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The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful

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Perhaps the most confident judgment one can make about the War Powers Resolution is that several of its most fundamental provisions are flagrantly unconstitutional. The Founding Fathers established a complex system of checks and balances based on co-equal, separate, and independent political branches. Even recognizing the existence of ambiguity concerning the precise limits of executive and legislative authority pertaining to the use of force abroad, it does not follow that either branch has the unilateral power to determine the limits of the other's authority. Attempts by Congress to modify its constitutional relationship with the executive branch by simple statute have been firmly rejected by the United States Supreme Court in the past.¹

Specifically with respect to the War Powers Resolution, there are at least four serious constitutional problems inherent in three provisions of the statute:

1. Although during the evacuation of Indochina and the Mayaguez rescue operation many members of Congress—including some key sponsors of the War Powers Resolution—acknowledged that the President had independent constitutional authority as Commander-in-Chief to rescue endangered United States citizens abroad,² the specific

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¹ See, e.g., Myers v. United States, 272 U.S. 52 (1926).
² Professor Alexander Bickel qualified his statement of the Resolution by saying: I don't think the President can be deprived of his power to respond to attacks and threats against our troops wherever they may be, as well as against our territory; or of the power to contribute to see to the safety of our troops once they are engaged, even if a statutory period has expired.


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language of section 2(c) of the Resolution asserts that this power is limited to "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." Any attempt to give legal effect to this provision would be patently unconstitutional.3

(2) Section 5(b) of the Resolution would deprive the President of his constitutional authority as Commander-in-Chief during a period of hostilities after a period of sixty days if the Congress remained silent on the matter. (The President would be permitted to act as Commander-in-Chief for an extra thirty days in order to protect United States forces in the process of withdrawal from hostilities.) Hostilities by United States forces could be continued only if Congress affirmatively acted to authorize their use. The idea that Congress can by silence or inaction deprive the President of a fundamental expressed constitutional power—in a time of national emergency, no less—is incompatible with our system of separation of powers.

(3) Section 5(c) of the Resolution would allow the Congress to deprive the President of his Commander-in-Chief powers at any time simply by passing a concurrent resolution. Such a resolution does not have the effect of law (and even a statute could not deprive the President of his independent constitutional powers), because it is not submitted to the President for his signature or veto as required by the Constitution's presentation clause. This constitutional difficulty was recognized by many congressional supporters of the resolution and by eminent constitutional scholars who testified in favor of war powers legislation during congressional hearings on the subject.4 Similarly, there is a danger that in practice the Congress would use the "silent veto" power to dictate the tactical conduct of military operations—an infringement of both the President's Commander-in-Chief power and his authority as Chief Executive of the nation. For the first reason, section 5(c) of the War Powers Resolution is unconstitutional on its face. For the second, it is incompatible with the spirit of the Constitution.5

3. Although Senator Javits took the position that § 2(c) was an operative part of the Resolution, Cruden, supra note 2, at 80, the Department of State legal adviser has argued that it was "at most a declaratory statement of policy." Id. There is, however, a public perception that this language is a legally binding constraint upon the President's authority. See, e.g., U.S.A. Today, Dec. 30, 1982, at 1, which, in summarizing major provisions of the Resolution, stated that the "President can send U.S. troops to hostile areas, but only when war is declared, when authorized by law or in a national emergency."


5. The United States Supreme Court seems to agree. In INS v. Chadha, — U.S. —,
That these rather apparent constitutional difficulties were ignored by enough members of both the House and Senate to override a presidential veto may be explained in part, perhaps, by Senator Javits' expectation that the White House would agree to a "methodology" for involving the Congress in decisions to commit United States forces to combat and that the resulting document would thus "represent a compact between Congress and the President for making the Constitution work in what is generally admitted to be a gray area." Under this "compact" theory it might be contended that at least some of the constitutional difficulties would not be present, since one branch would not be imposing its interpretation on the other. While this might successfully have established a working methodology for the duration of the Nixon Administration, even under a "compact" theory it could not be held to bind succeeding Presidents (any more than Congress could by statute prohibit a subsequent Congress from enacting a new statute taking a contrary position). Article five of the Constitution sets forth various procedures for amending the Constitution, but nowhere is it provided that the acquiescence of one President can alter the constitutional authority of a successor in office. While a "Ninety-third Congress-President Nixon methodology" might have been useful and fully acceptable to a future Commander-in-Chief, it would not be legally binding.

Political considerations also helped to obscure some of the constitutional objections to the Resolution—particularly after it had been vetoed by President Nixon. The vote to override the veto was taken in the wake of the firing of Watergate special prosecutor Archibald Cox, and senators were quoted as saying, for example: "This is not the time to support Nixon"; "We simply have to slap Nixon down, and this is the vote to do it on"; and "I love the Constitution, but I hate Nixon more."

Even were there no constitutional difficulties with the War Powers Resolution, a review of its implementation during the past nine years demonstrates that it has been as ineffective in practice as it is unwise in theory. Congress lacks the expertise to deal hurriedly with complex foreign policy emergencies, and most members are too busy with other

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103 S. Ct. 2764 (1983), the Court stated that the legislative branch cannot subject legislation to additional procedural requirements such as approval by a majority of both houses, thus creating a congressional veto on the executive's power. Id. at 2784-87.


7. Cruden, supra note 2, at 75.
duties to remain up-to-date on even a prolonged crisis. During times of crisis, decisiveness is often essential. Failure will almost be guaranteed if there are 536 potential secretaries of state trying to make decisions by consensus. Congress is not structured to make rapid decisions, and the more controversial and important the decision, the more likely it is that at least some members will want to prolong the debate to avoid having to take a position that might later prove to have been politically unwise.\(^8\)

The experience during the Indochina evacuations provides a good example. President Ford asked the Congress on April 10, 1975, to quickly consider and clarify his authority to carry out a humanitarian evacuation. He requested action within nine days and was promised expeditious consideration, but nearly three weeks later Congress was still debating as communist troops overran the last areas of Indochina. As the last congressional staff member evacuated from Saigon during the final days of April 1975, I am particularly grateful that President Ford decided to proceed with the evacuation on his own authority. Another individual might have found it more politically expedient to continue beseeching Congress for authorization legislation, and then to point the finger of blame at the Democrat-controlled Congress for failing to act to prevent hundreds of Americans from being seized by Vietnamese communist forces.

There is no guarantee that in a future crisis another United States President would act with the same degree of courage displayed in 1975 by President Ford. After the failure of President Carter’s attempted Iranian rescue there were calls for his impeachment for violating the War Powers Resolution, and during hearings in the House Committee on International Relations following the Korean tree trimming incident in 1976 it was asserted that if in the future a President did not comply with the provisions of the resolution: “We will have to get a new President.”\(^9\)

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\(^8\) Because of these institutional shortcomings, furthermore, unless substantial changes are made in the way Congress deals with national security problems, increasing the role of Congress in crisis management will, of necessity, amount to increasing the influence of congressional staffing members. If these individuals are to be provided the detailed and sensitive intelligence data necessary to make sound recommendations, recent experience suggests that much of the information will be either intentionally or inadvertently disclosed. See infra text accompanying notes 45-59. The end result will likely be compromised intelligence capabilities since foreign assets and intelligence sources will be unwilling to provide information to a government that has demonstrated an inability to protect secrets.

The requirement that the President must obtain congressional authorization or terminate hostilities after a sixty-day period may also prove to be mischievous in practice. It might encourage a President to escalate a conflict unnecessarily—with accompanying increased loss of life and property on all sides—in order to try to achieve a quick victory. President Nixon's fear that Congress would soon enact legislation terminating United States involvement in Indochina, for example, was a factor in the decision to bomb the Hanoi area in December 1972: "Faced with a perceived deadline in Congress and continued intransigence in both Saigon and Hanoi, the President's instincts were for a massive post-election escalation of the conflict to force North Vietnam to an agreement."\(^{10}\) While in the view of many (including myself) this was also a sound decision on military grounds, irrespective of possible congressional action, the fact remains that ideally such decisions should not be influenced by extrinsic domestic political considerations.

Alternatively, such a requirement might encourage an enemy to be more recalcitrant in the hope that by holding out a few weeks longer Congress would undercut the President's ability to prosecute the action. In such a situation, the President might conclude that it was necessary to make major concessions and sacrifice substantial United States interests in order to negotiate a quick truce and avoid the risk of having his commander-in-chief powers withdrawn and losing everything to the enemy.

Something of an analogy can be found in the experience of French Socialist Premier Pierre Mendès-France, who announced in June 1954 that he would resign if he did not succeed in arranging a cease-fire in Indochina by July 20 of that year. The communist delegations at the Geneva Conference realized that the longer they stalled the more concessions he would be willing to make to preserve his job. The serious negotiations took place during the final hours of July 20, and shortly before midnight the wall clock was unplugged to permit the French delegation to make a few more concessions within the artificial time deadline.\(^{11}\) Another, more recent, example of the harmful effects of an artificial negotiating deadline can be found in a review of the background to the Panama Canal treaties. Because President Carter re-

Dante Fascell, Chairman, Subcomm. on International Political and Military Affairs and Organizations).

10. 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, 103-04 (Comm. Print 1982) [hereinafter cited as SULLIVAN STUDY].

11. R. TURNER, VIETNAMESE COMMUNISM: ITS ORIGINS AND DEVELOPMENT 87, 96, 269 (1975) [hereinafter cited as TURNER ON VIETNAM].
fused to submit the nomination of his negotiator (Sol Linowitz) to the Senate for confirmation, by law the appointment could not extend beyond a period of six months. The treaties, which were filled with serious ambiguities, were agreed upon six months to the day after the appointment was made.

The War Powers Resolution might contribute to unnecessarily high United States casualties in other ways as well. Writing in the October 1980 issue of the Marine Corps Gazette, Major A. J. Ponnwitz argued: "An enemy who knows a withdrawal is imminent has most of the information necessary to prevent the success of the military mission, or at least, to inflict severe casualties on the retreating forces." In addition, the Resolution encourages the President to commit United States military personnel into potentially dangerous situations—where involvement in hostilities is possible but not so clearly indicated by the circumstances as to invoke section 4(a)(1) of the War Powers Resolution—either unarmed (as in the Zaire airlift and the 1976 evacuation of Lebanon), or inadequately armed for effective self-defense (as may be the case in El Salvador), so as to avoid the provisions of section


15. The State Department announced that because United States soldiers in El Salvador were armed with "personal sidearms, which they are only authorized to use in their own defense or the defense of other Americans," they were not equipped for combat and thus § 4(a)(2) of the War Powers Resolution did not apply. 127 CONG. REC. E901 (daily ed. March 5, 1981) (statement of Rep. Broomfield). A minor scandal occurred when United States journalists videotaped three United States soldiers carrying M-16 rifles in El Salvador. Lescazter, Reagan Calls for Full Report on Armed Team in Salvador, WASH. POST., Feb. 13, 1982, Part A, at 1, col. 1. For violating their orders, the following day the senior officer in the group was ordered out of El Salvador by the United States ambassador, and the other soldiers received official reprimands. Dickey, U.S. Colonel Told to Leave Salvador, WASH. POST, Feb. 14, 1982, Part A, at 1, col. 1. Following testimony before the Foreign Relations Committee, the State Department in 1982 responded to this written question submitted for the record:

**Question 38.** Do U.S. military trainers now in El Salvador carry M-16 rifles? Is consideration being given to permitting those personnel to do so? Would such a decision require reporting under any existing provisions?

**Answer.** U.S. military security assistance personnel are not authorized to carry weapons other than individual side arms in the field in El Salvador. The question of security of all USG [United States government] personnel is of course under continuing review. Should it be determined at some point that under certain circumstances, weapons other than individual side arms would be authorized. Con-
4(a)(2). Rules prohibiting United States military personnel from entering certain areas or accompanying host-nation troops on "offensive" operations may help to reduce the likelihood of their direct involvement in hostilities; but requiring that, if attacked, they defend themselves with rocks or other inadequate weapons makes little sense and should be unacceptable as a matter of national policy.

Even the formal reporting requirement, which was unchallenged by President Nixon or any of his successors—is not without risks. Senate Armed Services Committee Chairman John Tower has observed:

Although the act does not specify whether the report to Congress must be unclassified, there remains the possibility that a confidential report would become public knowledge. In many cases the more urgent the requirement that a decision remain confidential, the greater the pressures for disclosure. Thus, by notifying Congress of the size, disposition and objectives of U.S. forces dispatched in a crisis, we run the risk that the report may get into the public domain. If this information becomes available to the enemy, he then knows exactly what he can expect from American forces and thus what risks he runs in countering American actions. This removes any element of surprise the U.S. forces might have enjoyed and eliminates any uncertainties the adversary might have as to American plans.¹⁶

The War Powers Resolution has been heralded as the answer to future "Vietnams."¹⁷ Never again, it was said, would a President be able to commit United States soldiers to foreign wars without congressional participation in the decisionmaking process. While perhaps reassuring to the uninformed constituents of some congressmen, this rationale bore little resemblance to historical reality. Writing in the Virginia Law Review, Yale law professor (and former Undersecretary of State for political affairs) Eugene Rostow observed:

During the war in Vietnam . . . we experienced naked polit-

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ical irresponsibility. First, the President and Congress, acting together in a constitutional mode that goes back to the time of Washington, made a series of decisions involving us in the war. . . . Later, when the war . . . became unpopular, many of the congressmen who had voted and voted and voted for [it] suddenly began to say that [it was] all the President's fault. They claimed that the President had involved the country in war through stealth and concealment. . . . Then, having created the myth of presidential usurpation, Congress passed the War Powers Resolution to cure the imaginary disease.18

Perhaps the greatest irony of the War Powers Resolution is that, despite its unconstitutional infringement upon the authority of the President, it would not have prevented the war in Vietnam had it been in effect in the early 1960's. In compliance with section 2(c)(2) of the Resolution, the use of United States Armed Forces in Indochina was clearly done pursuant to "specific statutory authorization." Further, there was sufficient consultation to satisfy the mandate of section 3, and the reporting requirements of section 4 would not even arguably have influenced the likely course of events.19 Finally, it was not until the 1970's—many years after the commitment had been made and the troops deployed—that a majority could be mustered in Congress to limit funding for the war, much less direct that the troops be withdrawn.

Many "lessons," of course, can be drawn from our Vietnam experience—but only a few are legitimate. Those legislators who reflexively cry "no more Vietnams" each time the president exercises the national muscle might benefit from a re-examination of Vietnam, and particularly the role Congress played. Perhaps the United States was doomed to failure in Indochina—we will never know. But the war was not lost militarily on the battlefield; it was lost in Washington when a frustrated


Congress terminated funding. There are, no doubt, individuals who sincerely believe Congress acted wisely, but the consequences of the communist victory that followed in Indochina have been significant. To mention but a few:

1. The fall of the United States-supported governments did not bring the much-heralded peace. On the contrary, there is evidence that more people may have died in the first three or four years of so-called peace in tiny Cambodia alone than were killed on all sides throughout Indochina during thirteen years of war.

2. The “National Liberation Front” and “third-force” elements touted by congressional doves were promptly shoved aside by Hanoi’s legions, who ruled Saigon as an occupational army following its “liberation.”

3. The people of Vietnam are in a far worse position today than they were a decade ago. Corruption and mismanagement have resulted in economic disaster, and human rights have deteriorated dramatically. There are more political prisoners, elections are far less free, there are fewer newspapers (none opposing the regime), and unapproved books have been publicly burned. Apparently to repay the Soviets for their extensive economic aid, thousands of Vietnamese workers have been shipped to the Soviet Union to work as laborers.

4. Since “liberation,” more than a million people have risked robbery, rape, and even death (some experts estimate that boat people have no more than a fifty-fifty chance of surviving the ordeal) to flee the new Gulag that Vietnam has become.

5. United States interests in the region have suffered as well. Today Hanoi is closely allied with Moscow, and is providing the Soviet navy with access to extremely valuable port facilities along the southern coast of Vietnam. The new Vietnamese army is the third largest in the world (the United States Army ranks fifth).

If the War Powers Resolution does not resolve the conflict in legislative-executive relations regarding the use of force, what principles should govern the conduct of the two political branches in the national security policymaking process? Is there a solution, given the admitted ambiguities of the Constitution on this question? Probably so. At least there are steps that could be taken by both branches to substantially

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20. As this study was going to press, the United States Department of State submitted its annual human rights survey to Congress, as required by law. The report concluded that of all the countries surveyed, Vietnam was “the worst country to live in.” Wash. Times, Feb. 9, 1983.
reduce the likelihood of disasters in legislative-executive relations such as were witnessed during the early and mid 1970's.

To begin with, each branch should recognize that the other has a fully legitimate role to play, and that no policy will succeed in the long run without the support of both branches. This is certainly true when the policy in question might involve a commitment of armed forces to hostilities. Taylor Reveley was certainly right when, in his recent book, *War Powers of the President and Congress*, he observed that "the Constitution does impose one iron demand on the President and Congress: that they cooperate if any sustained venture for war or peace is to succeed."\(^{21}\) It hardly needs to be observed that, as a practical matter, Congress—despite its powers to declare war (subject to a presidential veto)—cannot effectively engage United States military forces in hostilities without the cooperation of the Commander-in-Chief. This was illustrated in the late nineteenth century when a lame-duck President Grover Cleveland kept Congress from declaring war against Spain until a more cooperative President McKinley assumed power. Robert McElroy, in his 1923 biography of Cleveland, gives this account:

A number of Congressional leaders called on President Cleveland to discuss an "important matter."

They said, "We have about decided to declare war against Spain over the Cuban question. Conditions are intolerable."

Mr. Cleveland drew himself up and said, "There will be no war with Spain over Cuba while I am President."

One of the members flushed up and said angrily, "Mr. President, you seem to forget that the Constitution of the United States gives Congress the right to declare war."

He answered, "Yes, but it also makes me Commander-in-Chief, and I will not mobilize the army. I happen to know that we can buy the Island of Cuba from Spain for $100,000,000, and a war will cost vastly more than that and will entail another long list of pensioners. It would be an outrage to declare war."

The project died.\(^{22}\)

Given the Vietnam experience, it should be even less necessary to

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emphasize the necessity of congressional cooperation in formulating policies involving the use of military force. In many instances, of course, a congressional role is mandated by the Constitution. But even were this not the case, in the long run congressional support is essential. First of all, even if the Commander-in-Chief already has a sufficient army and navy, for extended hostilities he will need congressional appropriations to purchase fuel and ammunition. More important, members who feel that Congress has been cut out of the decision-making process will be more likely to take their case to the people, and the resulting display of disunity will endanger public support and adversely affect the morale of our soldiers and the policies of our friends and foes alike. We need look back no further than Vietnam to realize the decisive role that these psychological factors can play.23

Accepting the practical utility—indeed, the necessity—of effective cooperation between the political branches on policy questions involving the use of armed force, we must at the same time recognize the difficulty of trying to consult seriously during a period of crisis prior to making a decision. Certainly the President cannot be expected to talk individually with all 535 members of Congress, and at times events move so quickly that even the best-intentioned Commander-in-Chief can do little more than instruct his staff to keep congressional leaders informed. This is what consultation has come to mean in practice under the War Powers Resolution, but it is far less than Congress has a right to expect if the crisis is foreseeable. The solution may be for the two branches to maintain sufficiently close contacts on a regular basis so that, when an emergency requiring an immediate response does confront the President, he can take probable congressional attitudes into account from the start. When appropriate, of course, he would still need to seek formal congressional approval or authorization. But by maintaining continuous and close consultation with Congress, he would lessen the likelihood of being surprised by subsequent criticism and at the same time would be less likely to leave Congress with the feeling that it had been ignored.

It should be noted that consultation can take many forms. At least as important as formal hearings and sessions with congressional leaders in the White House are the more numerous informal exchanges that occur when administration officials encounter members of Congress at cocktail parties and in other off-the-record settings.24 Although there

are risks involved—given the competing demands on a congressman's time and the instrumental role played by congressional staff members in the national security field, particularly when the subject matter is technical or the issues are highly complex—it is important for the executive branch to maintain regular contacts with key congressional staff members. This not only increases the likelihood that the administration will be aware of areas of special congressional concern, but also serves to better inform Congress about administration programs and policies.

The Constitution requires that the President, executive-branch officials, and all members of Congress take an oath of office to "support" or "defend" the Constitution of the United States. This should be kept in mind by both sides when issues of constitutional consequence are under consideration. During my years as a Senate staff member, on several occasions I heard other staff members, and even senators, assert that it was for the courts, not Congress, to worry about whether a statute was constitutional. This is not a responsible attitude. True, some issues are so complex that even constitutional scholars differ as to where fine lines should be drawn (or if they should be drawn at all). But ideally, in these gray areas, neither branch should seek to provoke a confrontation with the other.

In this regard, the executive branch could well be guided by the legacy of President Jefferson in his dealings with the Barbary powers. Although war had been declared by the Bey of Tripoli and the opinion was widespread that in such a circumstance the President needed no additional authority to initiate offensive hostilities, Jefferson nevertheless deferentially sought formal authorization from Congress to carry on the campaign. The guiding rule for the executive branch was expressed well by Alexander Hamilton, who wrote: "In so delicate a case, in one which involves so important a consequence as that of war—my opinion is that no doubtful authority ought to be exercised by the President."25

If Jefferson should be the model for the executive branch, the Congress could learn from the late Senator Arthur H. Vandenberg, who served as President Pro Tempore of the Senate, chaired its Foreign Relations Committee, and worked closely with the Truman Administration to forge a bipartisan consensus on foreign policy. In a 1947 speech to the Cleveland Council of World Affairs, Senator Vandenberg said:

25. Letter from Alexander Hamilton to James McHenry (May 17, 1798) (emphasis added), quoted in Scigliano, supra note 19, at 140.
“This [bipartisanship] does not mean that we cannot have earnest, honest, even vehement domestic differences of opinion on foreign policy. It is no curb on free opinion or free speech. But it does mean that they should not root themselves in partisanship. We should ever strive to hammer out a permanent American foreign policy, in basic essentials, which serves all America.”

On domestic issues, Senator Vandenberg was capable of being as partisan as most of his colleagues. No doubt he would have enjoyed watching the other party squirm on foreign policy matters as well, but he knew the extreme importance of national unity in facing a shrinking world. He once said: “In the face of any foreign problem, our unity is as important as our atomic bombs,” and in one of his last public speeches—a Lincoln Day address in Detroit on February 10, 1949—he looked toward the future:

It will be a sad hour for the Republic if we ever desert the fundamental concept that politics shall stop at the water’s edge. It will be a triumphant day for those who would divide and conquer us if we abandon the quest for a united voice when America demands peace with honor in the world. In my view nothing has happened to absolve either Democrats or Republicans from continuing to put their country first. Those who don’t will serve neither their party nor themselves.

In the sphere of foreign policy, where national unity is of such great importance, the President has a special status. As the Supreme Court noted in *United States v. Curtiss-Wright Export Corp.*, he is “the sole organ of the federal government in the field of international relations.” He has an obligation to weigh the opinions of Congress and needs the affirmative approval of Congress to implement many policies; but no matter how hard he tries, if the issue is controversial, he cannot satisfy the wishes of all of the 535 members of the House and Senate. Not infrequently, the professional judgments of his advisers may lead him to pursue strategies that would not be chosen by a majority of the Congress. But so long as the President is pursuing policy

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goals shared by the Congress and the American people, he should be allowed substantial flexibility in his choice of tactics.

President Lincoln once observed: "In a storm at sea, no one on board can wish the ship to sink, and yet not infrequently all go down together because too many will direct and no single mind will be allowed to control." In a similar vein, two years after leaving office Thomas Jefferson wrote:

Leave the President free to choose his own coadjutors, to pursue his own measures, and support him and them, even if we think we are wiser than they, honester that they are, or possessing more enlarged information of the state of things. If we move in mass, be it ever so circuitously, we shall attain our object; but if we break into squads, every one pursuing the path he thinks most direct, we become an easy conquest to those who can now barely hold us in check. I repeat again, that we ought not to schismatize on either men or measures. Principles alone can justify that.

The proper congressional role in national security matters should be that of a full partner in the formulation of general principles and policies, rather than that of a micro-manager or second-guesser of the President's execution of those policies. Certainly the initiation of significant offensive hostilities is such a policy decision, which under our constitutional system of government should not be made without the approval of Congress. But more detailed questions of how many and which forces to use, and how best to employ them, are beyond both the expertise and the constitutional jurisdiction of the legislative branch. Similarly, the recent practice of globe-trotting congressmen traveling to international crisis spots to negotiate with foreign leaders—unless expressly authorized by the President—would have shocked the Founding Fathers and is a gross infringement on the constitutional authority of the President.

Clearly there are substantial benefits to be gained by presenting a

32. In addition, some such activities may well be felonies under the Logan Act, 18 U.S.C. § 953 (1976), which provides in part that any citizen of the United States, whoever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any office or agent thereof, in relation to any disputes or controversies with the United
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united foreign policy to the world. It is difficult to prove conclusively, but a strong case can be made that the divisiveness in United States foreign policy during the 1970's was instrumental in Hanoi's decision to escalate the fighting in South Vietnam, and in Moscow's decision to deploy Cuban soldiers to seize control of the Angolan revolution. There may be some issues of principle on which agreement cannot be reached and regarding which bipartisan cooperation will prove impossible—but cooperation should always be the goal. This can only work, however, if both branches, and both political parties, make a full commitment to pursuing that goal in good faith.

While in practice the first step—legitimate consultation with the Congress—may belong to the President, in reality the controlling decision belongs to the congressional opposition. As Senator Vandenberg observed:

Since the Constitution charges the President with primary responsibility in international relations, it is he who must start the process and set its boundaries. But in the final analysis the Congressional "opposition" decides whether there shall be cooperation. We cooperated. I express the belief that our patriotic Democratic friends will follow this example when they are in the "opposition." 

Unfortunately, those in opposition have the greatest incentives toward partisanship. Furthering the interests of their own candidates—or in many cases their own candidacy—is not accomplished by making the incumbent President look good; and, realistically, he is likely to get most of the public credit for successes. Even ignoring these considerations, there are substantial pressures on a congressman to undercut presidential foreign policy initiatives. For example, experience shows that the press gives more attention to the critics than to the supporters of national policy, and in politics press exposure can often be directly

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33. See TURNER ON VIETNAM, supra note 11, at 247-55.
34. Consider this sequence of events. On November 24, 1975, Secretary of State Kissinger denounced Soviet "adventurism" in Angola and warned that continued intervention would not be tolerated. On December 9, President Ford made a similar statement and called for an end to all external assistance to Angola. The Soviet airlift of military equipment and Cuban troops to Angola ceased until December 19, when the United States Senate voted 54-22 to prohibit further covert assistance to any faction in Angola. The Soviets immediately resumed their airlift, and within about two weeks had doubled the number of Cuban troops in Angola. For information on this period, see H. KISSINGER, AMERICAN FOREIGN POLICY 317-19 (3d ed. 1977).
translated into votes. Furthermore, many foreign policy issues are of greater interest to a small but vocal ethnic, religious, or other special-interest group than to the population in general. Senator Tower has observed that "to the extent that Congress often represents competing regional and parochial interests, it is almost impossible for it to forge a unified national foreign policy strategy and to speak with one voice in negotiating with foreign powers."

The influence of ethnic pressures was very apparent during the Cyprus crisis in the mid 1970's. I heard several congressmen and senators say, in effect, "Don't talk to me about the strategic importance of Turkey—I don't have any Turkish restaurants in my district." Issues of war and peace are particularly susceptible to this sort of pressure—few intelligent legislators enjoy casting votes that may cost the lives of the sons and daughters of voting constituents. Thus the safest vote for an individual congressman often becomes the most dangerous for the nation—a vote of partisan dissention during a period of national crisis. There is a special irony here, in that while the congressman by his dissension is absolving himself from the consequences, the divisiveness he helps to create may be a central factor in encouraging the enemy to escalate the conflict—resulting in an even greater number of United States casualties.

In his 1975 Virginia Law Review article, Eugene Rostow wrote:

> When the Executive Branch deals with congressmen and senators who continue to vote for a war and then say, "there's no one here but us chickens" after the war becomes unpopular, a mode of suspicion develops which is rather hard to allay. I personally have dealt with congressmen and senators about Vietnam, often reminding them that the Administration had

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36. John Lehman writes:

> It is a fact of life that there is virtually no political profit for a Congressman in the serious pursuit of foreign affairs. The role of critic after the fact, or of dramatic accuser, however, can produce useful publicity. And a latent American exasperation with "foreigners" has often exerted an obvious influence on Congressional action, especially when coupled with the political requirements of domestic and constituent concerns. Every member must stay close to the latter concerns. Only in the absence of opposition interest, or consensus back home can a legislator be free to judge an issue by the larger national interest—and only then if he is free of the party whip, the pressure of a vital lobby, or of committee loyalties. Most regrettable of all, Congress is particularly vulnerable to the powerful narrow interest lobbies: not merely the sordid black bag of the industry and labor lobbies, but zealous forces of Common Cause, the Liberty Lobby, Reserve Officers Association, Greek-Americans, and the Sierra Club, each stampeding vulnerable members to their own narrow view of the national interest.

Lehman, supra note 24, at 28.

long been trying to achieve goals which they have recommended in political speeches—reconvening the Geneva Conference, for example. Typically, their response was, I know that, but you must remember that I have to be elected in my district. The President has to do what must be done. I must take care of my reelection. In short, a great many men slithered off the deck when the going got rough.38

This attitude of political irresponsibility was a central factor in the creation of the War Powers Resolution—which was portrayed by many in Congress as a means of insuring that a future President would not bypass Congress as Johnson and Nixon had done in Vietnam. Congressional irresponsibility has also been apparent in the implementation of the War Powers Resolution. With the possible exceptions of the Indochina evacuations, providing a multinational force and observers for the Sinai, and the first Lebanon deployment in 1982, none of the instances examined in this study has been preceded by the kind of meaningful consultation envisioned in the Resolution. The stated purpose of the Resolution (and presumably the consultation requirement) is to “insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities.” The President can hardly consider the “judgment” of the Congress if his consultation amounts to having a staff member inform congressional leaders once a decision to act has been made and is in the process of implementation.

Except for the fact that his action was permissible under his independent constitutional authority (and thus, as applied, the War Powers Resolution was unconstitutional), President Ford’s use of force in the Mayaguez affair appears to have been a violation of the consultation language of the resolution. During the same operation, the President violated the specific terms of the (unconstitutional) Cooper-Church Amendment and its progeny by using United States Armed Forces off the shores of Cambodia without specific congressional authorization. And yet his operation was viewed by the American people as a great success, and so liberals in the Congress generally praised his performance. The Senate Foreign Relations Committee even went so far as to unanimously adopt a resolution praising the rescue operation. As the New York Times (which also praised the operation39) observed: “In the Mayaguez case, Mr. Ford believed he was required to consult

38. Rostow, supra note 18, at 802.
with Congressional leaders before acting. He seems instead to have informed them somewhat after the fact. Yet there was practically no criticism on legal grounds probably for several reasons: Criticism at a welcome moment of success would be politically risky at best."

In contrast, President Carter failed to consult before starting the first phase of his attempted rescue of United States citizens held hostage in Iran—when there was no Cooper-Church-type restriction on United States military activities in the region, and when complete secrecy was essential to any chance of success—and was sharply criticized in the Congress and the press. His rescue attempt failed. It does not seem unreasonable to expect the Congress to play by one set of rules. Further, if it insists upon prior consultation, Congress must be responsible enough not to leave the President swinging in the wind nearly three weeks later—as occurred before the Saigon evacuation—facing a crisis while Congress continues to debate. And if Congress really doubts that the President has constitutional authority to rescue endangered United States citizens in Indochina or Iran, it must apply this principle uniformly without respect to the ultimate success or popularity of the president's actions.

Finally, if Congress contends that the President cannot rescue endangered Americans without first securing formal authorization, it must be prepared to accept greater responsibility for the fate of those endangered citizens. Had President Ford accepted the argument of many in Congress that he lacked authority to rescue the last Americans from Phnom Penh because of the War Powers Resolution or other statutory constraints, and had those Americans suffered the fate of more than a million Cambodians under the subsequent rule of Pol Pot, we might wonder whether Congress would have willingly accepted any responsibility for their deaths.

For all of his faults and weaknesses—and I believe they were numerous—President Johnson recognized the importance of congressional participation in an effective foreign policy. He had, after all, served for many years as majority leader of the Senate. Reflecting on

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40. *Ford Sends a Signal*, N.Y. Times, May 18, 1975, § 4, at 1, col. 1. Foreign Relations Committee staff director Pat Holt writes:

Although fighting was minimal and casualties were light, the evacuation [of Saigon] clearly took place in a hostile environment and therefore put the President at least technically in violation of the numerous limitations on using funds for military activities in Vietnam. The evacuation was a violation, even by [State Department legal adviser] Monroe Leigh's interpretation of April 16... Nevertheless, the evacuation could be counted an operational success, and there was little disposition in Congress to quibble.

Holt, supra note 6, at 15-16.
the failures of his Vietnam policy, he wrote in 1972: "I knew that if I wanted Congress with me at the crash landing, they had to be with me at the takeoff. But I forgot about the availability of parachutes." 441

One of the more perceptive analyses of the congressional role in foreign affairs was provided by Pat Holt, who spent thirty years on the staff of the Senate Committee on Foreign Relations and was its staff director at the time of the Indochina evacuations, the Mayaguez rescue, and some of the other operations discussed in this study. He writes:

Senator Vandenberg said that Congress wanted to participate in the takeoffs as well as the crash landings; actually it sometimes seems more interested in investigating crash landings than in participating in takeoffs. Despite the fact that it was clumsily executed, Mayaguez was a success, and there is little political mileage to be gained in a post mortem of the rescue of American citizens and the protection of freedom of the seas.

After the failure of the Bay of Pigs invasion in 1961, the Senate Foreign Relations Committee held weeks of hearings rehashing all the bad advice Kennedy had received and trying to determine who had bungled what. After the success story of the missile crisis in 1962, Secretary of State Dean Rusk all but begged the Foreign Relations Committee to review—or investigate, if you will—the administration's handling of it, but no one was interested. The general principle seems to be that success has few autopsies; the corpse of a failure is picked to pieces. 442

The lessons of the congressional reaction to Vietnam and to various incidents after the War Powers Resolution was adopted are not encouraging. While the period may be historically atypical, during the 1970's Congress proved itself time and again to be a political creature with a conveniently selective institutional memory. More often than not, congressional attitudes toward specific situations appeared more attuned to public opinion polls than to the requirements of the law or the Constitution. Even after a commitment had been established by treaty, authorized by joint resolution of Congress, and reaffirmed for years by overwhelming congressional majorities through the appropriation of funds 443—as occurred in Vietnam—many members of Congress

41. Letter from President Johnson to Eugene Rostow (March 25, 1972), quoted in Rostow, supra note 18, at 803.
42. Holt, supra note 6, at 32-33.
43. Although § 8(a) of the War Powers Resolution denies that authority to commit
found no difficulty in pretending that the President was solely responsible and that Congress had unconstitutionally been excluded from the decision to commit troops. Yet, when the President did act essentially alone, without consulting Congress, if the operation was perceived by the public as a success, he was greeted with cheers.

If bipartisan cooperation in the formulation of national security policy is going to work, Congress must commit itself in word and deed to playing a more responsible role. The practice of undercutting the President for partisan gain, or to placate a special-interest constituency, is a luxury we can no longer afford if we are to have a viable foreign policy.

The benefits to Congress of being a full partner in the formulation of foreign and national security policy are significant, and those to the American people are even greater; but they will not come cost free. Members of Congress must be willing to devote substantially greater time to keeping abreast of national security problems—time that will directly gain them few, if any, votes, because often they will not even be able to discuss the subject matter in public. Each hour spent in a classified briefing is an hour that cannot be spent with constituents or seeking newspaper headlines. Further, many of the briefings will be uninteresting and will pertain to matters that might—but usually will not—require formal congressional action or become issues of concern for most Americans.

In past years, few members of Congress have been willing to take

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troops to hostilities can be inferred “from any provisions of law . . . including any provision contained in any appropriation Act,” at the time of the Vietnam War this was not the law. War Powers Resolution of 1973, § 8, 50 U.S.C. § 1547(a)(1) (1976). In The Prize Cases, 67 U.S. (2 Black) 635, 670-71 (1863), the Supreme Court said that “if it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861.” In more recent cases (not related to the war powers), as well, the Court has held “the appropriation by Congress of funds . . . stands as confirmation and ratification of the action of the Chief Executive.” Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 116 (1947). See also Brooks v. Dewar, 313 U.S. 354, 361 (1941). Similarly, in 1981 the Supreme Court found authority for presidential action in “the area of foreign policy and national security” on the basis of the enactment of legislation closely related to the question of the President’s authority in a particular case which evinces legislative intent to accord the President broad discretion—particularly where “there is a history of congressional acquiescence in conduct of the sort engaged in by the President.” Dames & Moore v. Regan, 435 U.S. 654, 678-79 (1981). See also Haig v. Agee, 453 U.S. 280, 291 (1981). See SULLIVAN STUDY, supra note 10, at 4, which notes that during the Gulf of Tonkin hearings in 1964, Secretary of State Rusk informed the Congress that the Administration regarded congressional appropriations as authority for the Vietnam involvement. As a practical matter, such indirect approval is not desirable, since for some members of Congress the approval of funds to permit deployed soldiers to defend themselves would not imply approval of the actual deployment.
time from their busy routines to attend such briefings. Former Na-
tional Security Council staffer Dr. John F. Lehman has noted:

Consultation as a process . . . requires as much active
involvement on the part of Congress as on the part of the Ex-
ecutive. Failure to consult is a constant complaint from Con-
gress, but the fault quite often lies with the members of
Congress rather than the Executive. During the period 1969-
73, for instance, the National Security Council had a standing
offer to brief any member of Congress on whatever foreign
policy issue he desired. The ground rules for such briefings
were to provide the fullest and most highly classified informa-
tion on the issue, but to allow no transcript and to provide no
documents. According to the records of the NSC, this offer
was taken up only three times in five years.\textsuperscript{44}

Lehman—who later served as deputy director of the Arms Control and
Disarmament Agency and as secretary of the navy—also notes the
"very sparse attendance at committee hearings" on national security
issues, and says, "It is always difficult to round up an audience of any
number on Capitol Hill to hear executive branch officials brief on a
policy unless it is the crisis topic of the day.\textsuperscript{45}

A greater congressional role in this vital area will not only increase
the demands on a member's time, it will also increase the likelihood
that he will be held accountable by the American people for foreign
policy failures. This is a serious risk, but it comes with the partnership
role. Following failure of the Iran rescue attempt, an article in the National Journal noted: "There is also the question of how much leaders
of Congress really want to know about such risky ventures as the at-
temted rescue of the hostages. If they had been briefed fully and in
advance in this case, they could have been held accountable, along with
the President, for the mission's failure."\textsuperscript{46} More recently, Stephen
Chapman wrote:

The crisis in Lebanon shows the limits of Congress' new role.
Its idea of a partnership is to set policy when there is a polit-
ical advantage to be gained, and to shirk responsibility when
there are dangers . . . . A true partnership requires that Con-
gress not merely hold its veto over the President's head. Con-
gress also has to help formulate answers to tough questions
. . . . Congress enjoys exploiting its newfound power on the

\textsuperscript{44} Lehman, \textit{supra} note 24, at 226.
\textsuperscript{45} Id.
\textsuperscript{46} Nat'l J., May 4, 1980, at 740.
easy issues—aid to El Salvador, CIA involvement in Angola. But on the more divisive ones, where there are political risks as well as benefits, it is happy to let the White House serve as point man . . . . Once the President steps out, the dangers can be gauged. Then, and only then, will Congress make up its mind. That is how it thinks a partnership in foreign policy ought to operate—with maximum risk to the President, and maximum opportunity for legislators. Some partnership. Some foreign policy.\textsuperscript{47}

Finally, full congressional participation in the making of national security policy will be impossible unless Congress finds a way to deal with the intentional or inadvertent disclosure of classified or sensitive national security information. To be successful, many operations are totally dependent upon secrecy. In effect, they are vulnerable to being "vetoed" by any individual who decides to go public with criticism. The Constitution does not require—and no workable set of rules could require—that sensitive national security operations have the approval of every single member of Congress. Indeed, there is evidence that the Founding Fathers expected that certain sensitive national security information would be denied to the Congress. Writing in The Federalist, for example, John Jay wrote in 1788:

There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a larger popular assembly. The convention have [sic] done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.\textsuperscript{48}

More recently, in \textit{United States v. Curtiss-Wright Export Corp.},\textsuperscript{49} the Supreme Court noted:

[The President] has his confidential sources of information. He has his agents in the form of diplomatic, consular and

\textsuperscript{47} Chi. Tribune, Sept. 23, 1982.
\textsuperscript{48} THE FEDERALIST No. 64, at 434-35 (J. Jay) (J. Cooke ed. 1961).
\textsuperscript{49} 229 U.S. 304 (1936).
other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted.\(^{50}\)

In recent years—particularly after the Watergate scandals and the accompanying investigation of intelligence abuses—Congress has been provided considerably greater access to sensitive national security information than was previously the case. Yet, unless Congress acts with a greater sense of responsibility, the executive branch must recognize that information provided on sensitive operations will be subject to “veto by leak” by any member. Following the Iranian rescue attempt Senator John Glenn, a former marine officer, said: “If I were on the raid, I wouldn’t want it all over Capitol Hill.”\(^{51}\) Although Senate Foreign Relations Committee chairman Frank Church was among the first to condemn President Carter for his failure to consult before the rescue attempt, the *National Journal* observed: “The White House surely recalls the last time Church was told a military secret—United States discovery of a Soviet brigade in Cuba—the first thing he did was call a press conference.”\(^{52}\)

Clearly, if Congress expects to be provided the sort of sensitive national security information necessary to contribute to an intelligent policy decision, it must substantially improve its record of preserving secrets. As Barbara Hingston Craig notes in a recent issue of the *Journal of Policy Analysis and Management*:

Presidential decisions such as the rescue attempt [in Iran] are made in light of data accumulated from highly classified intelligence files. Security concerns, however, preclude the president’s sharing this information with members of Congress. Congress has yet to organize itself in such a manner that it can be trusted with sensitive information. . . . In the House, for example, 17 of 22 committees deal with at least some aspects of foreign policy. In the Senate, 16 of 19 committees have some jurisdiction over foreign policy. To keep 535 persons informed who may feel free to disseminate what they

\(^{50}\) *Id.* at 320.


\(^{52}\) *Id.*
learn thereby is clearly impossible. Nor is there any way at present for the president to deal with a smaller representative group. Changes in the last decade that have eroded the leadership’s power and that have fractionalized and disaggregated the power of the body itself have worked to make it a collection of “loners.”

Recently, former Director of Central Intelligence Stansfield Turner observed:

To a greater extent than with executive branch oversight, the fear that information will leak may inhibit the agencies from taking risks. The danger of leaks is particularly high because the [congressional oversight] committees are larger than necessary; sensitive material cannot be restricted to only a few committee members. Moreover, secrecy goes against the grain of most politicians.

One of the most discouraging phenomena I witnessed during my years working with the Foreign Relations Committee was the disclosure to the press of information provided by the executive branch under injunction of secrecy. Indeed, on one occasion, in October 1975, the committee voted to “declassify” and make public the texts of classified agreements submitted to the committee by the Department of State. When Senator Robert Griffin—who had strongly opposed the decision— informs his colleagues the following day that the action violated both statutory law and Senate rules, the committee hastily called another meeting and voted to reclassify the documents it had already released to the press.

Fortunately, in at least one area—intelligence—there is some evidence that security measures have been improved. Congress has provided that the most sensitive operations are to be reported to only one committee of each house, and impressive security measures have been taken to reduce the likelihood of sensitive information being compromised by those committees, but some problems still remain.

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54. Turner & Thibault, Intelligence: The Right Rules, FOREIGN POL’Y 129 (Fall 1982) (emphasis added).
56. Until 1980, 10 congressional committees were informed about the most sensitive covert intelligence operations. Today, only the two intelligence committees are by law automatically given that information. See Craig, supra note 53, at 332 n.45. The situation has improved significantly under the new rules, but problems remain. For example, several reports in August 1981 suggesting that the CIA was seeking approval to assassinate Libya’s
been suggested many times over the years that Congress establish a joint committee on national security—comprised of key House and Senate leaders and representatives of each committee with major national security responsibilities—to represent the Congress in consultation with the executive branch on national security matters.\textsuperscript{57} This is certainly worth considering. Something needs to be done—the stakes are too high to permit the present arrangement to continue indefinitely.

One thing is clear. Nearly a decade of experience has demonstrated that the War Powers Resolution has not been a useful tool in facilitating improved executive-legislative cooperation in the formulation of national security policy. Not only are many of its provisions

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\textsuperscript{57} Muammar Qaddafi appeared to have originated with the House Permanent Select Committee on Intelligence. \textit{See}, \textit{e.g.}, \textsc{Newsweek}, August 3, 1981, at 19. Not only was this erroneous information harmful to United States foreign policy interests in general, more specifically it may have been instrumental in the reported decision by Libya to send "hit teams" to the United States to assassinate United States leaders. In \textsc{Newsweek}, Nov. 8, 1982, at 42-55, a cover story on alleged covert operations quoted congressional sources as having wondered pointedly whether the administration had used approval for plans to cut off the flow of Cuban arms to rebels in El Salvador as a cover for a more reckless plot to topple the Sandinistas. "This operation's just about out of control and people are getting panicky," said one source.

\textit{Id.} Part of the problem is that attitude of some journalists. A congressman or staff member who wouldn't think of directly disclosing classified information to an enemy spy might be more willing to provide a few details to a sympathetic United States journalist—particularly one who claims to already have much of the story, or one who might support the policy preferences of his source. The dilemma which results is well illustrated by a \textsc{Newsweek} article on covert action which acknowledged that a "nation with global responsibilities still needs covert action as a third tool of foreign policy—one more forceful than diplomacy and less hideous than war," \textit{id.}, at 55, but at the same time said: "Keeping secrets requires the acquiescence, if not the connivance, of the press . . . . Even today, the news media will generally suppress a story if publication would put lives at risk or expose a secret that is indisputably vital to the national interest. Beyond that, some reporters and editors say that they will withhold a story if the covert action in question strikes \textit{them} as necessary, prudent and moral." \textit{Id.} (emphasis in original). Thus the standard for destroying a sensitive national policy—which may in fact involve the lives or freedom of large numbers of people—is whether a single journalist concludes that it is "indisputably vital" to the national interest. Presumably this is based upon the assumption that all journalists will be aware of every possible ramification of the operation in question. But even this standard—which would give every knowledgeable journalist a veto over America's most sensitive national security activities—is insufficient for \textsc{Newsweek}. Individual journalists should not only have a \textit{right} to disclose sensitive national security secrets—they have a \textit{duty} to do so. Thus, the writers of the \textsc{Newsweek} article wrote: "The press has no business making such value judgments. Its role in an open society is to print the news, fully and fairly, not to calculate the incalculable consequences and shave the truth a bit here and there." \textit{Id.} By this reasoning, the writer's predecessors during the great wars were remiss in not publishing in advance the sailing schedules and routes of United States troop ships and convoys.

\textsuperscript{57}. For a brief summary of the various proposals for such a committee, see \textsc{Sullivan Study}, \textit{supra} note 10, at 273-75.
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clearly unconstitutional, but it is fraught with practical difficulties as well. The limited consultation and the pro forma reports it has produced have done nothing to improve the relationship between the two political branches in the important business of defending the United States and promoting international peace and stability.58

Barbara Craig noted that "there are no signs . . . that the resolution has been instrumental in bringing about a more cooperative partnership between the executive and Congress in regard to decisions about the use of armed forces." She added:

The president has much to gain by developing a workable procedure for comity with Congress with regard to foreign policy. By involving that body, his own position could be strengthened. His ability to act decisively in the world community would be greatly enhanced if it were known to be based on the consent of Congress. And there's the rub. The War Powers Resolution pits Congress and the president against each other.59

Not only does the Resolution pit the political branches against each other, but it does so resoundingly and before the entire world—with predictably damaging consequences. The proliferation of nuclear arms and other weapons of devastating destructiveness of necessity makes deterring a primary national security objective, and winning only a clear second choice. In reality, in modern warfare there may be no winners. Deterrence is a function of perceptions of capabilities and, equally if not more important, perceptions of the national will to employ those capabilities effectively.

The United States has made an inestimable contribution to international peace and security during the post-World War II era by convincing potential aggressors that the costs of aggression will greatly outweigh any perceived benefits. In part, this has been made possible by the creation of regional security and collective defense arrangements, perhaps the foremost of which is the North Atlantic Treaty Organization (NATO). Peace has also been furthered by occasional calculated saber-rattling by United States Presidents—from the Truman Doctrine in the Mediterranean, Eisenhower in the Middle East and Formosa, and Kennedy in Berlin and Cuba to Reagan in Central America. When appropriate, particularly serious threats have been

58. For example, Senator Javits characterized the Ford Administration's reports as being "brief to the point of being . . . almost worthless from an informational point of view." HOLT, supra note 6, at 21.
59. Craig, supra note 53, at 324 (emphasis added).
met by both the President and the Congress through the enactment of joint resolutions—putting friend and foe alike on notice that the United States was united and fully committed to taking all necessary steps to help its friends resist aggression.

Over many years, and through many crises, this approach proved extremely effective in helping to keep the peace. But its success was predicated upon the existence of two critical perceptions in the minds of potential aggressors—that the United States was strong, and that it would use all of its strength, if necessary, to prevent the success of aggression. Tragically, during the past fifteen years decisions made largely in the Congress have inadvertently led our adversaries to question both of these perceptions. Of course, Congress has not done this single-handedly. Numerous mistakes were also made in the executive branch. At the time of the 1962 Cuban missile crisis, the United States had an approximate twenty to one superiority over the Soviet Union in deliverable nuclear weapons.60 By 1965, Secretary of Defense McNamara concluded that the Soviets had given up on ever achieving nuclear parity with the United States,61 and on this premise requests to Congress to fund strategic programs during the late 1960s were quite modest. Most defense expenditures during the period were keyed to the growing conflict in Vietnam, and the strategic focus was on arms control agreements. The United States intelligence community was also not without blame, as it substantially underestimated the Soviet effort to close and even reverse the so-called missile gap. As a result, between late 1966 and the opening of the SALT I negotiations in November 1969, the total number of United States nuclear delivery vehicles decreased by forty-five, while those of the Soviet Union nearly doubled.62 At the same time, substantially adverse trends were also developing in the balance of conventional weapons.63

However, the greatest harm, in this writer's view, was done by the Congress. When it became politically expedient to be a Vietnam "dove" (a transformation which not infrequently took on a strangely retroactive character, so that legislators who had voted for the Gulf of Tonkin Resolution and time and again to finance the war would suddenly proclaim with straight faces that they had opposed the war from

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62. Turner on SALT II, supra note 60, at 751 n.31.
the beginning), cutting the defense budget became something of a sport, and members of Congress virtually stood in line to get an opportunity to challenge commitments to other states as well. The Senate, for example, rather gratuitously passed the National Commitments Resolution, putting the world on notice that the United States had no national commitment to any country with which it did not have a formally ratified treaty or other congressionally approved defense relationship. In a similar vein, shortly thereafter the Congress announced to the world in section 8(a)(2) of the War Powers Resolution that in the event of an enemy attack on our closest NATO allies the President would not have legal authority to commit United States forces unless Congress decided to vote him that authority.

The Senate, in other words, essentially went full circle. It assured the world's potential aggressors that the United States had no obligation to assist any country with which it did not have a congressionally approved defense agreement, and it then joined the House in saying that for the President to have the power to execute our solemn treaty commitments he would need to seek the same type of formal congressional approval that would be required to assist a state with which the United States had no relations at all. This gave a new meaning to the concept of a commitment.

65. Legal scholars may disagree about whether the NATO and similar treaties are self-executing or require affirmative legislation from Congress before the President can commit United States forces to assist a treaty partner in resisting aggression. Article five of the NATO treaty provides in part:

Between the Parties agreement that an armed attack against one or more of them . . . shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them . . . will assist the Party or Parties so attacked by taking such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.


Since under article VI of the Constitution, a treaty is equivalent to a statute as the "supreme law of the land," a case can be made that the President can legally respond to an armed attack on the United States, and thus can exercise his Commander-in-Chief powers without first seeking congressional approval. On the other hand, article 11 of the NATO treaty says in part: "This treaty shall be ratified and its provisions carried out by the Parties in accordance with their respective constitutional processes." North Atlantic Treaty, 63 Stat. 2241, T.I.A.S. No. 1964, 4 Bevans 828, 34 U.N.T.S. 243. It could thus be argued that the President cannot act under the treaty until Congress has affirmatively declared war or provided equivalent authorization. The War Powers Resolution supports this interpretation. It is also supported by the writings of President Jefferson, who argued that while the President and the Senate could change a state of war into a state of peace, "the Constitution expressly requires the concurrence of the three branches to commit us to the state of war." XIV The Writings of Thomas Jefferson 445 (A. Lipscomb & A. Bergh ed. 1905). Jefferson's
Senate passage of the National Commitments Resolution reminded some observers of a January 1950 speech by Secretary of State Dean Acheson outlining a United States defense perimeter that excluded South Korea.\textsuperscript{66} Pyongyang was apparently listening, because within a few months more than 60,000 North Korean soldiers invaded South Korea. At that point Acheson apparently decided that he had been mistaken and that South Korea was worth defending. Nearly 34,000 United States soldiers lost their lives in rectifying that mistake.\textsuperscript{67}

During the height of its anti-Vietnam irresponsibility, the Congress ignored this lesson. Not satisfied with having assured our adversaries that genuine United States defense commitments were few—and that those which existed were, legally speaking, essentially meaningless—the Congress began enacting other legislation limiting the President's flexibility in dealing with national security problems. According to Senator Tower, during the 1970's "over 150 separate prohibitions and restrictions were enacted on Executive Branch authority to formulate and implement foreign policy."\textsuperscript{68} Several of these laws virtually guaranteed our enemies that the United States would not effectively help to resist aggression in specific trouble spots like South Vietnam, Laos, Cambodia, and Angola. It may have been coincidental, but it is worth noting that upon enactment of those laws external communist forces substantially escalated their activities, and each of those states is today under Marxist rule.

Today, the War Powers Resolution continues to pit the Congress against the President. In El Salvador, where President Reagan is valiantly trying to dissuade Moscow and Havana from underwriting the overthrow of a popularly elected government, the prospects for meaningful peace are being jeopardized by the War Powers Resolution. Vir-

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\item \textsuperscript{66} Acheson, \textit{Crisis in Asia—An Extension of U.S. Foreign Policy}, 23 DEP'T ST. BULL. 111, 116 (1950).
\item \textsuperscript{67} See 123 CONG. REC. S9954 (daily ed. June 16, 1977) (statement of Sen. Griffin). There were, of course many other considerations that led to the North Korean decision to invade, but Acheson's remarks greatly reduced one of the most important disincentives to the invasion.
\item \textsuperscript{68} Tower, \textit{supra} note 16, at 234.
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tually every time the President speaks or acts firmly to deter the communists, his congressional critics cite the War Powers Resolution and tell the world—occasionally in language reminiscent of the old Ludlow Amendment—"He can't do that!"

Needless to say, this continuing display of divisiveness reduces the effectiveness of the President's efforts to deter Soviet and Cuban aggression. If the President's efforts at deterrence fail, America's long-term options would appear to be (1) watching feebly from the sidelines as Moscow and its well-armed clients subvert our neighbors to the south one by one or (2) eventually committing United States combat troops to a costly re-establishment of that national credibility which is the sine qua non for effective deterrence. If these are in fact our options, supporting the president at this time in an effort to deter aggression appears increasingly attractive.

Since its passage over a presidential veto in 1973, a number of members of Congress have expressed serious concerns about the constitutionality or practicality of the War Powers Resolution. Even Senator Frank Church, as Chairman of the Senate Foreign Relations Committee, expressed doubt about the ability of Congress to restrain the Commander-in-Chief by statute and concluded: "I wonder really whether we have done very much in furthering our purpose through the War Powers Resolution."70

If Congress does not take the lead and repeal the resolution, the Reagan Administration would be wise to reassess its own public posture toward the statute. While the President's apparent effort to avoid a confrontation over the constitutionality of the Resolution is in many respects commendable, it may not be wise in the long run. The prominent constitutional scholar Charles Warren has written:

Under our Constitution, each branch of the Government is designed to be a coordinate representative of the will of the people. . . . Defense by the Executive of his constitutional powers becomes in very truth, therefore, defense of popular rights—defense of power which the people granted him.

It was in this sense that President Cleveland spoke of his duty to the people not to relinquish any of the powers of his great office. It was in that sense that President Buchanan stated the people have rights and prerogatives in the execution of his office by the President which every President is

69. See SULLIVAN STUDY, supra note 10, at 272.
70. HOLT, supra note 6, at 39.
under a duty to see "shall never be violated in his person" but "passed to his successors unimpaired by the adoption of a dangerous precedent." In maintaining his rights against a trespassing Congress, the President defends not himself, but popular government; he represents not himself, but the people.\textsuperscript{71}

If a future President concludes that it is necessary to ignore some of the Resolution's unconstitutional provisions, congressional critics can be expected to rely heavily upon any tradition of acquiescence by prior Commanders-in-Chief. The proper constitutional balance will therefore fare better if there is a well-established public record of presidential failure to recognize the validity of certain provisions of the statute.

The constitutional and practical difficulties posed by the Resolution also give Congress a strong incentive for readdressing this issue. The large majority of those who voted in 1973 to override the President's veto of the War Powers Resolution are no longer in the Congress.\textsuperscript{72} Now that its failure has been demonstrated and the acrimony resulting from Vietnam has receded, Congress could take a valuable first step in the direction of improved legislative-executive cooperation in this vital area—and in the process reaffirm its commitment to constitutional government—by repealing the War Powers Resolution.

\begin{footnotes}
\item[72] Sullivan Study, supra note 10, at 265.
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