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## THE WAR POWERS RESOLUTION AND KOSOVO

*Abraham D. Sofaer\**

It is a privilege to participate in the war powers Symposium of Loyola's 1999 Fritz B. Burns Lecture Series. The subject of the War Powers Resolution (WPR)<sup>1</sup> and Kosovo is certainly important, dealing as it does with the power over war. Yet, it is sadly true that the WPR has become more of an embarrassment to the United States than a meaningful description of how our three branches of government should exercise their powers under the Constitution.

People feel very strongly about both aspects of our subject: the war in Kosovo and whether it complied with the WPR or the Constitution. I can say nothing positive about the way in which President Clinton's administration conducted the diplomacy leading up to the war. The diplomatic performance of the United States and the North Atlantic Treaty Organization (NATO) was a disaster. We threatened Yugoslav President Milosevic with force if he failed to sign the Rambouillet Accords.<sup>2</sup> We promised the Kosovar Albanians that we would use force to compel Yugoslavia to abide by the Ac-

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\* The Honorable Abraham D. Sofaer has had a distinguished career as prosecutor, legal educator, federal judge, government official, and attorney in private practice. From 1985 to 1990, Mr. Sofaer served as Legal Adviser to the United States Department of State. In 1990, he was named the George P. Shultz Distinguished Scholar and Senior Fellow at the Hoover Institute. He is also Professor of Law (by Courtesy), Stanford Law School, and considered a leading scholar in the area of the war powers. His book, *War, Foreign Affairs and Constitutional Power: The Origins*, examines the early exercise of the constitutional powers of Congress and the President to control the use of military forces. Mr. Sofaer graduated from Yeshiva College and the NYU School of Law. He served as Law Clerk for Judge J. Skelly Wright, United States Court of Appeals for the District of Columbia Circuit, and Justice William J. Brennan, Jr., United States Supreme Court.

1. 50 U.S.C. §§ 1541-1548 (1991).

2. See Abraham D. Sofaer, *International Law and Kosovo*, 36 STAN. J. INT'L L. 1, 1-2 (2000).

cords if the Albanians signed them.<sup>3</sup> And then we bombed Yugoslavia until it agreed to a significantly different agreement that excluded demands that Milosevic rejected as unacceptable in the original proposal.<sup>4</sup> That kind of diplomacy violates Article 2(4) of the United Nations Charter<sup>5</sup> and reflects poorly on our country. But, ultimately, I must concur with what Professor Kahn said here at the Symposium that, at the end of the day, the Clinton administration was legally and morally justified in acting to intervene in Kosovo.<sup>6</sup> We had 800,000 people evicted from their homes by a racist murderer, who despite having been indicted, unfortunately, is (at the time we speak) still alive and running a country.<sup>7</sup> So, I support the war in Kosovo and believe that President Clinton acted consistently with the UN Charter.

Congress has a role to play in any war, and even if the war in Kosovo was justifiable under international law, it must also pass muster under U.S. law. In general, I agree with Professor Kahn's interpretation of what Congress can do, which is quite contrary to what Representative Kucinich has indicated he believes. Congress was never given the power to stop a war, especially one that it funds, without doing anything (i.e., through inaction). Congress was given the power over war by the Constitution, but it has to exercise that power.<sup>8</sup> It cannot allow—and indeed facilitate—a war and then try to establish the claim that, because of legislation passed by a prior Congress, the war became illegal after a certain duration.

Some claim that Kosovo was so out of line with what has happened in the history of our government that it should be regarded as some new assertion of executive power.<sup>9</sup> It should not. To begin with, the Constitution has long been recognized *not* to require Con-

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3. *See id.*

4. *See id.* (and other sources cited therein).

5. U.N. CHARTER art. 2, para. 4 (requiring that all member states refrain from the threat or use of force).

6. *See* Paul W. Kahn, *War Powers and the Millennium*, 34 LOY. L.A. L. REV. [(PAGE #)] (2000).

7. *See* James Gerstenzang & Richard C. Paddock, *U.S. Assails Kosovo 'Genocide,' Hints at NATO Protectorate*, L.A. TIMES, Mar. 31, 1999, at A1.

8. *See* *Woods v. Cloyd W. Miller Co.*, 333 U.S. 135, 140 (1948).

9. *See generally* Sofaer, *supra* note 2 (discussing whether the United States exercise of force in Kosovo had legal justifications).

gress to “declare” war in order for a war to be legal.<sup>10</sup> The first war the United States fought after the ratification of the Constitution was with France.<sup>11</sup> It was called the “Quasi-War.”<sup>12</sup> Why? Because it was undeclared.<sup>13</sup> The Supreme Court explicitly upheld that Quasi-War as lawful in a decision 200 years ago, despite the fact that it was undeclared.<sup>14</sup> The Court held that the Quasi-War was lawful because it was authorized by legislation.<sup>15</sup> So, the issue we have here today really boils down to the following question: Was the war in Kosovo authorized by legislation or was it illegal because Congress failed to indicate approval in the specific manner purportedly required by the WPR?

The answer to the first part of the question must be based—as it was in the Supreme Court’s decision upholding the legality of the Quasi-War—on the measures adopted by Congress on the subject.<sup>16</sup> Each measure must be examined carefully and in its context to determine whether, in light of controlling standards, congressional approval was effectively given.

Let us consider what happened. There was widespread publicity and a lot of information and debate about the war in Kosovo, before the war ever began. Many people in Congress and elsewhere noted that Secretary of State Albright threatened force several times before the U.S. government and NATO finally acted.<sup>17</sup> In addition to the public threats by the United States and NATO, Clinton administration officials testified in Congress about what they were doing and about the measures they had caused, or attempted to cause, the UN Security Council to adopt.<sup>18</sup> Among these measures was Security Council Resolution 1199, declaring the actions of Yugoslavia in

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10. See generally ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: THE ORIGINS* (1976); Abraham D. Sofaer, *The Power Over War*, 50 U. MIAMI L. REV. 33 (1995) (arguing that the Constitution does not require rigid procedures in matters as risky as war).

11. See Sofaer, *supra* note 2, at 41.

12. See *id.*

13. See *id.*

14. See *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800).

15. See *id.* at 39, 41-46.

16. See *id.*

17. See John R. Bolton, *Clinton’s Bluster*, WKLY. STANDARD, Mar. 8, 1999, at 14-15.

18. See *id.*

Kosovo to be a threat to peace and security in the region.<sup>19</sup> All this information—and much more—was before Congress, as were NATO pronouncements and the statements of President Clinton.

On March 23, 1999, the day before President Clinton approved the use of force in Kosovo, the Senate adopted a resolution authorizing “air operations and missile strikes” in cooperation with NATO against Yugoslavia.<sup>20</sup> On March 24, the same day the President acted, the House of Representatives adopted a resolution supporting U.S. armed forces “engaged in military operations against the Federal Republic of Yugoslavia.”<sup>21</sup> Different resolutions, yes, but both supportive of military action after a full understanding of the relevant facts. Then, on March 26, the President reported to Congress under the WPR that he had authorized U.S. forces to join in “Operation Allied Force.”<sup>22</sup> This was in conjunction with NATO’s decision in response to Milosevic’s effort to cleanse Kosovo of Albanians. The decision expressly took into account the views and support of Congress.<sup>23</sup> Here was the President telling Congress: “I appreciate the support of the Congress in this action.”<sup>24</sup> Congress did nothing to question, let alone challenge, this implicit characterization.

On April 7, the President sent an additional extensive report to Congress, in which, among other things, he promised to continue the war to the end.<sup>25</sup> In his report, the President also said that the United States was bombing Yugoslavia and would continue bombing until victory was achieved. However, he did not know when the war would end.<sup>26</sup> In effect, the President was indicating both that he intended to continue bombing until the war ended, and that the process could take more than sixty days, a period beyond the limit set by

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19. See S.C. Res. 1199, U.N. SCOR, 53d Sess., 3930th mtg. at 1, U.N. Doc. S/RES/1199 (1998).

20. S. Con. Res. 21, 106th Cong. (1999).

21. H.R. Res. 130, 106th Cong. (1999).

22. See President’s Letter to Congressional Leaders Reporting on Air Strikes Against Targets in the Federal Republic of Yugoslavia, 35 WEEKLY COMP. PRES. DOC. 527 (Mar. 26, 1999).

23. See *id.*

24. *Id.* at 528.

25. See President’s Letter to Congressional Leaders Reporting on Air Strikes Against Serbian Targets in the Federal Republic of Yugoslavia, 35 WEEKLY COMP. PRES. DOC. 602 (Apr. 7, 1999).

26. See *id.*

Congress under the WPR for a military action conducted without specific, legislative approval.<sup>27</sup>

On April 28, four votes took place in the House related to the legality of the war in Kosovo.<sup>28</sup> A declaration of war was defeated.<sup>29</sup> The House was evenly divided on whether to reject or support Senate Resolution 21.<sup>30</sup> Then, the House passed a bill against the use of ground troops, not against using troops in general, or planes, but against *ground* troops.<sup>31</sup> Finally, one month later, on May 20, while the bombing was still going on and before sixty days had run (i.e., while the WPR still implicitly authorized the President to act), both houses of Congress passed a supplemental appropriation bill paying for "Operation Allied Force," and stating that Congress desired a report from the Department of Defense about the operation since its inception on March 24.<sup>32</sup> In this legislation, Congress authorized and directed payment of billions of dollars to support the war.<sup>33</sup>

In the real world of legal responsibility, the measures adopted by Congress clearly established its approval.<sup>34</sup> But in the artificial world that the WPR has attempted to create, these acts were not sufficient to establish approval because Congress had not conferred approval in any law with a specific reference to the WPR, as 50 U.S.C. § 1547(a) requires.<sup>35</sup>

The problem with the requirement of a specific reference to the WPR in order for congressional approval to be established is that the rule has absolutely no relationship to legal approval in any real-world

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27. *See id.*; *see also* 50 U.S.C. § 1544(b).

28. *See* 145 CONG. REC. 2427 (daily ed. Apr. 28, 1999).

29. *See id.*

30. *See id.*

31. *See* H.R. 1569, 106th Cong. § 2(a) (1999).

32. *See generally* National Defense Authorization Act for Fiscal Year 2000, S. 1059, 106th Cong. (1999) (authorizing appropriations for fiscal year 2000 for military activities of the Department of Defense).

33. *See id.*

34. *See, e.g.,* Colleen R. Courtade, Annotation, *What Constitutes Policy or Custom for Purposes of Determining Liability of Local Government Unit Under 42 U.S.C.S. § 1983—Modern Cases*, 81 A.L.R. FED. 549 (1987) (collecting and analyzing numerous federal cases as to how local governments are determined to be responsible entities in the context of claims of deprivation of federally guaranteed civil rights).

35. *See* 50 U.S.C. § 1547(a).

context. Imagine, for example, how the courts would react to an exculpatory claim by the leader of a Mafia family who attempted to rely on an approval requirement analogous to that of the WPR. The head of the Mafia family would, of course, love having such a rule to govern the family's personal responsibility for its criminal activities. Suppose that one of the family's chief lieutenants walks into the Don's office and says: "Don, we are going to take care of the other family. They have been giving us a lot of trouble, and we have to act. I just sent some of the boys out to do the job. We are calling it 'Operation All in Our Family.' We will keep at it until the job is done, however long it takes." The Don replies: "Oh, well, thanks for telling me. I really cannot approve the operation under the family rules, which call for explicit permission. But here is a resolution of support for our boys out on the streets, and I wish them luck."

So, the lieutenant goes out on the streets and starts to "take care" of business. The lieutenant is in the middle of the job when the lieutenant comes back and says, "Don, I have a problem. I need more money to pay for the operation. The other family is putting up a big fight. We have to turn up the pressure." So, the Don says, "Oh, well, you know, that is not a problem. We can pay for 'Operation All in Our Family'." But I still cannot give you an explicit resolution. I am going to give you the money you need, the guns you need, whatever, but do not say that I approved this under the family rules. That would be wrong."

Silly? Indeed. That is my point. When the Don is indicted, the Don has no legal defense. No university, no company, no leadership of a university, no board of directors of a company, no chief executive officer—the list could go on and on—would ever be able to avoid responsibility in such a situation. Once an organization—or an individual—passes a resolution supporting the success of participants in a project, and then in the middle of it agrees to pay for the project, it becomes ridiculous to claim that the project was not approved merely because a self-serving verbal formula of some sort was not used.

That is what the WPR attempts to do, however. According to 50 U.S.C. § 1547(a), in order for approval to be established for a military action, Congress must explicitly state in a law "that it is intended to constitute specific statutory authorization" of the action under the

WPR.<sup>36</sup> This effort by one Congress to restrict the legal effect of the actions of future Congresses is itself legally ineffective. The Supreme Court would likely avoid this issue on standing or other grounds, as the lower courts have.<sup>37</sup> But if the Court ever reaches the question it will hold, instead, that authorization is authorization, and that a legal conclusion cannot be defined by one Congress at one point in time to exclude in all future cases all but one of its possible forms.<sup>38</sup> And what Congress did with regard to Kosovo is authorization.<sup>39</sup>

Congress should repeal this aspect of the WPR, if for no other reason than its effect in encouraging legislative irresponsibility. It gives Congress a way of saying that it did not approve something that it not only tolerated, but also condoned and paid for. This is definitely *not* the way to get Congress to take seriously its responsibility to consider when and how the President and the nation should use force. In fact, it also encourages executive irresponsibility, suggesting to the President that what Congress does is irrelevant, and that the President has the legal power to act freely, without constitutional restraint. This is plain wrong and could lead some day to a serious constitutional crisis.

These dangerous weaknesses in the WPR by no means require its overall repeal. The WPR makes a lot of sense in two areas. First, it requires the President to consult with Congress so that Congress is

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36. *See id.*

37. *See* *Crockett v. Reagan*, 558 F. Supp. 893, 901 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983); *see also* *Campbell v. Clinton*, 52 F. Supp. 2d 34, 35 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (D.C. Cir. 2000), *petition for cert. filed*, 68 U.S.L.W. 3741 (No. 99-1843) (holding that plaintiffs do not have standing to raise the claims).

38. *See* *Marcello v. Bonds*, 349 U.S. 302 (1955); Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379 (1987).

39. *See* *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971) (finding congressional authorization in support of military operations in Southeast Asia based on the Tonkin Gulf Resolution of August 10, 1964, plus continuing appropriation bills providing billions of dollars); *see also* *DaCosta v. Laird*, 448 F.2d 1368, 1369 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972) (holding that repeal by Congress of the Tonkin Gulf Resolution on December 31, 1970, did not remove the congressional authorization previously found sufficient in *Orlando*).



appropriately informed in exercising its constitutional powers,<sup>40</sup> and so that the President is forced to explain the reasons for using force in the absence of a declaration of war when introducing U.S. armed forces.<sup>41</sup> Second, the WPR is helpful in setting up a process by which Congress can express its position, if it has something to say.<sup>42</sup> Congress can undoubtedly stop the President from using force if Congress acts in a definite and timely manner.<sup>43</sup> Congress can even force the President to act, with some possible exceptions.<sup>44</sup> But the WPR is ineffective insofar as it seeks to redefine the meaning of authorization and it should be repealed in that regard.

What our government did in the Gulf War was as close to perfect as possible in terms of a joint, responsible use of the power over war. President Bush and Secretary of State Baker mustered the support of most of the world, the UN Security Council, and then of Congress.<sup>45</sup> That is why, in part, the Gulf War was successful. Arguably, it should have been continued a little longer, but it was very successful to the extent that it isolated a Nazi-like regime and prevented it from expanding its control throughout the Middle East.<sup>46</sup>

Congress needs no phony legal definitions to control or support the President. It needs only to act as it sees fit, but to allow the President to lead if it is unable or unwilling to act. It should pass a law that simply and cold-bloodedly tells the President: "Tell us what you have done, what you are going to do, and why. We have set up a voting process by which we will decide whether to support you, oppose you, or do nothing definitive. At the end of the day, what we do or fail to do is what we will have to stand behind."

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40. See 50 U.S.C. § 1542.

41. See *id.* § 1543.

42. See *id.* §§ 1541, 1544.

43. See generally Sofaer, *supra* note 10 (stating that Congress, not the President, has the ultimate power over war).

44. See *id.* at 34.

45. See generally Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597, 640-55 (1993) (stating that the President worked hard to forge an international consensus on the Gulf War Crisis and discussing Congress's approval of the use of force).

46. See *id.*; Louis Rene Beres, *Prosecuting Iraqi Gulf War Crimes: Allied and Israeli Right Under International Law*, 16 HASTINGS INT'L & COMP. L. REV. 41 (1993) (discussing that the crimes of the Baghdad regime were of the gravest nature).

President Clinton claimed he could act in Kosovo for sixty days without any legislative approval.<sup>47</sup> That, I submit, is an unhealthy constitutional situation. If Congress had rejected the supplemental appropriation, the President would in fact have been acting unconstitutionally and would in any event have soon run out of the means to continue the war. These facts would have been clear if the WPR had not been around to mislead.

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47. See President's Letter to Congressional Leaders Reporting on Air Strikes Against Targets in the Federal Republic of Yugoslavia, 35 WEEKLY COMP. PRES. DOC. 527 (Mar. 26, 1999).

