace.

Congressional responsibility is the prerequisite to collective judgment. Artificial mechanisms forcing a written report or stipulating a set number of days for a military operation have not brought Congress back into the decisionmaking process. The 27-year record of using the War Powers Resolution as a shield against the need to take action is clear. The mechanisms provided by the resolution have not, and cannot, substitute for informed debate and principled action.

. Finally, *expedited procedures should be tied to statutory action*. Many works by practitioners and legal scholars have called for expedited procedures for congressional decisionmaking. In an article in the *Georgetown Law Journal*, Senator Joseph Biden and John Ritch identified the key foreign policy problem of the Cold War era as a presidential willingness to invoke "emergency powers" in the absence of statutory authorization.[30] Yet, their call for expedited procedures in debating war powers issues presumes maintenance of the War Powers Resolution framework and allows specific statutory authorization to be optional, not mandatory.

Unless expedited procedures force Congress to act by joint resolution and require an "up or down vote," Congress will find new and innovative ways to avoid direct responsibility, and any hope for substantive change will disappear. Congress most effectively--and constitutionally--involves itself in war powers issues through statutes, through passing legislation that either prohibits or authorizes presidential actions within a time framework where such actions are relevant and binding. Acting by statute also allows Congress to confront each action or crisis as a unique event and to contour its approval or disapproval accordingly. Procedural change that shifts responsibility to a consultative group does not resolve the issue. In that case the checking and balancing by an engaged Congress is bypassed. Congressional reassertion through vigorous debate and appropriate legislation is risky, fraught with difficulties, and may even get a few members booted out of office at the next election. But it remains the sole way in which the intent of the Constitution as interpreted by the Congress itself--seeking collective judgment in matters involving the use of force--can be fulfilled.

Has Congress gotten what it wanted in 1973? In theory, Congress wanted to restore its role in war powers decisionmaking. It created legal and procedural mechanisms intended to put its own feet to the fire and force actions or responses that would ensure collective judgment when American troops are placed in harm's way.

In reality, however, the plan has failed. The artificial provisions and restraints created by the War Powers Resolution have not fit the post-Vietnam practice of short, easily winnable military actions, peacekeeping efforts, or nation-building under the auspices of the United Nations. In practice, the resolution has become something never intended nor envisioned by its proponents and framers: a shield from and a substitute for substantive action.

Congress has satisfied itself with the show of participation without the attendant political risks. But it has forfeited something much more significant and essential--the constitutional representative mandate. Restoring that power will not come through a revival or revision of the War Powers Resolution. Repeal of the resolution must precede any move of Congress to fulfill its aspiration of bringing collective judgment into issues of war and peace.

NOTES

1. Section 2(a) of the War Powers Resolution states that "this joint resolution [is] to fulfill the intent of the framers of the Constitution . . . and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities." Even this plain language presents an interpretive problem. Should this section be read as Congress's desire to accomplish two distinct purposes (e.g. fulfill the intent of the Constitution's framers *and* increase the degree of collective judgment regarding overseas military actions)? Or is Congress just noting that the intention of the framers *is* to effectuate collective judgment? The canons of statutory construction do not provide clear guidance, but for our purposes it does not matter what the intentions of the Constitution's framers were (indeed, there is significant debate over whether Congress's interpretation of the founders' intention was accurate). What matters is that the War Powers Resolution sets forth a significant expectation that

Congress's role with regard to the engagement of American armed forces would be greater than in the years immediately preceding. Congress believed that it had lost its voice and wanted to find it again. It is against this standard that the War Powers Resolution should be assessed.

2. This is open to interpretation. Most writers see the requirements of the War Powers Resolution as interconnected, and conclude that the report by the President "trips" the clock and the 60-day countdown begins. However, there is nothing to stop Congress, without the presidential report, from adopting a measure that begins the clock and notifying the President that the 60-day clock has officially started.

3. This section of the resolution, ostensibly intended to curb short-term presidential adventurism, has been determined by many to be a legislative veto, and therefore unconstitutional. See the Supreme Court opinion of and extensive discussion surrounding *Immigration and Naturalization Service v. Chadha*, 103 S.Ct. 2764 (1983). In *Chadha*, the court ruled that the one-house legislative veto was unconstitutional. The decision was seen as invalidating section 5[c] of the War Powers Resolution. Scholarship is split over the applicability of *Chadha* to section 5[c]. It should be noted, however, that Congress has not followed the direction of the court in the 17 years since the *Chadha* decision. Constitutional doctrine has not translated into legislative practice. Justice Byron White's dissent in the case declared that it sounded the "death knell" for the legislative veto. Such has not been the case. Congress has passed more than 200 new laws containing legislative vetoes since the 1983 decision.

4. War Powers Resolution of 1973, H. J. Res. 542, Public Law 93-148 (1973); 87 Stat. 555, 50 U.S.C. 1541-1548, at 1543.

5. See comments of Representative Toby Roth, *Congressional Record*, 7 June 1995, pp. H5659-60.

6. War Powers Resolution, at 1544.

7. See David L. Hall, *The Reagan Wars: A Constitutional Perspective on War* (Boulder, Colo.: Westview Press, 1991), p. 110.

8. Note the hearings held by the Senate Foreign Relations Committee in 1988. Occasioned by both the events in the Persian Gulf in 1987 and the bicentennial of the US Constitution, the war powers hearings produced 1,500 pages of debate and testimony entitled "The War Power After 200 Years: Congress and the Presidency at a Constitutional Impasse." Little was discussed in terms of the obligations and involvement of Congress in any specific policy context. Instead, the hearings revisited the questions of the validity of the War Powers Resolution and the ways in which presidents have sidestepped its procedural requirements. Some of those who testified had been before the House Foreign Affairs Committee in the early 1970s making similar, if not identical, claims. (Compare: US Senate, Committee on Foreign Relations, *Hearings Before the Senate Subcommittee on War Powers*, 14 July 1988; with US House of Representatives, Committee on Foreign Affairs, "War Powers," *Hearings Before the Subcommittee on National Security Policy and Scientific Developments*, 7-20 March 1973.)

9. See Hall, pp. 252-62.

10. One of us has written that part of the problem of war powers is in interpreting collective judgment as shared or concurrent power between the branches in the conduct of military force abroad. It is better viewed as sequenced power, where each branch exercises power granted in the text of the Constitution at a particular point during the onset and conduct of war or hostilities. Within this system of sequenced powers, Congress remains preeminent. It is vested with the power to make laws, and to tax and spend. It thus has the first and last word in the realm of foreign affairs and use of force. Congress must authorize and vote in appropriations for armed forces before the President, as Commander in Chief, can contemplate any use of force. And Congress can also remove those forces, either by decommissioning them or by specifically forbidding their use in a particular setting or circumstance. However, what sits between those two congressional powers is executive power and initiative. Despite the impressive array of powers granted to Congress, this view of sequenced power infers that there is something in-between that Congress cannot do. It cannot direct the forces it has created, acting as a "co-Commander in Chief." (See Timothy S. Boylan, "War Powers, Constitutional Balance, and the *Imperial Presidency* Idea at Century's End," *Presidential Studies Quarterly*, 29 [June 1999], 232-49.)

11. War Powers Resolution, at 1546.

12. For the specific language of the bills and the debates surrounding them, see US Senate, Committee on Foreign Relations, *The Peace Powers Act (S.5) and the National Security Revitalization Act (H.7), Hearing*, 21 March 1995.

13. See *Congressional Record*, 1 October 1990, p. H8443, comments of Representative Dante Fascell and the graph detailing the differences between the proposed resolution and the Gulf of Tonkin Resolution of 1964.

14. Ibid., p. H8444.

15. Comments of Representative Les Aucoin, ibid., p. H8448.

16. Ibid.

17. Comments of Representative Peter DeFazio, ibid., p. H8451.

18. See especially the comments of Senator John McCain: "It is intellectual sophistry to believe [sanctions] will have a decisive effect without the use of force. The best estimates of the CIA indicate that this is not the case. We have already imposed sanctions for five and one-half months, and we still have no clear timeline or date when we can be sure that sanctions will change Saddam Hussein's behavior. When will sanctions have enough time? Are we deferring action, or avoiding it?" *Congressional Record*, 11 January 1991, p. S230.

19. When the UN Security Council resolution was mentioned during the Senate debates, Senator George Mitchell replied, "The Constitution of the United States is not and cannot be subordinated to a UN resolution." The seeds of the 1995 National Security Revitalization Act and Peace Powers Act were being sown. See remarks of Senator Mitchell, *Congressional Record*, 10 January 1991, p. S101.

20. Comments of Representative Bill Green, *Congressional Record*, 12 January 1991, p. H390.

21. "Kosovo and U.S. Policy," *CRS Issue Brief*, Congressional Research Service, Library of Congress, Washington, D.C., 19 March 1999, p. 14.

22. Ibid., p. 15.

23. *Congressional Record*, 28 April 1999, p. H2414.

24. Ibid., p. H2427.

25. Comments of Representative Bernard Sanders, ibid., p. H2418.

26. Comments of Representative Matt Salmon, ibid., p. H2428.

27. Comments of Representative Benjamin Gilman, ibid., p. H2403.

28. Comments of Senator John McCain, *Congressional Record*, 3 May 1999, p. S4514.

29. John Hart Ely, *War and Responsibility* (Princeton, N.J.: Princeton Univ. Press, 1993), p. 49.

30. Joseph R. Biden and John B. Ritch III, "The War Power at a Constitutional Impasse," *Georgetown Law Journal*, 77 (December 1988), 372.

Timothy S. Boylan is assistant professor of political science at Winthrop University in Rock Hill, South Carolina. Professor Boylan was a civilian participant in the 45th annual National Security Seminar at the US Army War College in 1999. His academic interests are in the fields of constitutional theory, war powers, and national security law. His article "War Powers, Constitutional Balance, and the *Imperial Presidency* Idea at Century's End" appeared in the June

1999 issue of *Presidential Studies Quarterly*.

Glenn A. Phelps is professor of political science at Northern Arizona University in Flagstaff, Arizona. He is the author of *George Washington and American Constitutionalism* (Kansas, 1995) and has published articles in *Political Research Quarterly*, *Presidential Studies Quarterly*, and the *Santa Clara Law Review*. He recently addressed the US Air Force Academy on the subject of George Washington and American foreign policy.

Reviewed 15 February 2001. Please send comments or corrections to carl_Parameters@conus.army.mil