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# Too Far Apart: Repeal The War Powers Resolution

MICHAEL J. GLENNON\*

*[W]ith your opening remarks about war powers, we may not be that far apart.*

—Ambassador Madeleine Albright to Senator Jesse Helms<sup>1</sup>

Thirty-five years ago, one of the constitutional scholars who participated in the drafting of the War Powers Resolution,<sup>2</sup> Alexander Bickel, wrote: “[T]he Court should declare as law only such principles as will—in time, but in a rather immediate foreseeable future—gain general assent.”<sup>3</sup> The same, I should think, ought apply equally to Congress: Congress should declare as law rules that will be followed. Enacted in 1973 to help ensure a true partnership between Congress and the Executive in the decision to use armed force, the War Powers Resolution has not succeeded at that task, and in failing to gain general assent the Resolution has become a monument to the ignorability of a law disliked. It can be made to work as it was intended to work; I have suggested elsewhere how it might be fixed.<sup>4</sup> But in the political climate prevailing today, twenty years after the fall of Saigon, it will not be

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\* Copyright © 1995 Michael J. Glennon. Professor of Law, University of California, Davis, Law School. I am grateful to John A. Leman for research assistance.

1. Senate Foreign Relations Committee Hearing on the Contract with America Defense Policy Provisions, Federal News Service, March 21, 1995, available in LEXIS, News Library, Curnws File. The two continued:

Sen. Helms: Now you are going on record right now as favoring the repeal for War Powers Act, is that correct?

Amb. Albright: Well we have always—in every administration there have been issues between the executive and legislative branch on war powers. We want to work with you and Congress on this particular issue. I think on the specifics of this you need to talk to the lawyers in the administration. My own sense is that we feel, as other administrations have, about war powers.

Sen. Helms: So that says that for your part that you would favor a repeal of the War Powers Act?

Amb. Albright: Yes.

Sen. Helms: Speaking for yourself?

Amb. Albright: Yes, speaking for myself.

*Id.* She continued, offering clarification: “What I’d like to say, in terms of the administration, is that I specifically am not calling for its repeal. I think that what we need is flexibility within it.”

*Id.*

2. 50 U.S.C. §§ 1541-48 (1973).

3. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 239 (2d ed., Yale University Press 1986).

4. MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 111-18 (1990).

fixed, and there is no indication that the climate is about to change any time soon. Therefore, except for a fairly minor provision, the War Powers Resolution should be repealed.

## I.

The War Powers Resolution has failed largely because its framers presupposed a political context radically different from that in which the Resolution has operated. The Resolution emerged from an aberrational political climate in 1973, and that climate was wrongly assumed to represent a sea-change in congressional-executive relations that would exist for years to come. Among the many strange ideas people had in the "Sixties" was the idea that the era would go on forever. Many of the new political activists of those years had never really seen political change before, and there seemed no reason to believe that it would not be permanent. The Sixties did go on, through Nixon's 1974 resignation, and perhaps through the 1975 Church Committee hearings on intelligence abuses. But, as the 1970s wound down, the Sixties petered out, and when they came to an end, so too did the public outrage that led to laws like the War Powers Resolution. When the political climate that spawned such laws dissipated, so too did the will to enforce them.

Those were heady times for supporters of a congressional reclamation of power. I recall walking back to the Dirksen building from the Senate Chamber on the warm November night in 1973 when the Senate overrode President Nixon's veto of the War Powers Resolution. The Senator with whom I walked—a liberal Democrat who was one of the Resolution's sponsors—said over and over, "Boy, we sure stuck it to Nixon."<sup>5</sup> The "Saturday Night Massacre" (in which Nixon fired Watergate special prosecutor Archibald Cox) occurred only three weeks earlier, and a whiff of "payback time" was in the air. Arthur Schlesinger's *The Imperial Presidency*, published that year, was seen by many in Congress as identifying the core of the nation's problems. The Senate's Ervin Committee delved into Watergate during the summer of 1973 and, against the backdrop of an increasingly unpopular President, Congress proceeded to put an end to American involvement in the Vietnam war, to reassert its power over the purse in the Congressional Budget and

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5. In a sense, Congress did indeed "stick it to Nixon," but Congress did little to change the way America makes war. As Professor Ely notes, after realizing Congress had dodged its constitutional duties since 1950, it "decided it could not count on itself to decide [issues involving the use of force] unless forced to, and enacted, over President Nixon's veto, the War Powers Resolution of 1973." JOHN H. ELY, *WAR AND RESPONSIBILITY* 48 (1993). But, as the history of the War Powers Resolution amply demonstrates, Congress seriously underestimated its own ability to avoid making tough decisions.

Impoundment Control Act,<sup>6</sup> and, for the first time in history, to force a President from office. The times, it seemed, had changed. And many thought the times would remain changed.

But, of course, they did not. Less than two years after the enactment of the War Powers Resolution, President Ford directed military operations incident to the evacuation of South Vietnam that ran counter to seven different statutory funding prohibitions enacted during prior years to end American involvement in the war.<sup>7</sup> Members of Congress who had sponsored and voted for the Resolution, when faced with public support for the President's actions, said nothing.<sup>8</sup> And though no President has ever clearly violated the sixty-day time limit, such is the pattern that has persisted to this day. When confronting a popular military initiative, members of Congress are loathe to criticize procedure for fear of being seen as criticizing substance, and—remembering Vietnam—few are willing to run the risk of being caught on the wrong side of a debate on use of force.<sup>9</sup> The late Senator Frank Church, a sponsor of the Resolution, said it well: “[I]f the President, as Commander-in-Chief, uses the Armed Forces in an action that is both swift and successful, then there is little reason to expect the Congress to do anything but applaud.”<sup>10</sup>

Since the high-water mark of congressional activism during which the Resolution was adopted, members of Congress have increasingly come to eschew controversial votes. Kent Weaver of the Brookings Institution has characterized this as “credit claiming” and “blame avoiding” behavior,<sup>11</sup> and it has come to pervade vast stretches of legislative

6. Pub. L. No. 93-344, 88 Stat. 297.

7. President Ford, however, did not violate the War Powers Resolution; he filed a report, and concluded the operation within 60 days. Ford cited § 4(a)(2) of the War Powers Resolution when he reported the operation to evacuate Danang and the operation to evacuate Cambodia. Thomas M. Franck, *Rethinking War Powers: By Law or By "Thaumaturgic Invocation"?*, 83 AM. J. INT'L L. 766, 769 n.13 (1989). Ford “[took] note” of § 4(a)(1) when he reported the *Mayaguez* rescue. *Id.*

8. As Professor Ely concludes from his survey of Congress' role in the Vietnam War, “Congress is reluctant, by whatever means, to refuse to fight a war the president has indicated he wants, particularly (though I think this factor may also tend to be overrated) one he has already begun.” ELY, *supra* note 5, at 29.

9. Professor Ely characterizes the post-World War II consensus this way:

During that period a tacit deal has existed between the executive and legislative branches, not just with respect to foreign policy but more generally, to the effect that the president will take the responsibility (well, most of it) so long as he can make the decisions, and Congress will forego actual policy-making authority so long as it doesn't have to be held accountable (and can scold the president when things go wrong).

ELY, *supra* note 5, at 54.

10. *A Review of the Operation and Effectiveness of the War Powers Resolution: Hearings Before the Committee on Foreign Relations, 95th Cong., 1st Sess.* 172 (1977).

11. R. KENT WEAVER, *AUTOMATIC GOVERNMENT: THE POLITICS OF INDEXATION* 18-19 (1988).

terrain beyond the war power: base-closing, interest rate regulation, and budget cuts have all been assigned to entities removed from the political process.<sup>12</sup> The problem in recent years has been less and less an imperial presidency and more and more a monarchical legislature—a Congress whose members seek the trappings of office but flee from their traditional decision-making responsibilities.<sup>13</sup> It is said to many new members of Congress that no one will ever regret a speech that one never gives; the same can be said for a vote that one never casts. The upshot, increasingly, is legislative autopilot, a process through which credit can be claimed but blame avoided. As Senator Robert Byrd has candidly said, “It is not just that the President is often reluctant to consult, but it is always the case that if we are honest with ourselves, we here sometimes do not want early responsibility.”<sup>14</sup>

As generals supposedly always refight the last war, so too does Congress. Its members myopically assumed in 1973 that future war powers disputes would involve Vietnam-like scenarios, where massive American troop buildups occurred over a graduated period following an identifiable blowup or flash point of the sort that supposedly occurred in the Gulf of Tonkin. Accordingly, the Resolution requires the President to report within forty-eight hours and to withdraw the forces from those hostilities within sixty days.<sup>15</sup> But specific, identifiable flash points often don’t occur, and when they do, the resulting hostilities normally don’t last for sixty days. Thus, on a macro level, the War Powers Resolution presupposes a conflict model that is only one of many possibilities that have been multiplied in number by modern military technology. On a micro level, this erroneous assumption has been magnified by ambigui-

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12. I do not disparage the effectiveness of their work: the Federal Reserve Board and Base Closing Commission probably have been among the most successful of Congress’s creatures in recent years. The point is simply that *they* do the work and take the heat—not Congress. *See id.* Professor Ely points out that the War Powers Resolution, while similar to laws such as the Graham-Rudman-Hollings Budget Control Act because it is “designed to force a decision regarding matters that Congress has in the past shown itself unwilling to face up to,” is different because the War Powers Resolution “does not push the tough decisions onto somebody else (such as the Comptroller General).” ELY, *supra* note 5, at 48. Of course, in practice, Congress has in fact shifted the responsibility for tough decisions to someone else—the President.

13. Indeed, as Prof. Ely points out in *War and Responsibility*:

Throughout the Indochina war—as in connection with various lesser conflict since—a majority in Congress showed itself unwilling to end the fighting, in fact quite willing (until the very end) to continue to fuel it, but at the same time quite resourceful in scattering the landscape with rationalizations whereby it could continue to claim that it wasn’t really *its* war.

ELY, *supra* note 5, at 12.

14. *Role of U.S. Armed Forces in the Post-Cold War World: Hearing Before the Comm. on Foreign Relations, United States Senate, 103rd Cong., 2d Sess. 10 (1994)* (statement of Sen. Byrd).

15. 50 U.S.C. §§ 1543(a), 1544(b) (1988).

ities in the reporting requirement. These ambiguities have made it possible for Presidents to claim compliance with the Resolution while leaving unanswered the question whether the sixty-day time period has actually been triggered.

Finally, the most controversial provision of the Resolution, the sixty-day time limit, has become harder to justify as the mission of the American military evolved over the last quarter century. In 1973, American forces were used less frequently as actual policemen. Recently, not only in Haiti but also in Somalia and to a lesser extent in Bosnia, members of the armed forces have been called upon to carry out missions directed at establishing or preserving domestic civil order. In such situations the Resolution gives would-be adversaries an incentive to engage American troops in firefights, with the hope that ensuing hostilities will trigger the Resolution's reporting requirement and necessitate the withdrawal of the forces within sixty days.<sup>16</sup> If the provision is to be retained, it should be harmonized with other legislation—not yet in effect—governing U.S. participation in United Nations peace enforcement operations. Such legislation should authorize U.S. participation in a standing or stand-by force, set strict limits that ensure the respect of constitutional requirements concerning the command structure, and ensure that the United States pays only its fair share.<sup>17</sup>

## II.

In part as a consequence of these shortcomings in the Resolution, representatives of the Executive Branch have continued to make extravagant claims of constitutional power. Following the Iraqi invasion of Kuwait, President Bush claimed power to prosecute hostilities against Iraq without congressional approval, premised upon the contention that it was within the President's sole power to determine what constitutes a war.<sup>18</sup> If this claim were correct, a federal district court declared, "the

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16. See Alice Love, *Speech by Clinton Adviser Spurs New Talks on Reform Plans for War Powers Resolution*, ROLL CALL, Oct. 27, 1994, where National Security Adviser Anthony Lake made this same point in a 1994 speech at Harvard University.

17. See Michael J. Glennon, *The Gulf War and the Constitution*, FOREIGN AFFAIRS, Spring 1991, at 97-101; Michael J. Glennon & Allison R. Hayward, *Collective Security and the Constitution: Can the Commander in Chief Power Be Delegated to the United Nations?*, 82 GEO. L.J. 1573, 1602 (1994).

18. At his Jan. 9, 1991 press conference, when asked whether he would go to war with Iraq if Congress failed to provide authorization, President Bush said, "I don't think I need it." He continued: "Secretary Cheney expressed it very well the other day. There are a lot of differences of opinion on either side. But Saddam Hussein should be under no illusions. I believe I have the constitutional authority—many attorneys having so advised me." *Excerpts: The Great Debate on War Powers*, NAT'L L.J., Jan. 21, 1991, at 26. Justice Department lawyers in the *Dellums v. Bush* case argued that the President had the sole power to determine when military activity constitutes

congressional power to declare war [would] be at the mercy of a semantic decision by the Executive. Such an 'interpretation' would evade the plain language of the Constitution, and it cannot stand."<sup>19</sup>

Nonetheless, the Clinton administration repeated essentially the same claim prior to the invasion of Haiti. Clinton objected to congressional proposals to curb presidential power to use armed force in Haiti and Somalia, saying "I would strenuously oppose such attempts to encroach on the President's foreign policy powers."<sup>20</sup> Congressional approval to invade Haiti was not required, he claimed. "Like my predecessors of both parties," he said, "I have not agreed that I was constitutionally mandated to get [approval]."<sup>21</sup> Assistant Attorney General Walter Dellinger, a respected legal scholar, contended that the invasion would not be a "war" and that congressional approval was therefore not required.<sup>22</sup> The invasion was also justified under the law, Dellinger argued, because it "accorded with the sense of Congress" and "satisfied the requirements of the War Powers Resolution."<sup>23</sup> Each of these contentions will be examined in turn.

#### A.

Addressing the second argument first—the contention that Congress effectively approved the Haiti invasion—it is constitutionally irrelevant whether the action "accorded with the sense of Congress," that is, whether Congress expressed an opinion not inconsistent with the invasion. The real issue, as Dellinger himself recognized, is whether Congress authorized the invasion, prohibited the invasion, or remained

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"war" for constitutional purposes. *Dellums v. Bush*, 752 F. Supp. 1141, 1145 (1990). The district court rejected this argument. *Id.*

Professor Ely notes that "the debates preceding the votes in both houses, though truncated by the eleventh-hour nature of the President's request, were among the most responsible within memory." ELY, *supra* note 5, at 50. Given the way in which decisions to use military force have been made "within memory" this could be read as faint praise. Professor Ely recognizes this when he subsequently states that "it would be a clear mistake to conclude from the Desert Storm authorization that from here on we can count on the president and Congress to do their constitutional duties." *Id.*

Professor Ely provides a brief summary of some of the practical and constitutional problems with the Gulf War. *See id.* at 50-52. For an extended discussion of these issues, see Glennon, *supra* note 17.

19. *Dellums v. Bush*, 752 F. Supp. 1141, 1145 (D.D.C. 1990).

20. Interview With Radio Reporters, 29 WEEKLY COMP. PRES. DOC. 2097 (Nov. 11, 1993).

21. The President's News Conference, 30 WEEKLY COMP. PRES. DOC. 1616 (Aug. 3, 1994).

22. Letter from Assistant Attorney General Walter Dellinger to Sen. Robert Dole et al. (Sept. 27, 1994), in 140 CONG. REC. 140, at S14314 (1994) [hereinafter Dellinger Letter]. Professor Dellinger signed a letter opposing President Bush's assertion of executive power prior to the war against Iraq. Letter from Walter Dellinger et al. to Sen. Edward M. Kennedy (Jan. 2, 1991), in 137 CONG. REC. 6, at S128 (1991).

23. Dellinger Letter, 140 CONG. REC. 6, at § 14314.

silent.<sup>24</sup> Dellinger in fact argued in the alternative that Congress had either authorized the invasion or remained silent.<sup>25</sup>

Clearly Congress did not authorize the invasion. To summarize, Dellinger's argument to the contrary is based, first, upon a nonbinding prohibition limited only to one source of funds, the FY 1994 DoD Appropriations Act,<sup>26</sup> from which he infers congressional assent. Next, Dellinger argues that congressional authorization follows from the absence of a prohibition in the War Powers Resolution, even though the Resolution itself says that such an absence implies nothing.<sup>27</sup> Finally, he utterly ignores a statutory provision (also in the War Powers Resolution) precluding such an inference from *any* law—precisely the sort of authorization he infers from the Resolution.<sup>28</sup>

The FY 1994 DoD Appropriations Act contained a “sense of the Congress” statement effectively saying that Congress believes funds made available under that law—not under *other* laws, but only *that* law—ought not be spent for military operations in Haiti unless the President made certain findings and reported them to Congress.<sup>29</sup> The President so found and so reported.<sup>30</sup> Accordingly, it was (supposedly) no longer the opinion of Congress that this particular pot of funds was off-limits for funding an invasion of Haiti. This “not off-limits” opinion is very different from a congressional opinion that the President *should* invade Haiti, or from a congressional opinion that the President need not get prior congressional approval if he wished to invade Haiti, or from a congressional opinion that money made available under other statutes should be seen as affirmatively authorized for an invasion of Haiti.<sup>31</sup>

24. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

25. Dellinger Letter, 140 CONG. REC. at § 14,314; *see also* Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107 (1995).

26. *See id.*

27. War Powers Resolution § 8(a)(1), 50 U.S.C. § 1547(a) (1988). Dellinger does not even make the argument (at least, not in writing) that Professor Ely raises and promptly rejects in *War and Responsibility*, namely that an earlier statute cannot trump a later statute. ELY, *supra* note 5, at 129. The argument in favor of disregarding § 8(a) is that a past Congress can't keep a future Congress from enacting an appropriations bill that will finance an unauthorized military action without complying with the War Powers Resolution. *Id.* Professor Ely rightly identifies this section as a “rule of construction” which a subsequent Congress can repeal at any time, but, in the absence of such a repeal, it should be honored. *Id.*

28. War Powers Resolution § 8(d), 50 U.S.C. § 1547(d) (1988).

29. Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8147(b), 107 Stat. 1474 (1993).

30. *See* Letter to Congressional Leaders in Haiti (Sept. 18, 1994), 30 WEEKLY COMP. PRES. DOC. 1801 (1994).

31. And it is very different from the inferences made from the act of appropriating funds to conduct the war in Vietnam. Professor Ely points out that in 1965, Congress explicitly authorized seven hundred million dollars for “military activities in southeast Asia.” ELY, *supra* note 5, at 27.



The operative equivalent of a nonapplicable, nonbinding prohibition, in short, is *not* authorization. It is *silence*.

Similarly, Dellinger contends that the War Powers Resolution itself "recognizes and presupposes" presidential power to introduce the armed forces into hostilities in a situation such as that which developed in Haiti.<sup>32</sup> The reason, he suggests, is that the Resolution sets a sixty-day time limit on the use of armed forces in hostilities, and it would not do so unless the Resolution, at least implicitly, permitted such a use.<sup>33</sup> But a different interpretation is more logical. If Congress wished to take *no position* on the underlying constitutionality of any such use, would the Resolution not read precisely the way it does? Is it not possible that the sponsors of the Resolution might have thought that they had the votes, in 1973, merely to *limit* certain activities without *prohibiting* them? Dellinger assumes, dubiously, that the act of limitation constitutes an implicit authorization of the conduct in question. In reality the Resolution in and of itself implies no judgment whatsoever with respect to the permissibility of the underlying conduct at its inception.

In fact, of course, the sixty-day limitation does *not* exist "in and of itself." The limitation exists in a statute that expressly provides that nothing in it may be construed as granting any authority to the President to use armed force that the President would not have had in its absence.<sup>34</sup> In other words, Congress directs all interpreters of the Resolution to *assume its non-existence* for purposes of answering the question for which Dellinger *relies upon its existence*. Faced with explicit instructions by Congress as to how the statute is to be interpreted, Dellinger disregards those instructions and proceeds through guess-work to devise his own canon of construction, tailored to the outcome he desires.

Lest there be the slightest doubt concerning the availability of the Resolution, or any other statute, to be pressed into service as an authorization for the use of force, the Resolution sets forth two specific conditions that must obtain before such reliance is permissible. First, any such law must *specifically authorize* the introduction of the armed forces

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That same year, an additional \$1.7 billion was appropriated. *Id.* The following year Congress appropriated \$4.8 billion. *Id.* at 28. No such affirmative appropriations of funds existed for the U.S. invasion of Haiti.

32. Dellinger Letter, 140 CONG. REC. at S14314. As far as I am aware, this is the first time that any administration, Democratic or Republican, has sought to bolster its claim for the use of force by relying upon the Resolution.

33. *Id.*

34. State Department Legal Adviser Abraham Sofaer claimed this provision was invalid. Professor Dellinger made no such claim in his opinion but did so orally at the symposium that spawned these articles. For a discussion (and rejection) of the argument, see GLENNON, *supra* note 4, at 100-02.

into hostilities or likely hostilities.<sup>35</sup> Second, such a law must expressly refer to the War Powers Resolution.<sup>36</sup> Neither the FY 1994 DoD Appropriations Act nor the Resolution contains anything approaching such wording.

Accordingly, it is unconvincing to contend that the President was authorized by Congress to invade Haiti. At best, Congress was silent. At *worst*, the posture of Congress was opposition, as evinced by the statement of congressional opinion in the War Powers Resolution that the President's commander-in-chief powers "are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."<sup>37</sup> Clearly, none of these circumstances existed with respect to the invasion of Haiti, and the provision is directly applicable to that invasion. Dellinger, so eager elsewhere in his memorandum to give effect to a nonbinding congressional opinion that is nonapplicable, here dismisses this sense-of-the-Congress statement because it is either nonbinding or "incomplete,"<sup>38</sup> i.e., because Congress was wrong in its view that the President lacks sole power to stage a military operation such as the invasion of Haiti. The President may have such power, but if he does, it cannot come from either of the statutes that Dellinger cites. It must come from the Constitution.

## B.

The Constitution authorized the invasion of Haiti, Dellinger argues, because the invasion was to take place with the consent of the "legitimate government, and did not involve the risk of major or prolonged hostilities or serious casualties to either the United States or Haiti."<sup>39</sup> This is the first instance in modern times, to my knowledge, that any Executive has provided a meaningful standard by which the scope of sole presidential authority under the commander-in-chief clause might be assessed. Most administrations have paid so little regard to the rule of law that they have not deigned to let us in on the war powers "law" under which they have purported to operate. Unfortunately, the test proffered by this administration does not represent a reasonable interpretation of the Constitution's grant of power to the President.

Dellinger's constitutional argument is partly valid, partly invalid,

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35. War Powers Resolution § 8(a), 50 U.S.C. 1547(a) (1988).

36. *Id.*

37. War Powers Resolution § 2(c), 50 U.S.C. 1541(c) (1988).

38. Dellinger Letter, 140 Cong. Rec. S14314 (daily ed. Oct. 6, 1994).

39. *Id.*

and partly irrelevant. It is valid to suggest that among the factors that affect the constitutionality of a given use of force by the President are the likely nature, scope, and duration of the putative hostilities. I hardly have standing to suggest otherwise, having argued recently in *Foreign Affairs* that the President is not precluded, constitutionally, from "minor uses of force not directed at significant adversaries, or risking substantial casualties or large-scale hostilities over a prolonged duration."<sup>40</sup> The case for constitutionality is indeed strengthened, therefore, if few members of the U.S. armed forces are involved and if little loss of life is likely. The case for constitutionality is strengthened if the operation is defensive in nature, or is directed at rescue of endangered U.S. citizens or military personnel located abroad. The case for constitutionality is strengthened if the use of force is for a short, rather than a long, period of time.

But these are not the only pertinent criteria for assessing constitutionality. Indeed, a use of force can meet those criteria and still be beyond the scope of the President's power without congressional authorization. For example, in its declining years, the Soviet Union seized an American journalist, headquartered in Moscow, and accused him of espionage. Suppose it were possible, with a quick, Entebbe-like military operation, for American special forces to have freed the incarcerated journalist with little or no likely loss of life. Most observers probably would think—correctly, I believe—that the President would have been precluded, constitutionally, from initiating use of force against the Soviet Union. The reason is that the Constitution can be fairly read as imposing a requirement of *proportionality* upon the use of force even though that use is authorized *ab initio*.

Similarly, most observers read into the Constitution an "emergency" requirement, i.e., a requirement that the President seek prior congressional consent unless confronted with circumstances so exigent that no time exists to seek such approval. Of course, this condition, like the others discussed above, is necessary but not sufficient: the mere presence of an emergency, in and of itself, will not support the use of force by the President alone. Among other things, the nature and magnitude of the threat to American interests must be taken into account. It would be one thing to use force without congressional approval upon warning that Pearl Harbor was about to be attacked, but it would be quite another to use it upon warning that Russia was about to attack Chechnya.

This emergency requirement—recognized by Congress in its reference to a "national emergency" in the War Powers Resolution<sup>41</sup>—is

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40. Glennon, *supra* note 17, at 90.

41. War Powers Resolution § 2(c), 50 U.S.C. § 1541(c) (1988).

ignored altogether by Dellinger; and it is, most would agree, the requirement central to the invasion of Haiti. The possibility of an invasion was discussed for *months* before it was actually launched.<sup>42</sup> Nothing occurred within the days or hours preceding “launch” that justified immediate action. Congressional approval could easily have been sought by the Clinton Administration. Why it was not sought is speculative. Probably, Congress would have refused; possibly, the President viewed this as a useful opportunity to show that he does not always take the popular course, or that he is “tough enough” to use armed force, or that he is receptive to the views of an often-ignored congressional caucus. These are precisely the kinds of reasons, of course, that the Constitution places the decision to go to war in the hands of Congress: it is intolerable for a Chief Executive to place American military personnel at risk to shore up waning political popularity, and if Congress approves, executive motives are less suspect.<sup>43</sup>

Finally, it is a matter of the utmost inconsequence, constitutionally, that the invasion was approved by the “legitimate” government of Haiti. The breadth of the President’s constitutional authority is not a function of the preferences of Jean Jacques Aristide. As a matter of *international* law, not constitutional law, the use of force against the territorial integrity or political independence of a state is flatly impermissible. *When* such use becomes permissible—as, for example, when a request is made to use third-party force to forestall a military coup (as was done in the Philippines)—the request for intervention must be made by the sitting government, assuming that it is actually in control of its territory and population, and not by some entity that can be recognized or der-recognized by a would-be intervenor wholly at its whim. In the face of congressional silence, the illegality of a military initiative under international law implies illegality under U.S. domestic law as well, for international law, as the Supreme Court has said, “is part of our law.”<sup>44</sup>

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42. As early as October 1993, almost a full year before the actual invasion took place, government officials acknowledged that the use of American armed forces was being considered. Carla A. Robbins, *U.S. Officials Say Restoring Democracy In Haiti May Require Military Invasion*, WALL ST. J., Oct. 18, 1993, at A18. Indeed, the often asserted need for surprise in military actions was of no concern in the invasion of Haiti; the Clinton administration intentionally “telegraph[ed] its punch” to try to force the military junta out. Michael R. Gordon, *U.S. Hopes Talk of War Forces Out Haiti Army*, N.Y. TIMES, Sept. 10, 1994, at Sect. 1, p. 4.

43. In a “confidential” memorandum to UN Secretary General Boutros Boutros-Ghali, the UN special representative to Haiti reported that Clinton’s aides saw political advantage in an invasion that would demonstrate “the President’s decision making capability and the firmness of leadership in international political matters.” The document was entered in the *Congressional Record*. 140 CONG. REC. H6433 (daily ed. July 28, 1994) (Memorandum from U.N. Special Envoy Dante Caputo).

44. *The Paquette Habana*, 175 U.S. 677, 700 (1900).

## III.

Congressional critics of the Haiti operation, serious in the belief that it was beyond the President's constitutional power, would support, it would seem, legislative measures to make effective their own ability to check the abuse of presidential war power.<sup>45</sup> This was, of course, the purpose of the War Powers Resolution: it was aimed at facilitating the task of Congress in checking presidential abuses of the power to make war. As Senator J. William Fulbright wrote when the Resolution was reported by the Senate Foreign Relations Committee, the Resolution should not be necessary, but it is necessary. The poor handling of the Haiti operation, which could have cost many lives, Haitian as well as American, sadly reveals that, twenty years later, legislation facilitating congressional involvement is still necessary.

For the reasons discussed above, the War Powers Resolution has failed in that task. But it can be made to work, as many commentators have pointed out.<sup>46</sup> The steps that need to be taken are readily identifiable and a remarkable level of consensus exists. Many of those refinements are included in Sen. Joseph Biden's "Use of Force Act," introduced in March, 1995 and in *War and Responsibility*.<sup>47</sup> The term "hostilities" should be defined. The consultation requirement needs to

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45. Nonetheless, many of those same critics propose *repeal* of the War Powers Resolution because it impinges upon presidential power—presidential power that they have little hesitancy in impinging when it comes to presidential authority to permit the use of U.S. troops in UN peacekeeping operations. See 141 CONG. REC. S522 (daily ed. Jan. 5, 1995) (statement of Sen. Nickels) (stating Peace Powers Act will limit President's power to place U.S. troops under foreign command); 141 CONG. REC. S101 (daily ed. Jan. 5, 1995) (statement of Sen. Dole) (stating same). Sen. Dole supported the War Powers Resolution in 1973 but now supports its repeal. *Id.*

Sen. Jesse Helms (R-N.C.), in a speech reiterating his view that the War Powers Resolution is unconstitutional, proposed legislation that would, in his words, "limit the placement of U.S. troops under U.N. command unless it is vital to U.S. national security interests." See Senate Foreign Relations Committee Hearing, *supra* note 1 (statement of Sen. Helms). He did not explain how Congress is authorized constitutionally to control peacetime deployments of the armed forces but not to control their introduction into hostilities.

46. See, e.g., LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995); ELY, *supra* note 5; GLENNON, *supra* note 4, at 71-122; Joseph R. Biden, Jr. & John B. Ritch III, *The Treaty Power: Upholding A Constitutional Partnership*, 137 U. PA. L. REV. 1529 (1989); Joseph R. Biden, Jr. & John B. Ritch III, *The War Power at a Constitutional Impasse: A "Joint Decision" Solution*, 77 GEO. L.J. 367 (1988); John H. Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379 (1988); John H. Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877, 925-26 (1990); John H. Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 STAN. L. REV. 1093, 1136-37 (1990); Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814 (1989); Michael J. Glennon, *Comment: Mr. Sofaer's War Powers "Partnership"*, 80 AM. J. INT'L L. 584 (1986); Michael J. Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law*, 78 AM. J. INT'L L. 571 (1984).

47. S. 564, 104th Cong., 1st Sess. (1995); ELY, *supra* note 5, at 115-38.

be sharpened. Ambiguities in the reporting requirement should be eliminated. The list of instances where sole presidential power is permissible should be expanded and made binding, preferably with mandatory funding cut-offs. The Resolution should be made judicially enforceable. And a number of other improvements should be made.<sup>48</sup>

But they will not be. The current wisdom, in Congress<sup>49</sup> as well as the Executive Branch,<sup>50</sup> is not that the Resolution should be beefed up but that it should be repealed.<sup>51</sup> I am aware that others, predisposed as I am toward broad congressional checks on presidential warmaking power, have argued that some benefit inheres in keeping the Resolution on the books, its flaws notwithstanding. The Resolution, it is said, deters at least some unwanted executive behavior, and in any event requires the Executive to justify its acts. Further, it is unlikely that another opportunity will arise in which Congress will be able to muster the political will to enact checks on executive abuses of the power to make war.

There is more than a little truth in these suggestions, and it might be useful to examine them more closely if repeal is ever seriously contemplated by Congress. It would be interesting to know, for example, precisely what role the Resolution played in internal executive branch deliberations preceding the invasions of Panama, Grenada, and Haiti, or prosecution of the Gulf War. My impression is, not much; Presidents

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48. See, e.g., GLENNON, *supra* note 4, at 113-21.

49. Repeal of the War Powers Resolution is the principal objective of pending legislation. In the Senate, the bill is S. 5, 104th Cong., 1st Sess. (1995), the "Peace Powers Act." In the House, it is H.R. 7, 104th Cong., 1st Sess. (1995), the "National Security Revitalization Act."

50. In 1994, the Clinton Administration announced support for repeal of the sixty-day time period. David J. Scheffer, *Introductory Note to United States: Administration Policy on Reforming Multilateral Peace Operations*, 33 INT'L LEGAL MATERIAL 795 (1994). This was reaffirmed by National Security Adviser Anthony Lake in a speech at the Harvard University Center for International Affairs. Thomas W. Lippman, *White House Seeks Talks on War Powers; Clinton Aide Calls for End of Fight Between Branches*, WASH. POST, Oct. 25, 1994, at A12 (reporting on Lake's Harvard speech).

51. Some members, of course, continue to find that the Resolution provides useful cover. The *Washington Post* reported on the reaction in Congress following National Security Adviser Anthony Lake's speech calling for its evisceration:

"The question this body must face is whether or not to repeal the [W]ar [P]owers [A]ct because it has no meaning whatsoever," Rep. Howard L. Berman (D-Calif.) said during that debate. "Every president has viewed it as unconstitutional." But other members said the measure is useful because it allows members to appear to be asserting their prerogatives without having to decide anything substantive, as they would if they had to vote on a measure to cut off funding for a military deployment.

Lippman, *supra* note 50, at A12.

It is disingenuous, I think, for representatives of this administration to claim that it does not support repeal of the Resolution. The Byrd, Nunn, Warner proposal, which the Administration supports, would gut the Resolution by repealing the sixty-day time period. For a discussion of this proposal, see GLENNON, *supra* note 4, at 119-21.

Reagan, Bush, and Clinton all seem to have done pretty much as they pleased in those situations, and whatever checks came into play seemed more political than legal. Still, executive officials have said that the Resolution made them think about things that they would not otherwise have considered. (Whether any *action*—or *inaction*—resulted from such thought about those things is another question.)

My frustration with the Resolution, again, flows from the belief that those benefits seem slight in comparison with its costs. Its “deterrent effect” is at best speculative; prior to the Gulf War, in *Dellums v. Bush*,<sup>52</sup> the congressional plaintiffs did not even argue that the executive was constrained by the Resolution, probably because it was clear after *Lowry v. Reagan*<sup>53</sup> that the Resolution was judicially unenforceable. The invasion of Haiti (like the invasions of Panama and Grenada) was launched in the comfort of the apparent assumption that hostilities would last less than sixty days. It is difficult to identify any instance in which the Executive desired to undertake a military initiative but did not because of the Resolution.

Finally, the improbability that Congress will again develop the “mood” to enact a beefed-up Resolution strikes me as a reason to repeal the Resolution rather than a reason to keep it. It is simply fanciful to expect unquestioning governmental compliance with any law that says government cannot do what it, on occasion, badly wants to do—especially when the law inevitably must speak in words that, given the subject matter, are ambiguous. Political will in Congress is a necessary constant; if Congress lacks the backbone to confront the Executive, as we saw too vividly in *Dellums v. Bush*,<sup>54</sup> the courts will not likely do so. What is needed is a realistic code regulating the use of force, a code grounded upon an accurate assessment of the will to comply *over time*—not simply at the moment of its enactment. As discussed above, the Resolution fails that test. If the War Powers Resolution is not the flower child of another era, it is at least *seen* to be; in a legal system increasingly driven by the perceived consequences of violation rather than its own long-term integrity, that is worse. But we must take the system as we find it, and the reality is that the law’s long-term integrity is undermined by what has become to the separation-of-powers what the old 55-mile-an-hour speed limit became to driving.

I favor strengthening the Resolution over repealing it. But, if the alternatives are the current version of the Resolution versus no Resolution, a hardheaded cost-benefit analysis is required. Many commenta-

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52. 752 F. Supp. 1141 (D.D.C. 1990).

53. 676 F. Supp. 333 (D.D.C. 1987).

54. 752 F. Supp. 1141 (D.D.C. 1990).

tors have sung the merits of a workable Resolution, but few have examined the costs of the unworkable Resolution now in force, a Resolution that does not yield the originally advertised benefits but which does impose costs. Given the choice between no Resolution and one that doesn't work—one, indeed, that confounds the congressional role rather than strengthens it; one that confuses public attention rather than focuses it; one that, with each use of force, deflects attention from underlying policy considerations as well as constitutional questions; one that gives the Congress no information about a crisis that it cannot get from the *New York Times*; and one that has rendered the law irrelevant—the better choice is no Resolution. The costs of this Resolution outweigh its benefits. It cannot politically be made to work, not because the Clinton and Helms views are too far apart—they are virtually identical—but because the two are too far apart from Javits and Fulbright and Madison and Jefferson.

The War Powers Resolution should be repealed.<sup>55</sup>

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55. One provision should be retained—one of the least noticed that has turned out to be the most useful. That is the provision, discussed above, that tells the President and the courts that no “implicit” statutory source of authority for use of force is available. This provision ruled out the kind of inference made by Dellinger concerning Haiti. Congress did *not* authorize an invasion, and Congress should not be seen as authorizing use of force unless that authorization is *explicit*, as the Resolution requires.

Repeal at this point in time seems unlikely. On June 7, 1995, the House of Representatives voted 217-201 against repeal of the War Powers Resolution. Forty-four Republicans defected to vote in favor of the War Powers Resolution. The House Republican leadership claimed the defections were caused by concerns about “giving President Clinton more authority during the current Bosnia crisis.” *House Refuses to Lift Restriction on President's War Authority*, SACRAMENTO BEE, June 8, 1995, at A4. House Speaker Gingrich was quoted as saying, “A number of our members felt that on the edge of Bosnia, they didn't want to do something to strengthen the president's hand.” *Id.*