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Commentaries

The War Powers Resolution After the Libya Crisis

The Honorable Robert G. Torricelli†

The U.S. raid on Libya in April, 1986, raised once again the issue of presidential compliance with the War Powers Resolution¹ and also the larger issue of the proper roles of the executive and legislative branches in making foreign policy.² Among the questions that arose were the applicability of the War Powers Resolution to anti-terrorist operations, the nature of the President's obligation to consult with Congress, and the constitutional implications of an executive-legislative clash.

The War Powers Resolution was enacted in a triumph of congressional power when the House and Senate overrode President Nixon's veto in 1973. At that time the changing obligations of government and the changing nature of warfare had made the war-making procedure embodied in the Constitution unworkable. Since 1973, the transition in warfare — not just to insurgency, but to terrorism — has called into question the utility of the War Powers Resolution as well.

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1. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1541 (1982 & Supp. III 1985)). For a discussion of the War Powers Resolution, see HOUSE COMM. ON FOREIGN AFFAIRS, 97th Cong., 2d Sess., *THE WAR POWERS RESOLUTION* (Comm. Print 1982); R. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE* (1983).

2. For a discussion of Congress' reaction to the Libyan air strike, see N.Y. Times, Apr. 23, at A23, col. 1; *id.*, Apr. 23, A23, col. 2; Greenhouse, *Bill Would Give Reagan a Free Hand on Terror*, N.Y. Times, Apr. 18, at A9, col. 5; Roberts, *Lawmakers Say U.S. Failed to Consult Them Properly*, N.Y. Times, Apr. 17, at A17, col. 1.

I. Legislative History of the War Powers Resolution

The legislative (and political) history of the War Powers Resolution is long and complicated. As early as 1969, dissatisfaction with the conduct of the Vietnam War led the Senate to pass a non-binding resolution, S. Res. 85,³ which declared that a national military commitment could be made only "from affirmative action taken by the legislative and executive branches . . . by means of a treaty, statute, or concurrent resolution of both houses . . . specifically providing for such commitment."⁴

In 1970, the House passed H.R.J. Res. 1355,⁵ the first in a series of congressional measures that urged the President to consult with Congress before an unauthorized use of troops, and required him to report on his actions.⁶ It did not, however, give Congress the ability to force troop withdrawals.⁷ H.R.J. Res. 1355 died in the Senate, as did a similar bill, H.R.J. Res. 1, in 1971.⁸ By 1972, the tables had turned. The Senate passed a bill, S. 2956,⁹ that included provisions for congressional termination of United States military involvements. The contemporary House version contained no such provision, and no compromise between the two versions was reached in conference.¹⁰

The final passage and enactment of the War Powers Resolution was made possible in 1973 by a variety of circumstances. The Vietnam War by then encompassed Laos and Cambodia. President Nixon was increasingly weakened by the Watergate scandal. In March of that year, a House Foreign Affairs subcommittee began hearings on the issue. By May, the subcommittee had approved H.R.J. Res. 542,¹¹ the bill that survived amendments, conference, and presidential veto to become law.

The subcommittee version stated that in the absence of a declaration of war, congressional approval would be needed for

3. S. Res. 85, 91st Cong., 1st Sess. (1969).

4. *Id.* at 1.

5. H.R.J. Res. 1355, 91st Cong., 2d Sess. (1970).

6. H.R. REP. NO. 1547, 91st Cong., 2d Sess. 3-5 (1970); H.R. REP. NO. 1302, 92d Cong., 2d Sess. 4 (1972).

7. H.R.J. Res. 1355, 91st Cong., 2d Sess. 1-3 (1970).

8. H.R. REP. NO. 1302, 92d Cong., 2d Sess. 2 (1972).

9. S. 2956, 92d Cong., 1st Sess. (1972).

10. H.R. REP. NO. 1302, 92d Cong., 2d Sess. 2 (1972).

11. H.R.J. Res. 542, 93d Cong., 1st Sess. (1973).

the commitment of United States troops to hostilities for more than 120 days. In addition, Congress would be able to shorten the 120-day period by passage of a concurrent resolution.¹² The full House Foreign Affairs Committee reported out essentially the same language in June, 1973.¹³

In July, H.R.J. Res. 542 passed in the House of Representatives. Floor amendments changed the committee version in two principal ways: it deleted committee language that would have applied the resolution to the current conflict, yet also deleted language allowing the President to determine when an emergency existed.¹⁴

Meanwhile, the Senate Foreign Relations Committee had approved, in May, 1973, a bill which was stricter than the House version. The measure, S. 440,¹⁵ enumerated several emergency situations in which the President might enter United States troops into hostilities without a congressional declaration of war. It prohibited the continuation of any military actions after 30 days unless Congress had given its approval. The objections to S. 440 came from Senators, including committee Chairman J.W. Fulbright, who thought that the bill was not restrictive enough — that the emergency powers granted the President were certain to be abused.¹⁶ Despite these objections, the Senate passed S. 440 virtually unchanged in July of 1973.¹⁷

Following House and Senate action, conferees from each chamber compromised by agreeing to a 60-day deadline on commitment of U.S. forces not authorized by Congress, except under certain circumstances. The conferees also accepted language allowing Congress to force withdrawal of U.S. forces by concurrent resolution, even though there were doubts about the constitutionality of this provision.¹⁸ These doubts, of course, were justified in light of the subsequent *Chadha* decision.¹⁹ In that case

12. *Id.* at 4.

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

14. 119 CONG. REC. 24, 682-85 (1973).

15. S. 440, 93d Cong., 1st Sess. (1973).

16. See S. REP. NO. 220, 93d Cong., 1st Sess., 119 CONG. REC. 25,119 (1973).

17. S. 440, 93d Cong., 1st Sess., 119 CONG. REC. 25,119 (1973).

18. H.R. REP. NO. 547, 93d Cong., 1st Sess. (1973). See also 119 CONG. REC. 25, 089-90 (1973).

19. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

the Supreme Court held that a one-House legislative veto was unconstitutional, and the Court's opinion also cast doubt on the constitutionality of a two-House veto and other congressional review procedures.²⁰

The House and Senate approved the conference report in early October, 1973. On October 24 of that year, President Nixon vetoed the measure.²¹ Congress overrode the presidential veto on November 7, 1973, and the measure became law without the President's signature and over his strenuous objections.²²

The War Powers Resolution was opposed, throughout the debate, by a striking coalition of liberals and conservatives. The latter, primarily Republicans, stressed the danger of limiting the flexibility of the President to react to conflicts and also raised questions of constitutionality. The liberals also used the constitutional argument, but in a very different way. They maintained that the President's authority granted in the Constitution was already circumscribed, and that the Resolution would actually increase the scope of his power. According to this line of reasoning, statutory presidential authority to commit troops without a

20. *Id.* In *Chadha*, the Court held that the one-House veto provision in the Immigration and Nationality Act was unconstitutional. *Id.* at 959. The provision allowed either the Senate or the House of Representatives to overrule the Attorney General's determination that the deportation of an alien should be suspended. *Id.* at 924-25. The Court determined that the one-House veto provision violated the bicameralism and presentment requirements of article I, section 7 of the United States Constitution.

Article I, section 7 provides that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States" U.S. CONST. art. I, § 7, cl. 2. Article I, section 7 also provides that "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States" U.S. CONST. art. I, § 7, cl. 2.

The Court determined that the action of the House of Representatives in exercising its legislative veto and overruling the suspension of *Chadha's* deportation was a legislative function. *Chadha*, 462 U.S. at 952. As such, the action should have been taken pursuant to the provisions of article I, i.e. passage by both the House of Representatives and the Senate, and presentment to the President. *Id.* at 956-57.

The Court's focus on the presentment clause led to concern that a two-House legislative veto would also be held unconstitutional. This concern also led to doubts about the constitutionality of other actions, such as concurrent resolutions, which might be deemed to be legislative in nature but which would not meet the presentment requirement of article I.

21. H.R. Doc. No. 171, 93d Cong., 1st Sess. (1973).

22. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, 559-60 (1973).

declaration of war gave the President more power than constitutionally warranted.²³

Of the fifteen House liberals who had voted against the War Powers Resolution, eight switched sides at the last moment and provided the margin necessary to override the President's veto. The override margin was only four votes over the required two-thirds majority, so the votes of the holdout liberals — or, more aptly, strict constructionists — were key.²⁴ In the Senate, support for the Resolution was stronger. President Nixon's hold over Republican Senators was uncertain, and one of them, Jacob Javits of New York, was a prime supporter of the legislation.²⁵

H.R.J. Res. 542, in its final form, contained three central provisions relating to presidential war-making power: restrictions, requirements for consultation, and requirements for reporting.²⁶ The President was permitted to introduce U.S. armed forces into hostilities or situations where hostilities might be imminent only pursuant to a declaration of war, specific statutory authorizations, or a national emergency arising from an attack on the United States or its territories, possessions, or armed forces.²⁷

The President was required to consult with Congress, in every possible instance, before introducing U.S. armed forces into hostilities or situations in which hostilities might be imminent, and to continue such consultations so long as hostilities continued. In the absence of a declaration of war, the President was required to report to the Speaker of the House and President Pro Tempore of the Senate within forty-eight hours regarding the circumstances, scope, and projected duration of hostilities.²⁸

The Resolution then goes on to provide active and passive congressional impediments to the continuation of hostilities.

23. 119 CONG. REC. 36,176-79 (1973).

24. Yeas, 284; nays, 135; not voting, 14. 119 CONG. REC. 36,221-22 (1973).

25. Yeas, 75; nays, 18; not voting, 7. 119 CONG. REC. 36,198 (1973). *See also*, JAVITS, WHO MAKES WAR? (1973).

26. H.R.J. Res. 542, 93d Cong., 1st Sess. (1973).

27. Pub. L. No. 93-148, § 2(c), 87 Stat. 555, 555 (1973) (codified at 50 U.S.C. § 1541(c) (1982)).

28. Pub. L. No. 93-148, § 4, 87 Stat. 555, 555-56 (1973) (codified at 50 U.S.C. § 1543 (1982)).

Within sixty days after submission of the President's report, U.S. troops must be withdrawn unless Congress either declares war or specifically authorizes the continued commitment of troops. Congress may also, either before or after the end of the sixty-day period, terminate, by concurrent resolution, the use of U.S. armed forces.²⁹

II. The Raid on Libya

In the 1980's, the need for absolute secrecy in planning quick, limited military strikes has become paramount. A direct conflict now exists between military utility and constitutional checks and balances. While this dilemma has marked the entire history of the republic — it is only in dictatorships that the Executive has complete freedom of action in foreign policy — the increased speed of war-making ability and the breakdown of traditional definitions of war have brought this issue into sharper focus.

On April 14, 1986, U.S. warplanes attacked military installations in Libya.³⁰ The attack followed a series of Libyan-directed bombings in Western Europe that killed Americans and others.³¹ It also followed an incident of the previous month in which U.S. aircraft, challenged by Libyan forces in international waters that Libya claimed, destroyed anti-aircraft missile sites in that country.³²

President Reagan invited fifteen congressional leaders to discuss United States plans at approximately 4:00 p.m. on the day of the attack. The planes were already airborne, and eventually reached their targets three hours later. The President subsequently submitted a report to Congress in accordance with the War Powers Resolution.

The fifteen Representatives and Senators invited to the White House briefing on the day of the attack were the Speaker

29. Pub. L. No. 93-148, § 5, 87 Stat 555, 556-57 (1973) (codified at 50 U.S.C. § 1544 (1982)).

30. See N.Y. Times, Apr. 15, at A1, col. 6.

31. See N.Y. Times, Apr. 10, at A1, col. 6; Gelb, *U.S. Aides Think Libya was Linked to at Least One Bombing Last Week*, N.Y. Times, Apr. 8, at A8, col. 1; N.Y. Times, Apr. 6, at A1, col. 5; *id.* Apr. 6, at A1, col. 6; *id.* Apr. 4, at A1, col. 6; *id.* Apr. 4, at A8, col. 1.

32. See N.Y. Times, Mar. 29, at A7, col. 1; *id.*, Mar. 25, at A1, col. 6.

of the House and President Pro Tempore of the Senate; the majority and minority leaders of the House and Senate; the House majority whip; the chairman and ranking minority member of the House and Senate Armed Services Committees; the chairman and ranking minority member of the House Foreign Affairs Committee; the chairman and ranking minority member of the Senate Foreign Relations Committee.³³

As a result of the controversy surrounding the attack on Libya, Senator Robert Byrd, then Senate minority leader, proposed legislation that would have codified the question of which Members of Congress would be required to be consulted regarding prospective hostilities. One of the problems in persuading presidential administrations to comply with the Resolution has been its vague requirement to consult with "Congress" without defining that requirement. Presidents were left free to decide which Members of Congress to consult, since discussing imminent hostilities with the entire membership of both Houses would not be feasible for reasons of unwieldiness and the need to preserve secrecy.

The Byrd proposal³⁴ would designate a permanent consultative body of the previously mentioned members, with the exception of the House majority whip and the addition of the chairman and ranking minority members of the House and Senate Intelligence Committees. No legislation, however, can address the main obstacle to compliance with the War Powers Resolution. It is not that presidents do not know with whom to consult. It is that they would rather not consult.

III. Analysis

The Constitution gives Congress the power to declare war.³⁵ By designating the President as Commander in Chief, it implicitly gives the President the power to make war and to "repel sudden attacks."³⁶ Until recent times, presidential dispatches of U.S. troops to intervene in foreign countries met with little op-

33. See N.Y. Times, Apr. 15, at A10, col. 1; *id.*, Apr. 15, at A11, col. 1.

34. S.J. Res. 340, 99th Cong., 2d Sess. (1986).

35. U.S. CONST. art. I, § 8, cl. 11.

36. II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 318 (M. Farrand ed. 1911).

position from Congress. Vietnam, of course, changed that. The country found itself embroiled in a war that lasted for years, appeared on the home television screens of millions of Americans, and eventually lost popular support. What was lost in Vietnam was faith in the President's competence to enter into war.

Of all the military actions in U.S. history, only five have been wars declared by Congress. All others — excepting the Civil War, which is a special case — were limited enough in duration or expense so as not to incur widespread popular opposition. In the case of Vietnam, a substantial segment of the American people and their elected representatives came to the conclusion that the war failed to meet the test of protecting either the “‘inchoate interests’ and honor of the United States, or the rights and property of American citizens abroad.”³⁷

The 1986 attack on Libya needs to be seen in the context of the post-Vietnam congressional attitudes toward the presidential exercise of military force. In the period since 1973, and particularly in the Reagan administration, Congress had become far more accommodating of presidential authority in military matters. This accommodation was shown, for instance, by the relatively mild congressional reaction to the U.S. operation in Grenada in 1983.

Several factors contributed to this trend. First, the Soviet Union was perceived to be growing in military strength and to be increasingly willing to challenge U.S. interests in the Third World. The breakdown of detente in the 1970's and the Soviet invasion of Afghanistan both contributed to this perception. Second, the Sandinista revolution in Nicaragua, and the perception of Nicaragua as a Soviet satellite, created new fears about the security of the United States right on its home turf. In this atmosphere, the U.S. landing on Grenada and the overthrow of a Soviet-allied regime evoked relatively little domestic outcry. The muted reaction was also due to the Grenadan incursion's speed, low price, and ease of victory.

The April attack on Libya was not, as in the case of Grenada, undertaken for the stated purpose of safeguarding American lives in a direct sense. Rather, it was designed to deter and preempt Libya from carrying out further attacks on American

37. C.A. BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* 53 (1921).

citizens. The raid brought up questions in Congress about compliance with the War Powers Resolution and spurred hearings of the House Foreign Affairs Committee on the issue.

During the hearings on the compliance issue, State Department Legal Advisor Abraham Sofaer took the position that both the consultation and reporting requirements of the Resolution had been met. He stated that "extensive consultations occurred with congressional leaders. They were advised of the President's intention after the operational deployments had commenced, but hours before military action actually occurred."³⁸

In fact, by the time congressional leaders were consulted, the aircraft were already on their way to Libya. The President presented a *fait accompli*, thus informing the legislators of his decision rather than consulting with them.

Sofaer then went on to note that Congress had previously instructed the Department of Defense about the duty of special forces to protect United States citizens abroad and had authorized funds for that purpose.³⁹ In the controversy surrounding the Libya attack, there was little question of the President's right to engage in anti-terrorism operations. The April 14 operation, however, involved not a special squad engaged to free American hostages, but rather a large assemblage of regular military forces to attack the regular military forces of another country.

The aftermath of the U.S. raid on Libya shows that Congress, while concerned about protecting its prerogatives, will not provoke a serious confrontation over questions of compliance with the War Powers Resolution if it determines that the presidential action was warranted. President Reagan's policy toward Libya gained wide support in Congress and among the American people. Few legislators were willing to object to the President's actions on the ground of either procedure or substance. To the contrary, many of the administration's critics maintained that the United States had not been firm enough.

In the wake of the attack on Libya, legislation was intro-

38. *War Powers, Libya, and State Sponsored Terrorism: Hearings Before the Subcommittee on Arms Control, International Security and Science of the House Comm. on Foreign Affairs*, 99th Cong., 2d Sess. 9-10 (1986) (statement of Abraham D. Sofaer, Legal Advisor, Department of State).

39. *Id.* at 10.

duced in the House and Senate with the opposite intent of the Byrd measure: to loosen the restrictions of the War Powers Resolution.⁴⁰ This bill, the Senate version of which was introduced by Majority Leader Robert Dole, would authorize a President "to undertake actions to protect United States persons against terrorists and terrorist activity through the use of all such anti-terrorism and counter-terrorism measures as he deems necessary."⁴¹ The bill would also require the President to report to Congress on his actions within ten days,⁴² rather than the forty-eight hours mandated in the War Powers Resolution.

The War Powers Resolution remains valid regarding anti-terrorist operations, not just conventional warfare. However, the most effective application of the Resolution is for the purpose of keeping the United States out of the kind of conflict from which the legislation arose. It might be a good idea for legislators to reserve their heaviest fire for circumstances closer to those on which the framers of the Resolution based their formulations. The introduction of U.S. ground troops near or into Nicaragua might be one such case.

Congressional restraint on the Executive works best when administration policies threaten to entangle the United States in a drawn-out war with confused goals and little chance of success. President Reagan has so far avoided a major confrontation with Congress over the War Powers issue because he has drawn back whenever a conflict became prolonged. The 1983 Beirut peace-keeping misadventure can serve as a good example of this sort of realism. The administration decided to withdraw the Marines from Lebanon when it became clear that their presence only inflamed passions instead of calming them.

The U.S. encounters with Libya in March and April of 1986 did not threaten to involve the United States in a wider and longer war. Soviet ties with Libya proved fairly superficial; there was little danger that the U.S.S.R. would have come to Libya's defense. In addition, the hostilities were confined to the air and sea, thus avoiding the prospect of a deeper involvement that the

40. H.R. 4611, 99th Cong., 2d Sess. (1986); S. 2335, 99th Cong., 2d Sess. (1986). See also N.Y. Times, Apr. 18, at A9, col. 5.

41. H.R. 4611, 99th Cong., 2d Sess. § 4(b) (1986).

42. *Id.* at § 5.

introduction of ground troops entails.

Already, Congress' ability to exercise a direct influence on foreign and defense policy has been weakened by the march of technology. When faced with an imminent nuclear attack, a President would have no time to consult with Congress even if he so desired. Congressional control of the budget is frequently cited by the executive branch as evidence of Congress' influence over military matters. Congressional power of the purse, however, influences long-term policy only, not decisions that have to be made quickly.

The political reality of Washington is that Congress, for the most part, prefers a President to take the lead on foreign policy. So long as it agrees with presidential policy, Congress is unlikely to step in, even when it is not consulted. Congress tends to fence in a President only when it disagrees with both the substance and method of presidential conduct.

The Framers of the Constitution, mindful of the abuses of the British kings, sought to place limits on executive power without damaging the degree of central government control thought necessary in light of the poor record of government under the Articles of Confederation. The dilemma of executive expedience versus popular accountability has not changed that much in two hundred years. What has changed is the margin of error. Until World War II, a balance of power tipped in favor of Congress would not have caused the nation serious damage. Secure behind two oceans, the United States had a fairly large margin of error in the conduct of foreign and military affairs. Today, no such security exists.

Ronald Reagan and future Presidents will be able to prevent statutory restrictions on their flexibility in foreign and military policy only by including congressional leaders in major foreign policy decisions from the start. In the Libyan affair, the administration escaped the extent of congressional wrath because of the consensus supporting the substance of the policy.

In the more recent case of arms shipments to Iran, which became public knowledge in November, 1986, the administration might not be so fortunate. Although not a War Powers issue, the questions raised were the same. The President, by keeping Congress in the dark about a policy with which its Members strongly disagreed, has invited further congressional regulation of his ac-

tivities. The depth of outrage in the Iranian case might even lead Congress not simply to tighten reporting and consultation requirements, but to demand greater oversight with respect to presidential national security decision-making.

Clashes between the executive and legislative branches of the U.S. government are natural, inevitable, and, to a certain extent, desirable. The Constitution has, until now, worked to assure that neither branch has run unchecked.

I am skeptical about the possibilities that statutes alone will resolve the conflicts between President and Congress on War Powers issues and on questions of overall conduct of foreign policy. Presidents will always try to find ways to stay within the letter of the consulting and reporting requirements without ceding their prerogatives. For its part, Congress runs the risk of tying the President's hands by imposing too detailed restrictions; the threat of such legislation, however, might be enough to convince an administration to be more cooperative.

IV. Conclusion

The War Powers Resolution, even if it cannot be strictly enforced in every instance, will continue to be a necessary device to remind the executive branch of the need to work with Congress in the formulation of foreign policy. The Resolution's primary purpose has been accomplished, both through its own workings and through greater public and congressional awareness. It is unlikely that future Presidents could involve the United States in major hostilities without significant legislative oversight, as was the case with Presidents Johnson and Nixon in Indochina.

The War Powers Resolution cannot be viewed outside the context of the overall balance between Congress and the Executive in national security affairs. When Congress feels that it is part of policy formulation, and when a consensus has formed around the issue, little will be said about observance of the letter of the Resolution. When Congress feels excluded, however, it will insist on compliance with its formal prerogatives.

Because of his enormous popularity, President Reagan has until now been given a great deal of leeway in mapping U.S. military interventions. Another factor in the popularity of the President's moves was the sentiment that the United States needed

to recover from global setbacks suffered in the 1970's. In light of the Iran arms scandal, President Reagan and his successors will be called to account with greater frequency. The War Powers Resolution, then, can be seen as a fallback. For future administrations that attempt to make military commitments without a congressional consensus, it will remain potent.