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MAKING THE WAR POWERS RESOLUTION WORK: THE VIEW FROM THE TRENCH (A RESPONSE TO PROFESSOR GLENNON)

By George R. Berdes and Robert T. Huber***

Due to the recent, untimely death of Representative Clement J. Zablocki, the need for a response to Professor Michael Glennon's critique of Chairman Zablocki's last major statement on the War Powers Resolution, published in this issue of the *Loyola of Los Angeles Law Review*, has fallen on those who had the privilege to work for him in the formulation and implementation of the War Powers Resolution.

At the outset, we can find scattered points of agreement with Mr. Glennon. First, we wholeheartedly agree that the Chairman's death occurred "at a most untimely moment."¹ Great leaders often do not see the complete fulfillment of their work. Nonetheless, the late Chairman's stewardship in the enactment of the Multinational Force in Lebanon Resolution brought him closer to the objectives of section 2(a) of the War Powers Resolution than ever before.

Second, we agree that the more effective implementation of the Resolution has been slowed by less than vigorous congressional oversight. In his article, Zablocki concurred, suggesting methods for improvement. Nonetheless, in examining past efforts in this regard we would be delighted to compare the record of the House Committee on Foreign Affairs with any other congressional entity.²

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1. Glennon, *The War Powers Resolution: Sad Record, Dismal Promise*, 17 *LOY. L.A.L. REV.* 657, 657 (1984) [hereinafter cited as Glennon].

2. See, e.g., STAFF OF HOUSE SUBCOMM. ON INT'L SECURITY & SCIENTIFIC AFFAIRS OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 98TH CONG., 1ST SESS., *THE WAR POWERS RESOLUTION: RELEVANT DOCUMENTS, CORRESPONDENCE, REPORTS* (Comm. Print 1983); STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 97TH CONG., 2D SESS., *REPORT ON THE WAR POWERS RESOLUTION: A SPECIAL STUDY OF THE COMMITTEE ON FOREIGN AFFAIRS* (Comm. Print 1982); *The United States Supreme Court Decision Concerning the Legislative Veto, 1983: Hearings Before the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess.

Unfortunately, the overwhelming remainder of the Glennon article can be divided between those points on which he is misinformed and those on which he is simply mistaken. We will leave it to the reader to decide which is worse.

In the case of the former, we begin by saying that it is simply not true that the House conferees preferred no law to the Senate version of the War Powers Resolution. Rather, what they wanted—and got—was a compromise version that would pass both Houses over a presidential veto. Professor Glennon's insistence on the Senate version (which was far from perfect as we shall demonstrate in a moment) would have sacrificed effective legislative action for the sake of political purity. Furthermore, as Mr. Glennon must know, conference committees are designed to compromise conflicting versions of legislation, not to insist on ideological or institutional purity. Both House and Senate conferees realized this point and the Resolution, in fact, includes the best elements of both versions.

Also, the notion that Chairman Zablocki did not "express any disagreement with the initial introduction of the armed forces into hostilities in Lebanon"³ is simply not true. In a 1982 letter from Chairman Zablocki to President Reagan as well as in a 1982 *Washington Post* article, (both of which are referenced in the Zablocki article in this volume), Zablocki demanded that the President submit a section 4(a)(1) report to the Congress.⁴

Finally, it is "absolute nonsense," to use Mr. Glennon's own words, to suggest that Representative Zablocki confuses presidential acceptance of and agreement with the War Powers Resolution.⁵ It matters little whether or not the President agrees with the Resolution. What matters much more is that the President accepted the Resolution's application to Lebanon and signed legislation to that effect. The clear implication of Professor Glennon's arguments, that the law of the land is less important than presidential reservations about such laws, captures the cynicism which undermines all law.

Secretary Shultz's assertions about the constitutional necessity of

(1983); *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident, 1975: Hearings Before the Subcomm. on Int'l Security & Scientific Affairs of the House Comm. on Int'l Relations, 94th Cong., 1st Sess. (1975).*

3. Glennon, *supra* note 1, at 662.

4. See letter from Hon. Clement J. Zablocki, Chairman, House Committee on Foreign Affairs, to President Ronald Reagan (July 6, 1982); Zablocki, *Reagan is Skirting the War Powers Act*, Wash. Post, Oct. 3, 1982, § 2, at 7, col. 2.

5. Glennon, *supra* note 1, at 667-68.

the Multinational Force in Lebanon Resolution, one would assume, are less important than the fact that the Administration closely observed its terms. Such compliance itself brought an important albeit grudging acknowledgement that the executive branch is moving toward *acceptance* of the Resolution and its provisions. There is no question that Chief Executives "would prefer to forget"⁶ the War Powers Resolution. The point is they cannot.

We now turn to the large group of mistaken elements in the Glennon article. First, one cannot help but be struck by the nostalgic, almost religious, devotion to the so-called "recognized powers" section of the Senate version of the War Powers Resolution that was rejected by the House-Senate Conference Committee in 1973. Because Professor Glennon does not provide the reader with an explanation as to why this section was eliminated, we feel obliged to do so.

The Senate bill attempted to catalog various conditions under which the President would be permitted to make emergency use of United States Armed Forces without prior congressional approval and by implication deny any such use in situations which were not specified. The House resolution had no such provision. The House, both in its committee and on the floor, struggled with this problem and for sound reasons decided against listing of any conditions.

The attempt to define precisely and exclusively the circumstances under which authority could be exercised raises the very constitutional problems it seeks to avoid. Congress cannot define the "recognized powers" of the President. The development of all-inclusive list of authorized actions was correctly judged by the House and Senate conferees to be an impossible task. There are unavoidable gray areas of potential war power where some see broad presidential powers and others see narrow ones.

The Senate bill never resolved this question of defined powers and never dealt with the issue of whether it purported to grant certain presidential powers by statute or whether the catalog of powers in the Senate bill were recognized powers. The confusion of this approach hoisted the provision on its own petard.

By contrast, the House resolution reflected the concurrent nature of powers governing the emergency use of United States Armed Forces. Equally important, it reflected the political reality of the twentieth century which makes the use of such forces by the President, without prior congressional approval in certain circumstances, virtually unavoidable.

6. *Id.*

It is therefore of significant importance that *procedures* for congressional action, triggered by the performance of certain actions by the President, be established.

The constitutionality of presidential action will always be in the eyes of the beholder. The Congress, however, cannot wait for the definitive judgment of constitutionality. It must act in a manner which preserves its war powers prerogatives as well as advances United States foreign policy interests as Congress sees them in particular situations where troops have been deployed. Through sections 4(a)(1), 5(b) and 5(c), Congress exercises that judgment in a firm and final manner.

Lest this criticism be seen as the product of the institutional bias of the House, one need only read the supplemental views of former Senator J. William Fulbright, then Chairman of the Senate Committee on Foreign Relations, regarding the Senate bill. Significantly, it was Mr. Fulbright who argued persuasively that the recognized powers approach may go too far in the direction of executive prerogative, especially in allowing the President to take action not only to "repel an armed attack" but also to forestall the direct and imminent threat of such an attack.⁷ Fulbright also argued that the Senate approach could even provide sanction for a nuclear first strike based solely on the judgment of the President.⁸ As the obvious shortcomings of the "recognized powers" approach became clear, the Senate conferees agreed to drop this unworkable provision.

Appropriately, that legislative debate was settled over a decade ago. The Senate conferees realistically recognized that this element of the Senate bill would simply not work. Nothing has transpired since then to suggest otherwise. Nonetheless, Professor Glennon's insistence on flogging this dead horse apparently has no limits. Regrettably, Glennon's attack colors both his political judgment and his critique of the current terms of the War Powers Resolution.

The internal "inconsistency" of the Resolution, as we have already stated, is more accurately an honest concession to the fact that both the President and Congress would continue disputing the question of who controls the decision to commit troops into hostilities. How Congress would respond to exercises of executive power—whether they viewed them as constitutional or not—was the most important political question. The flexibility to terminate or to authorize the use of troops was

7. WAR POWERS, S. REP. NO. 220, 93d Cong., 1st Sess. 33-34 (statement by Hon. J.W. Fulbright).

8. *Id.*, see also 1973 U.S. CODE CONG. & AD. NEWS 2358-59 (supplemental views regarding S. 440, 93d Cong., 1st Sess. (1973)).

ultimately the vital issue. The genius of the Resolution is that it accomplishes this dual task as appropriate to the reality of circumstance.

Rather than seeing effective political action as the objective, Mr. Glennon prefers ruffled lace legal niceties and a quest for neatly defined categories where there are none. This is particularly puzzling since even Professor Glennon's preferred Senate approach would have allowed the President to use United States Armed Forces without prior congressional approval. As one House Foreign Affairs Committee member said during the Lebanon war powers debate, "[o]ne of the signs of maturity in both personal life and political life is to be able to live with ambiguity. Ambiguity is not a sign of incomprehension. . . . Ambiguity often enables democratic governments to function."⁹

As to the definition of "hostilities," we must assume Professor Glennon has read the House report accompanying its version of the War Powers Resolution which defined the term in detail.¹⁰ In fact, the word "hostilities" was substituted for the phrase "armed conflict" during Committee consideration and was defined, in addition to a situation in which fighting had actually begun, to encompass "a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict."¹¹ "Imminent hostilities" was defined as "a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict."¹²

Despite this clear legislative history, Professor Glennon accurately pointed out that "it seemed utterly disingenuous to claim, as the Reagan Administration did, that the hostilities test was not met."¹³ What he fails to understand, however, is that the problem is not the lack of definition but the Executive's disregard for the law.

We would be delighted to hear how Professor Glennon would define the words "to repel an armed attack upon the United States, its territories and possessions; to take necessary and appropriate retaliatory actions in the event of an attack and to forestall the direct and imminent threat of such an attack."¹⁴ Yet these were the words con-

9. *Statutory Authorization Under the War Powers Resolution—Lebanon, 1983: Hearings Before the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. 64-65 (1983) (statement of Hon. Tom Lantos).

10. WAR POWERS, H.R. REP. NO. 287, 93d Cong., 1st Sess. (1973) [hereinafter cited as House Report on War Powers].

11. *Id.* at 7.

12. *Id.*; see also 1973 U.S. CODE CONG. & AD. NEWS 2358-63 (supplemental and minority views to H.R.J. Res. 542, 93d Cong., 1st Sess. (1973)).

13. Glennon, *supra* note 1, at 664.

14. S. 440, 93d Cong., 1st Sess., 119 CONG. REC. 25,119-20 (1973).

tained in the Senate version of the War Powers Resolution. Senator Fulbright accurately pointed out that such a standard would enable the President to do almost anything without congressional approval. To replace a clear definition with a less clear one to ensure the "proper operation"¹⁵ of the Resolution makes little sense.

This leads to the next criticism in Professor Glennon's article, namely, that consultation has been perfunctory because Congress has allowed the President "time after time, to get away with perfunctory consultation."¹⁶ Consultation will always be a difficult process. We recognize that acceptable procedures for such consultation should be explored in greater detail, although the Hughes-Ryan experience¹⁷ indicates this is far easier said than done.

What disturbs us is the clear implication that while "it is not terribly useful to rail against the executive branch"¹⁸ about consultation, it is perfectly acceptable to rail against Congress' record on this issue. Whatever failings Congress has had in not "living up to its responsibilities under the role it carved out for itself under the Resolution,"¹⁹ they pale in comparison to executive branch arrogance in not complying with the spirit or, in most instances, the letter of the law. In resolving disputes concerning the War Powers Resolution, it is reasonable to expect the President to act in good faith regarding consultation, and to

15. Glennon, *supra* note 1, at 664.

16. *Id.* at 665.

17. The Hughes-Ryan Amendment, adopted in 1974, required reporting "in a timely fashion" of covert intelligence activities to "appropriate committees of the Congress." Foreign Assistance Act of 1974, § 32, Pub. L. No. 93-559, 88 Stat. 1795 (1974).

In attempting to comply with the amendment, the executive branch ultimately reported to eight committees (House Committee on Foreign Affairs, Senate Committee on Foreign Relations, and the House and Senate Committees on Appropriations, Budget, and Armed Services). The unwieldy nature of such reporting, which was expected to be prior reporting in most cases, contributed to the provision's repeal in 1980. See *Role of Intelligence in the Foreign Policy Process, 1980: Hearings Before the Subcomm. on Int'l Security & Scientific Affairs of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 170-98, 237 (1980).

The House and Senate sponsors of the War Powers Resolution also grappled with this problem. The House Resolution originally called for consultation "in every possible instance with the leadership and appropriate committees of Congress." The final version of the Resolution merely called for consultation "with Congress." Ultimately, even if a consultative framework concerning the War Powers Resolution could be worked out, cooperative relations between the Executive and Congress are crucial. Consultation means "that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available." House Report on War Powers, *supra* note 10, at 6-7.

18. Glennon, *supra* note 1, at 659.

19. *Id.* at 659-60.

“faithfully execute” the law of the land (including the reporting requirements of section 4(a)(1)), even if the law is not “convenient.” Laying the blame on an easy mark like Congress is self-defeating for those who purportedly seek to protect its prerogatives.

Finally, Chairman Zablocki has already acknowledged in his article that some changes in the Resolution may be “desirable at an appropriate political moment.”²⁰ Suggestions like requiring that the President specify the subsection of section 4 under which he is reporting to Congress, deserve careful study. But given executive branch hostility, new techniques for non-compliance might result even if such an amendment were included. It is also noteworthy to remind Professor Glennon that the Senate insisted that the provisions triggering the time limits in subsections 4(a)(2) and 4(a)(3) be removed.

It is satisfying that the Resolution remains unamended because no approach has yet been devised that would strengthen the Resolution and Congress’ role in war powers. Evidence concerning this point comes from the reality that neither the Senate nor the House has seen fit to act on such revisions. Until an approach which attracts wide political support in Congress is found, the amendment process should be approached with caution.

By contrast, Mr. Glennon’s solution to possible deficiencies in the Resolution is, not surprisingly, the “recognized powers” approach of the Senate version. Despite recognition by both the House and the Senate that the approach will not work, Mr. Glennon continues the practice of killing the messenger, and apparently feels killing the Resolution is the best course of action if his long-discredited pet approach is not enshrined in the law.

We are frankly disappointed at Mr. Glennon’s criticism of Mr. Zablocki’s political acumen regarding the Multinational Force in Lebanon Resolution (MFLR).²¹ In one sense this is not surprising. The Senate had very little to do with the crafting of the MFLR. In fact it adopted the House version virtually intact after it had been negotiated by House Democrats led by Chairman Zablocki and the Reagan Administration. Having been advised by Napoleon through Mr. Glennon

20. Zablocki, *War Powers Resolution: Its Past Record and Future Promise*, 17 *LOY. L.A.L. REV.* 579, 598 (1984).

21. Pub. L. No. 98-119, 97 Stat. 805 (1983). See Professor Glennon’s comments concerning the major concessions extracted from the executive branch in the formulation of the Lebanon War Powers Resolution and his comment that “[o]ne wonders how Rep. Zablocki emerged from those ‘tough negotiations’ without agreeing to apologize for his sponsorship of the War Powers Resolution.” Glennon, *supra* note 1, at 667.

"that the tools belong to the man who can use them,"²² we are chagrined at then being told that staying off the war powers battlefield would have been preferable for legislative prerogatives.

In no way did Chairman Zablocki insist that the Resolution posed no restraints on presidential war-making power. In fact, the MFLR did precisely that. Professor Glennon neatly glides over the panoply of legislative controls put on the authorization and described by Chairman Zablocki in his article. They affected the size, scope, degree of involvement and duration of the troop deployment in Lebanon.

Mr. Glennon was never further off the mark than in his references to "verbal window-dressing"²³ in the MFLR. Section 5(b) of the War Powers Resolution was written to enable Congress to invoke the sixty day period for congressional consideration precisely to take "into account a situation in which the President for whatever reason may decide not to report."²⁴ The procedure was followed carefully in the House and Senate action regarding Lebanon and the legislation specifically declared section 5(b) operative. Furthermore, both the House and the Senate conducted their debates under the priority procedures required by section 6 of the War Powers Resolution. There was nothing artificial or pretentious about the application of those procedures or the invocation of section 5(b).

Of course, the MFLR could have been enacted without the use of the War Powers Resolution. Such a course of action was what the Administration originally sought and we are therefore surprised that Mr. Glennon appears to advocate this approach. The point is, such an action was not undertaken and instead the War Powers Resolution was reinforced as the appropriate legal framework for legislative-executive decision-making on the commitment of troops into hostilities.

The persistent argument that the Multinational Force in Lebanon Resolution constituted a presidential "blank check" is simplistic sophistry. Any cursory reading of the MFLR dispels such an argument. No one in the executive branch regarded it as such and it was privately made clear that the eighteen-month authorization would be observed.

Professor Glennon's apparent solution, to seek presidential invocation of section 4(a)(1) or do nothing, would have accomplished the latter. Aside from scoring election-year political points, one wonders what Mr. Glennon would have said about the efficacy of the War Pow-

22. Glennon, *supra* note 1, at 660 & n.22 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952)).

23. Glennon, *supra* note 1, at 667.

24. House Report on War Powers, *supra* note 10, at 10.

ers Resolution if Congress stood still, leaving the Resolution dormant and making no attempt to impact on executive action in committing troops in Lebanon. Yet this would have been precisely the result of Mr. Glennon's suggested course of action.

No, Mr. Zablocki has nothing to apologize for. By contrast, where we see the need for true apology and rethinking is in persistent resort to definitions that lack clarity, legal formalisms devoid of political reality, adherence to discredited formulas long since rejected, and ideological purity in defense of fence-sitting.

With respect to Grenada, it is without doubt that presidential reporting under section 4(a)(1) would have been preferable. Since it was not forthcoming, the House again used the tools it had by invoking section 4(a)(1). An automatic result is not likely to be forced on a recalcitrant executive until it is clear that Congress will act for the President if he does not comply. By an overwhelming vote of 403-23, the House followed that course of action.²⁵ But the Senate after passing the Hart amendment sixty-four to twenty,²⁶ did not see fit to follow through on it. The Senate leadership was all too glad to drop the amendment in the House-Senate conference on the debt ceiling. Efforts to get Senate action on the House bill also went nowhere.

Nonetheless, as pointed out by Representative Zablocki, congressional war powers efforts concerning Grenada did affect the presidential decision to remove troops before the sixty-day time limit had run out, demonstrating sensitivity to the Resolution and its provisions and congressional insistence on its application. In this regard, we are perplexed by Professor Glennon's flip-flop regarding section 4(a)(1). Although opposed to Zablocki's insistence on presidential invocation of section 4(a)(1) with respect to Lebanon, Professor Glennon argues that Congress should have confronted the Grenada issue "in a more dispassionate setting sixty days after the triggering event."²⁷ Surely he cannot have it both ways.

One cannot help but conclude that Professor Glennon's objections to the implementation of the Resolution with respect to Lebanon and Grenada at least in part reflect opposition to the Reagan Administration's foreign policy with respect to those two countries. While reasonable people may disagree over foreign policy actions, it seems wrong to take out one's frustrations on the War Powers Resolution and advocate

25. 129 CONG. REC. H8933-34 (daily ed. Nov. 1, 1983).

26. 129 CONG. REC. S14,876-77 (daily ed. Oct. 28, 1983).

27. Glennon, *supra* note 1, at 669.

its dismantlement to assuage those frustrations. Such a strategy would be a tragic example of throwing away the baby with the bath water.

Two other points deserve brief comments. First, we cannot improve on the constitutional defense of the War Powers Resolution by Chairman Zablocki, Senator Javits and others. Nonetheless, we are troubled by Professor Glennon's contention that, because the vast bulk of war powers under the Constitution are granted to Congress, this fact is irrelevant with respect to the Resolution's constitutionality. But then, having been told in a later section of the Glennon article that presidents signing bills into law have nothing to do with the actual significance of those laws, we should not be surprised to be told that what the Constitution says does not matter either.

We also stand by Chairman Zablocki's defense of the continued constitutionality of section 5(c), *Chadha* notwithstanding. Long-term commitments of troops into hostilities are subject to prior congressional approval under the Constitution. The Commander-in-Chief leads the armed forces once war is commenced by Congress. While the power to repel sudden attacks is a presidential prerogative, in no other instance does war power reside in the Executive and in no instance is this congressional power delegated to the Executive. To suggest, therefore, that Congress can choose the legislative means for denying unauthorized aggrandizements of congressional war power is perfectly appropriate and constitutional.

Furthermore, we must reiterate Professor Eugene Gressman's sound judgment that the Supreme Court has traditionally stayed away from disputes over delegations of power in foreign affairs and that there exist "no guidelines in the Constitution to guide the courts in trying to rearrange the war powers as between the President and the Congress."²⁸ In the event of a hypothetical use of section 5(c), Congress need not have approval of its action from the Supreme Court, only unwillingness to block effective implementation of that section. Non-justiciability will suffice.

For one who wishes "the Court had disposed of *Chadha* on narrower grounds,"²⁹ Professor Glennon seems to take particular delight in giving *Chadha* its widest possible reach and providing grist for the mill of executive branch lawyers whose ultimate dream is to turn Congress into a powerless debating society. Any more help like this, to paraphrase Professor Glennon and Justice Hugh Black, and we shall be

28. *The United States Supreme Court Decision Concerning the Legislative Veto, 1983: Hearings Before the House Comm. on Foreign Affairs, 98th Cong., 1st Sess. 155 (1983).*

29. Glennon, *supra* note 1, at 663.

undone.³⁰

We are intrigued by Professor Glennon's parting comments that a courageous, forthright Congress would not need a War Powers Resolution. By that logic, only a cowardly, spineless Congress needs a War Powers Resolution. Such comments are political nonsense.

The War Powers Resolution is effective, flexible legislation which enables Congress to exercise its war powers responsibilities under the Constitution in a whole range of foreign policy scenarios short of declared war and beyond rescue missions of Americans abroad. The use of the Resolution in Lebanon is precisely in the range of hostility situations envisioned by the authors. Regardless of the eventual foreign policy outcome, the framework of the Resolution was effective in meeting Congress' responsibilities.

As usual, Professor Glennon does not tell us what his alternative would be. Perhaps it is funding cut-offs that can only be used in the most extreme cases without presidential waivers. Or perhaps it is non-binding resolutions rouged with great political rhetoric which do nothing to rein in the Executive pursuit of war. Professor Glennon would give us a congressional emperor with no clothes.

In conclusion, we must say that for those of us hunkered in the political trenches of Washington, seeking to strengthen congressional war-making prerogatives and improve the effective implementation of the War Powers Resolution, the scholarly legal community can serve an extremely useful purpose in criticizing, analyzing, and suggesting useful improvements to the Resolution. It is even more unfortunate, therefore, that instead of achieving those useful objectives the Glennon critique comes as an unfortunate form of "friendly fire" that lands in the legislative trenches of the war powers battlefield. Carrying a torch for shop-worn ideas, long since rejected, will do nothing to improve the Resolution.

30. *Id.* at 669 & n.54 (citing *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (Black, J., dissenting)).

