

THE PRESIDENT vs. CONGRESS IN AMERICAN FOREIGN POLICY: THE CASE OF THE WAR POWERS ACT† AND THE GULF WAR

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This study examines the impact of the War Powers Resolution on the formulation and implementation of U.S. post-Vietnam foreign policy. In a more specific way, it tests the application of the War Powers Act in relation to American responses during the Kuwaiti crisis. The paper first explores the role of the constitution in the struggle between the President and Congress over who has the constitutional mandate to declare war.

In order to put this study in its proper historical context, the research focused on tracing the evolution of the power relationship between the Congress and the President in regard to American foreign policy and focused especially on the circumstances surrounding the Vietnam war. Since that conflict, successive U.S. Presidents have tried to circumvent the meaningful participation of Congress in war-making decisions. In some cases, the Presidents have succeeded in dragging the country into a series of undeclared wars through various executive machination strategies. This practice survived until Congress was forced to reassert its constitutional role in foreign policy through the passage of the War Powers Resolution in 1973. Yet, thereafter, American presidents have refused to acknowledge the constitutionality of the War Powers Act. Presidential adventures in Grenada, Zaire, Lebanon, Libya and Iran support this position.

The circumstances leading to the Gulf war are reminiscent of the Vietnam drama. It should be noted that during the Gulf crisis, the American people witnessed an impotent Congress cheering from the sidelines without asserting either its constitutional and legislative roles or responsibility until the President had made grand scale military deployments in the area of "imminent danger" (the Middle East). This action set in motion a situation, irreversible by any other means short of outright war.

The Constitution And The Conflict Between The President And Congress

The separation of powers among the legislative, executive and judicial branches of government has been an obstacle to despotic government. But it has also caused gridlock, competition and lack of cooperation among the branches and institutions of government; all barriers to effective government.¹ The framers of the constitution were more concerned about preventing tyranny than they were about facilitating policy development. The doctrine of separation of powers, checks and balances between the executive branch and the legislature has encouraged formalism. Each branch of government has become naturally protective of its authority and in some cases has tried to usurp that of the other branches of government so that preserving a democratic and constitutional form of government and making timely alterations has become more difficult.²

What this evidence suggests is that there is ambiguity and confusion in the role of Congress vis-a-vis the President, as prescribed by the constitution. The confusion and lack of clarity and understanding of the functional interpretation of the constitutional mandate has spread to areas of foreign policy. The constitution gives Congress the sole or plenary power to declare war. Its conflicting clauses regarding whether the Congress or the President will wage war are rooted in the following passages:

"The Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water, to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; to provide and maintain a Navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the Militia to execute the laws of the Union, suppress insurrection, and repel invasion"³

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† The War Powers Act is often referred to as the War Powers Resolution. Hence, both terms will be used interchangeably in this paper.

¹ Walter Burnham, *Democracy in the Making* (New Jersey: Prentice Hall, 1983), 34.

² Charles Jones, *An Introduction to the Study of Public Policy* (Monterey, California: Wadsworth, 1983)

³ Quoted in *Congressional Quarterly* (January 5, 1991), 33.

"The President shall be commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into actual service of the United States."⁴

These overlapping provisions tend to put the two competing branches of government on a collision course. Also, it makes the application of the constitutional intent as regards the relationship between Congress and the President on matters of war and national security more ambiguous. Since the constitution gave the power to declare war to Congress in 1789, that power has been exercised only five times: against the British in 1812, Mexico in 1846, Spain in 1898, the Central Powers in 1917 and the Axis Powers in 1941.⁵ Most of America's recent wars like the Korean, Vietnam and now the Gulf (Iraqi) crisis have not been officially declared wars. Successive Presidents have employed a more limited use of force abroad without declarations of war.⁶

It was after the Vietnam war that Congress began to play a large role in American foreign policy. During the Johnson and Nixon Administrations, Congress was never adequately informed in advance on matters of foreign policy. These Presidents are known to have concealed from Congress information on some of their foreign policy activities. This behavior was evidenced in the fact that the secret bombing of Cambodia came as a surprise to members of Congress. That bombing incident set the stage for the showdown between Congress and the President. It was a confrontation which was won by Congress and that later cleared the way for a long string of legislative initiatives that fundamentally altered the process of formulating and implementing American foreign policy. Congress repealed the Gulf of Tonkin Resolution authorizing U.S. involvement in Indo-China. Rethinking the involvement of American combat forces in South Vietnam followed because Congress decided to play a more assertive role in foreign policy. American entanglement in Vietnam was ended when Congress evoked its "power of the purse" responsibilities under the constitution and cut off funds for the American war effort in South Vietnam. From then on, the balance of power shifted in favor of Congress. Congressional intervention was designed to check the abuses and excesses of executive power. Inadequate or even a complete lack of consultation on key foreign policy matters on the part of the President toward Congress led to a Congressional intrusion that eventually produced the War Powers Resolution Act of 1973. The act instituted limits regarding how the President can make war.

The excessive intrusion of Congress into the area of foreign policy as symbolized by the War Powers Resolution set a dangerous precedent that incapacitated the President's ability to conduct foreign affairs. The resolution tied the hands of the President, preventing him from protecting and promoting America's interests globally at a time when he needed more prerogative, discretion and flexibility to counter competing ideological interests unleashed by the cold war. Thus, pressure mounted for the War Powers Resolution Act to be repealed in order to give the President freedom to conduct foreign affairs, a role for which the constitution provides.⁷

The War Powers Resolution designates the dividing line between the constitutional power of Congress to declare war and that of the President to do the same as Commander-in-Chief. Also, it gives meaningful definition and clarification to the fact that the founding fathers vested the power to declare war in Congress rather than the Presidency.⁸ While the War Powers Resolution requires adequate consultation between the President and Congress on fundamental

⁴ *Ibid.*

⁵ *Ibid.*, 38.

⁶ Arthur Miller, "Political Issues and Trust in Government: 1964-1970" *American Political Science Review*, 68 (September)

⁷ John Tower, "Congress Versus the President: The Formulation and Implementation of American Foreign Policy" *Foreign Affairs* (Winter 1979): 229-246.

⁸ Pat Holt, *The War Powers Resolution* (Washington, D.C.: American Enterprise Institute, 1978): 1-17. ⁷ John Tower, "Congress Versus the President: The Formulation and Implementation of American Foreign Policy" *Foreign Affairs* (Winter 1979): 229-246.

issues of foreign policy, especially those of war and peace, it appears unrealistic in practicable terms in cases of national emergency. Perhaps that is why "no President has accepted the constitutionality of the War Powers Act."⁹ In the 1980s, passage of a joint resolution (S.J. Res. 194) required President Ronald Reagan to invoke the War Powers Act over his conduct in the Persian Gulf regarding the enforcement of Freedom of Navigation rights at the height of the Iran-Iraq war. The tug of war between the President and Congress over foreign policy was magnified by interactionary and institutional events leading to U.S. engagement over the liberation of Kuwait from the Iraqi occupation and annexation.

U.S. Foreign Policy In Vietnam And The War Powers Act

President Lyndon Johnson drew the United States into war in Vietnam in 1965 on the pretext that American interests were being threatened. While he initiated a limited military engagement, he was cautious not to be dragged into a major war. Because of this, Johnson decided that he would not make threatening gestures towards the Chinese or Russians by calling up reserves in large numbers. Rather, he was determined to press hard on the diplomatic front for a peaceful settlement.¹⁰ Johnson had opted for a military involvement in order to deter Communist expansion in South East Asia and to maintain American credibility and security commitments to its friends and allies.

Under the Nixon Administration, the United States embarked on the withdrawal of its troops from Vietnam. However, the renewal of the secret bombing in Cambodia set the stage for a confrontational encounter between Congress and the President. The whole episode cleared the way for Congress to pursue a number of legislative options that changed the fundamental processes in the formulation and implementation of American foreign policy. As a consequence, Congress repealed the Tonkin Gulf Resolution authorizing American involvement in Indo-China. The evacuation of U.S. combat forces from South Vietnam followed to avoid the further operational involvement of American pilots and aircraft in Cambodia.

However, the Nixon administration could not assuage all fears nor did it try. Instead, the administration contended that continued bombing was necessary to create the proper psychological conditions necessary for serious bargaining because "as long as the Khmer Rouge believed in an early victory, they would have no incentive to talk."¹¹ The War Powers Resolution of 1973 became the source of encapsulating and systematizing the role of Congress in crisis situations related to American foreign policy. The resolution is regarded, both legally and politically as the most fundamental and controversial procedural device for asserting the Congressional right to co-determine the nature, conduct and purposes of American foreign policy.

The aim of the War Powers Resolution has been to restore power to Congress over certain momentous decisions: when and under what circumstances the United States goes to war. The drafters of the constitution did not mean war in any technical sense, but they meant to give Congress control of those kinds of action short of the formal declarations of war which were commonly resorted to in times of crisis.¹² To some, the purpose of the War Powers Resolution is to assert the proper role of Congress as a partner in decisions about war and peace. The act is a statement of shared responsibilities between the President and Congress regarding decisions to send our sons and daughters into combat. It also reflects the need for the support of the American people if a commitment of force is to succeed.¹³

Prior to the passage of the War Powers Act of 1973, the mystique, power, confidence and legitimacy of Congress had been deeply eroded in the eyes of the American populace. Furthermore, those who had become disenchanting with Presidential leadership in foreign

⁹ *Congressional Digest* (December 1987), 308.

¹⁰ Lyndon Johnson, *The Vantage Point* (New York: Harper & Row, 1971), 149.

¹¹ *New York Times* (April 24, 1973), 5.

¹² Abraham Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* (Boston, Massachusetts: Ballinger, 1976).

¹³ *Congressional Digest, Op. Cit.*, 300.

affairs began to look elsewhere than toward Congress because Congress was viewed as impotent or distracted by institutional concerns and so rendered incapable of responsibly overseeing American interests abroad.¹⁴ In the last analysis however, Congress once again accepted the mandate of the constitution to fight for the privilege of directing American foreign policy.¹⁵

After repeatedly failing in its efforts to constrain presidential war making powers, Congress, over President Nixon's veto, voted to pass the War Powers Act of 1973. Its enactment into law reasserted Congressional authority in regard to war-making policy and provided a legislative standard for constitutional prescription. The War Powers Resolution spelled out the dividing lines and parameters between the constitutional power of Congress to declare war and the constitutional power of the President as Commander-in-Chief. The resolution which became law on November 7, 1973 (over President Nixon's veto) was the outcome of many years of Congressional frustration with the Indo-China policies of both the Nixon and Johnson administrations.¹⁶

The War Powers Resolution stipulates that before American troops are introduced into hostile territories or situations where imminent involvement in conflicts is clearly indicated by circumstances, the President is required to consult with Congress in every possible instance. In any case where troops are introduced without a declaration of war, the President is obligated to submit a report to Congress within forty eight hours (two days). Then, within a period of sixty days, or in special circumstances ninety days, the involvement of the troops should be terminated, unless Congress takes affirmative action to approve it. Congress can also terminate the involvement before sixty days has lapsed by passing a Concurrent Resolution which may not require the President's signature and therefore may not be subject to veto.¹⁷

The constitutional power of the President as Commander-in-Chief to introduce U.S. Armed Forces into situations of imminent danger is exercised pursuant to a declaration of war; specific statutory authorization, and in the situation of a national emergency created by an attack upon the United States, its territories, armed forces or possessions.¹⁸ President Nixon's opposition as symbolized by his veto of the War Powers proposal before its passage was based on the assumption that the proposed act would restrict the ability of the President to act in times of emergency with the implied unconstitutional effects being antithetical to the national interest of the United States.¹⁹

Another constraint was that the act would give a wrong signal to an adversary who, perceiving congressional constraints on the President would postpone serious or "good faith" negotiations in conflict situations until after the sixty days had lapsed.²⁰ Furthermore, the resolution has the potential of snatching away a wide range of peace keeping functions, strategies and instruments from the President by eliminating his ability to keep the peace through military coercion or diplomacy backed by a subtle shift in military deployment or other forms of power projection.²¹ Also, the act would establish a dangerous precedent that might give every future Congress the ability to handcuff future Presidents through inaction or indifference.²²

¹⁴ *New York Times*, (February 15, 1974).

¹⁵ Edward Corwin, *The President: Office and Powers, 1787-195* (New York: N.Y. Univ. Press, 1957), 200.

¹⁶ Pat Holt, *Op. Cit.*, 1.

¹⁷ *Ibid.*, 3.

¹⁸ *Ibid.*, 6.

¹⁹ *Ibid.*, 7.

²⁰ *Ibid.*, 8.

²¹ *Ibid.*

²² *Ibid.*

Presidential Wars And The War Powers Resolution

Most of America's fights have been initiated by the Chief Executive without Congressional declarations. It appears that Presidents have been riding on the convenience of undeclared wars. The Danang incident which occurred between March and April 1975 is a typical case of a Presidential engagement in conflict without a declaration of war. At the time of the fall of Danang to the Viet Cong and North Vietnamese troops, President Johnson dispatched a contingent of about 700 Marines and 12 helicopters to help evacuate refugees.

The fall of the Lon Nol government in Cambodia necessitated the evacuation of American nationals from the city of Phnom Penh. A naval task force of about 36 helicopters and aircraft and 350 Marines was involved. The Marines were deployed to provide cover around the U.S. Embassy in order to facilitate the emergency evacuation of Americans. As hostile forces drew near Saigon, Congress initiated the evacuation of Americans. On April 28, 1975, American forces carrying out the operation in a hostile environment were embroiled in a number of skirmishes that claimed some lives. In the end, the operation was proclaimed a success and there was no hostile reaction from Congress because the overwhelming military and political objectives were achieved at a minimal cost. During the Saigon evacuation, the President directed that Congressional leaders be notified, not consulted; and that the final phase of the evacuation of Saigon be carried out by military force.²³

In May 1975, the United States merchant ship, *Mayaguez* with a crew of twenty-nine was seized by Cambodian patrol boats in international waters off the Cambodian coast. Early diplomatic efforts to effect the release of the ship and its crew failed. President Ford ordered a military assault to rescue the vessel which resulted in the loss of American men and material. There was a larger public outcry over the *Mayaguez* incident than was the case in some previous cases involving the application and significance of the War Powers Act but no complaints were lodged about the rescue of the ship and crew.²⁴

However, controversy did erupt when there were charges that the United States overreacted, and that a hasty operation had resulted in a considerable number of casualties. Further criticism was leveled on the grounds that the President failed to consult Congress promptly as required by the War Powers Resolution. In the case of the *Mayaguez*, the lack of meaningful consultation approached the remarkable. Calls made to inform Congressional members after the operation had begun amounted to bare notification as opposed to genuine and meaningful consultation.²⁵ In Spring 1976, an American seaborne task force was dispatched to Lebanon charged with the task of evacuating 1,400 American citizens trapped in the middle of a raging civil war. President Ford did not report the use of American military forces to evacuate the stranded Americans to Congress.²⁶ The President did, however, cite the incident as a prime instance exemplifying the sort of difficulties encountered when conditions warrant urgent action and it is difficult to find key members of Congress to consult.²⁷ In the case of the Danang, Phnom Penh and Saigon evacuations, as well as in the *Mayaguez* rescue, the President reported to Congress within 48 hours, but only after American forces had already entered foreign territories, rather than when the decision to commit American forces to action was being formulated. As a result, reports on each stage of policy development reached Congress only after each military operation was already concluded.²⁸ In selected instances regarding the Indo-Chinese evacuations and the *Mayaguez* intervention, President Ford did inform Congress, but only after irrevocable decisions to commit U.S. forces had been made. The timing of Congressional consultation was not determined by a real concern to make Congress a partner in Presidential decisions as to the possible committing

²³ Thomas Frank and Edward Weisband, *Foreign Policy by Congress* (London: Oxford Univ. Press. 1975) 73.

²⁴ Pat Holt, 17.

²⁵ Thomas Frank and Edward Weisband, 73.

²⁶ *Ibid.*, 71-72.

²⁷ *New York Times* (April 12, 1977), 14.

²⁸ Frank and Weisband, 71.

of American troops. In other words, there was a report of notification but no consultation.²⁹

In 1978, President Jimmy Carter introduced American forces into an area of hostility in the Shaba Province of Zaire. The American forces were ordered to provide logistical help to Zairean and French forces which had engaged Zairean rebel soldiers who had crossed the border from neighboring Angola. The insurgency attack had trapped many European workers, mainly French civilians who resided and worked in the mining and mineral-rich Shaba Province. The Carter administration refused to file a report in accordance with the provisions of the War Powers Resolution, at the same time contending that since U.S. evacuation did not take place in the front line of hostilities, the U.S. forces involved in the action were exempted from the need to comply with the requirements of the Act.³⁰

Furthermore, in April 1980, President Carter reported to Congress on an unsuccessful attempt by American forces to rescue American citizens held hostage in Iran. Eight air force helicopters and six aircraft were involved. The rescue operation was staged in an attempt to rescue 62 American hostages held in the compound of the American embassy in Teheran. The incident was triggered when Iranian students demanded the return of the Shah of Iran in exchange for the release of the hostages. The Shah was at the time being treated for cancer in a hospital in New York. The military rescue operation failed when helicopters used in the mission were incapacitated in the desert staging area inside Iran.

In August 1983, President Ronald Reagan introduced U.S. troops into Lebanon in response to an Israeli invasion. The force became vulnerable to various factional units of Syrian and Lebanese forces. The bombing of the U.S. Marine headquarters in October 1983 that killed 241 U.S. Marines and sailors forced a debate over the nature, purpose and effectiveness of American foreign policy in the Middle East in general and Lebanon in particular. Mounting public pressure forced the President to withdraw the remaining forces in February 1984.³¹

October 1983 witnessed the invasion of Grenada by an American force of about 1200 U.S. marines and 700 army rangers together with 300 soldiers from Barbados, Jamaica, Antigua, St. Vincent, St. Lucia and the Dominican Republic. President Reagan had reported that the invasion was in response to a joint appeal from the aforementioned six nations requesting U.S. help to restore order to Grenada following the military coup that toppled the government of Maurice Bishop and took his life and those of his cabinet members. It was alleged that the Caribbean states had expressed alarm about Grenada's military buildup and the threat it posed to the balance of power in the region.

The U.S. intervention was also regarded as a move designed to undermine the Cuban presence in Grenada, and to take out the infrastructure and equipment which it had installed. These included a controversial airfield capable of handling various kinds of Soviet and Cuban planes. American forces also claimed that a fully equipped base with large quantities of weapons and communication equipment was discovered. The invasion was justified by the Reagan administration on the grounds that the lives and property of about 1,000 American students living in Grenada were in danger.

In March 1986, U.S. naval forces confronted the Libyan navy. The clash arose from a dispute over the East-West 'line of death' drawn by Libyan leader Muammar Qadhafi in the area of the Gulf of Sidra. Qadhafi had threatened to confront any foreign forces that trespassed inside that limit and that if he could he would make sure that any trespassers would "die for it." The battle was fought by the U.S. sixth fleet which was on routine patrol in the Mediterranean. The confrontation was intended to challenge a Libyan territorial claim of 150,000 Square miles off the gulf as its waters. Most nations observe a 1 2-mile territorial sea limit under international law.

²⁹ *Ibid.*, 72.

³⁰ U.S. House Committee on International Relations hearings before the Subcommittee on International Security and Scientific Affairs, Congressional Oversight of War Powers Compliance: Zaire airlift, 95th Congress, 2nd Session, 10 August 1978.

³¹ Robert E. Hunter, "The Reagan Administration and the Middle East" *Current History* (January 1989): 57-58.

The U.S.-Libya confrontation was provoked by the U.S. over "rights of passage." President Reagan had dispatched a naval contingent to underscore his argument that Libya's territorial waters did not extend beyond 12 miles. During the course of the battle, Libyan defenses including patrol boats and radar guidance units and installations were destroyed. This was not the first time the United States had confronted Libya over violations of its "freedom of navigation" rights. In 1981, American F-14 jets shot down two Soviet-made Libyan fighter bombers in the course of its first hostile encounter with Libyan forces in the 1980s.

From The Halls Of Congress To Court

Although the War Powers Act heralded the onset of a new Congressional role in making foreign policy, its effect remains substantially untested. However, events in foreign policy since its passage have brought doubts about its utility as a means to ensure executive-congressional co-determination of American foreign policy.³² Throughout American history, power has always shifted between Congress and the President even during periods when American foreign policy was marked by executive dominance or congressional dominance. Overall, down through the years more power has resided in the executive branch.³³

The possibility of a U.S. military involvement in the Gulf conflict was realized on August 2, 1990, following the Iraqi invasion of Kuwait. On August 7, 1990, President Bush dispatched American forces to Saudi Arabia to boost Saudi defenses against a possible Iraqi incursion into Saudi territory. This action was justified by the United States by means of a report of a massive Iraqi military buildup along the Saudi-Kuwaiti border on August 4, 1990.³⁴

By August 8, 1990, when Iraq declared its official annexation of Kuwait, the Bush administration had admitted to the presence of about 50,000 American troops in Saudi Arabia. The massive American military presence was followed by an official notification (regarding the progress of troop deployment) that "hostilities were not imminent". This declaration is widely believed to have been a strategic move to circumvent any adherence to the provisions of the War Powers Resolution.

After President Bush had used the word "hostages" to describe Americans trapped in Iraq, he called up more than 40,000 reserves on August 22, 1990. By using the word hostages, he gave the crisis and his functions as Commander-in-Chief a national emergency flavor. In October 1990, the House voted 380-29 for resolution HJ Res. 658 supporting U.S. military deployment in the Gulf. Similarly, the Senate voted 96-3 in favor of an identical resolution (S Con Res 147). However, members of both Houses of Congress reiterated that the measures should not be construed as an authorization for the President to use force in the gulf. In general, the mood in Congress—as indicated by the "votes of confidence"—suggest that the favorable votes were triggered by the President's indications during the early part of the deployment procedure that his deployments were for "defensive purposes" and were to insure against any further Iraqi territorial ambitions in Saudi Arabia. By mid October, the number of deployed American military personnel had reached 200,000.

Lack of Congressional assertiveness in shaping U.S. policy in the gulf also came to light on October 17, 1990 when Secretary of State James Baker, in testifying before the Senate Foreign Relations Committee, refused to promise that the administration would seek Congressional approval before launching any attack on Iraq. Following antiwar protests in about 20 cities across the U.S.—with an estimated crowd of about 20,000 protesting in New York—members of Congress began to raise concern about the consequences of the continuing acquiescence of Congress.

³² James A. Nathan and James K. Oliver, *Foreign Policy Making and the American Political System* (Boston: Little, Brown & Co., 1983), 143.

³³ Stan A. Taylor, "Congressional Resurgence" in *Problems of American Foreign Policy*, Martin B. Hicks, ed., (Beverly Hills, CA: Glencoe Press, 1975): 106-107.

³⁴ *U.N. Chronicle* (December 1990): 12-13.

Senate majority leader, George J. Mitchell of Maine released a statement intended to silence public anxiety over the possibility of war and also to communicate to the President that congressional acquiescence should not be interpreted as a tacit or implied endorsement of any determination to go to war. The statement was intended to reassert the constitutional role of Congress vis-a-vis the Executive in matters of war and peace.

By November 8, anxiety had grown in Congress regarding the irreversibility of the onward march toward war when President Bush ordered the near doubling of U.S. forces in the gulf. Also worrisome was Bush's abrupt change of goals and objectives from a defensive to offensive posture. He had said that the United States must have an "adequate offensive" capability. This was followed by indications from U.S. officials that plans to rotate American troops in and out of the Persian Gulf had been dropped. The doubling of American forces and the canceling of the rotation plans put in motion a new dynamic in the gulf crisis with enormous military implications and consequences.³⁵

With rising concerns about the drift toward war, the Senate Armed Services Committee chairman, Sam Nunn (D-GA), criticized the massive troop build-up and the decision to scrap troop rotation, calling them a mistake. Two days later, knowing that Congress was being sidelined in shaping U.S. policy in the Gulf, leading Senate Republicans called for a special session of Congress to discuss troop deployments. Reflecting the need for damage control and the urgent need to reassert Congressional constitutional authority on the Persian Gulf question, Minority Leader Bob Dole of Kansas called the forum a chance for Congress to "put up or shut up."

As a result of dissatisfaction over the inability of Congress to shape the course of American foreign policy in the Gulf, 45 democratic Congressmen, fearing that the President would drag the U.S. into war, turned to the courts to restrain the Chief Executive from initiating any military action. Federal judges in recent times have been reluctant to place the courts in the middle of a debate between the President and Congress. Consequently, they have in effect given more power to the President. On November 20, 1990, Democratic Congressmen filed a suit to force President Bush to seek congressional approval before launching any military attack against Iraq. The suit was later joined by additional members of Congress bringing the number of dissenters to 54. It was believed that a judicial injunction was the only option left to avert war.

In the resulting case, *Dellums vs. Bush*, the plaintiffs, in an attempt to halt further deployment of forces in the gulf by the Bush administration, argued that "the power to declare war is synonymous with the power to initiate it."³⁶ The plaintiffs, arguing before U.S. District Judge Harold H. Greene, asked for an injunction restraining the President from initiating hostilities until a time when Congress declared war. The complainants noted that it would be unconstitutional for the President to unilaterally make war without a formal declaration. In quoting James Madison, the Plaintiffs said "in no part of the constitution is more wisdom to be found than in the clause which confines the question of war or peace to the legislature and not to the executive department."³⁷

In response, the defense argued that the provisions of Article II of the U.S. Constitution dictate that the President is the ultimate authority in foreign affairs; and that the President acts as the sole organ of the federal government in the field of international relations. The Bush administration was represented by the Justice Department with the Assistant Attorney General, Stuart M. Garson acting as the chief legal counsel. The government relied on a legal precedent, a Supreme Court decision in the 1936 case of the *United States vs. Curtiss-Wright Export Corporation* in which the court upheld a grant of authority to the President by allowing

³⁵ U.S. Department of State Dispatch, 1, 11 (November 12, 1990): 258-259.

³⁶ Quoted in *Congressional Quarterly* (January 5, 1991), 36.

³⁷ *Ibid.*

him to bar the sale of arms to warring countries in South America. In conclusion, the defense argued that "while the President has the right and power to deploy American forces, the courts are worse equipped than the Congress to address the matter."³⁸ The defense further suggested that if Congress resented presidential actions, then it should take corrective legislative actions. To sum up, the defense again indicated that the argument between Congress and the President about foreign policy that stood before the court was a political rather than a judicial matter.

On December 13, 1990, the presiding judge Harold Greene ruled that the case was premature because only a small portion of the entire Congress was seeking relief instead of the majority. He noted that it would be premature and presumptuous for the court to render judgement on the issue of whether a declaration of war was required at the time of deployment or later because the full Congress had not taken a position as to whether a declaration of war was necessary or imprudent.³⁹ However, Judge Greene left open the door to finding an undeclared war in the Gulf unconstitutional in the future by affirming that the power to authorize war rests with Congress and that "an invasion of Iraq by United States forces could be construed as war within the meaning of Article 1, Section 8, Clause II of the Constitution."⁴⁰

Vote Of Confidence Or Declaration Of War?

Congress, in an attempt to shed its image of impotency gave the President a "vote of confidence" which in effect turned out to be a green light for the presidential initiation of war. Four days prior to the war, Congress had empowered President Bush to employ force in the removal of Iraqi troops from Kuwait. The joint resolution (HJ Res. 77) stated that the President could use "all means necessary" to force Iraq out of Kuwait after January 15, 1991; a date that coincided with the deadline set by the U.N. Security Council. The Security Council voted 12-2 on November 29, 1990 on a similar proposal to authorize "all means necessary" to remove Iraqi forces from Kuwait if they did not withdraw by January 15, 1991. This occasion marked the first time since the Korean War in 1950 that the United Nations authorized the use of force against a member or signatory.

On January 17 and 18, 1991, the Senate and the House respectively approved a "vote of confidence". The text of the measure which was transmitted from Congress to the President reads that "the Congress commends and supports the efforts and leadership of the President as Commander-in-Chief in the Persian Gulf crisis; the Congress unequivocally supports the men and women of our armed forces."⁴¹ The confusion and lack of consensus over supporting the President in all his actions in the Gulf were reflected in the patterns of votes in the Congress which showed both a partial and an even split. To take the Senate vote as an example, the Senate vote for SJ Res 2 and HJ Res 77 was 52-47 and 250-183 respectively. The full implications of the Congressional vote in support of the President were underscored by the statement made by the majority leader, George Mitchell before the vote that "if the administration was trying to prevent war, divisions over policy could serve to undermine that threat, thereby making actual military confrontation more likely."⁴² Some Senators said that in order for the United States to maintain credibility on this issue, the country should be united behind the President. Others agreed that official airing of differences would encourage Saddam Hussein and communicate doubts to America's allies. These arguments were congenial to what President Bush expected of Congress--take a unified stance against Iraq. In order to make a unanimous vote possible, Bush allayed congressional fears that he was on an irreversible path to war. On December 9, 1990, he sent U.S. Secretary of State James Baker to Baghdad for direct talks with Saddam Hussein. Even House Majority Leader Richard Gephardt, who was leaning against Bush's Persian Gulf policy, praised the offer of talks.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Congressional Quarterly* (January 19, 1991), 177.

⁴² *Congressional Quarterly* (December 1, 1990), 4004.

Thus, Congress had gradually begun to board the presidential bandwagon in regard to his policy on the Gulf.

Unfortunately, hopes for a peaceful resolution of the Kuwaiti conflict were dashed when the proposed talks bogged down over the issue of a mutually acceptable date for meetings between the U.S. and Iraq. Baghdad insisted on Baker visiting Iraq on January 12, 1991, while Washington insisted that the meeting take place no later than January 3, 1991.⁴³ This type of decision making, based on a struggle for unanimity of opinion, has its dangerous consequences. Irving L. Janis calls the phenomenon "groupthink" and defines it as a "mode of thinking which people engage in when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action."⁴⁴

Janis warns that in public policy making, the drive to speak with one voice can sometimes lead to serious policy blunders emanating from secrecy and the lack of adequate policy debate, consultation and analysis. It should be noted that President Bush had indicated that his "credible threat" option would be meaningful if his hand were strengthened by bi-partisan support of his Gulf policy. The "credible threat" option works on the assumption that the Iraqi leadership would be coerced into complying with the resolutions of the United Nations, withdrawing from Kuwait if it perceived that the United States government players "spoke with one voice" coupled with the realization that the United States force in the Gulf would be used against it if it failed to comply.

There are many plausible reasons why a majority of Congressional members voted to support the President's Gulf policy. One reason was that they did not want to deny the American troops who were already on the ground (on the directive of their Commander-in-Chief) the necessities and resources they required in order to perform their duties. Denial of resources to prosecute the war, or appearance of such on the part of Congress, would have been perceived as a humiliation by members of the public. According to national polls conducted at the time, the people of the United States could identify those who were serving in a military capacity in the Gulf. The political cost of withholding resources would have been unbearable to Congress.

Moreover, Congress wanted to go on record as supporting American troops in the field who were engaged in war. It did not want to delegate all the functions of foreign policy to the President. In other words, it was a way for Congress to show its assertiveness as a co-equal partner in the shaping of American foreign policy, even if it was purely symbolic.

After the Congressional vote in support of Presidential policy in the Gulf, the President undoubtedly had received a tacit authorization to go to war as he choose. Yet, he needed to give the impression that he had exhausted all avenues to reach a settlement. Hence, the avenue of the Geneva Conference was pursued. In January 1991, Iraqi Foreign Minister Tariq Aziz met with U.S. Secretary of State James Baker. Aziz had refused to accept a letter written by President Bush to Hussein claiming that "it was not sufficiently respectful" under the rules of international diplomacy. This incident made the prospect of war inevitable.⁴⁵

On January 12, 1991, Congress passed resolution HJ 77 authorizing Presidential use of force in the Gulf. However, the resolution contained a requirement that President Bush first certify that efforts to resolve the crisis without force had been unsuccessful. In a letter to Congress dated January 16, 1991, the President noted that pursuant to the provisions of the said resolution, he had concluded that all diplomatic and peaceful efforts to extract Iraqi compliance with the U.N. Security Council resolutions had not only been exhausted, but had failed.⁴⁶ On the same day, President Bush ordered American troops into action. U.S. war planes had been dispatched into action 30 minutes before the President telephoned to inform

⁴³ George Bush, "The Persian Gulf Crisis: Going the Extra Mile for Peace" *U.S. Department of State Dispatch*, 2, 1, (January 7, 1991), 1.

⁴⁴ Irving L. Janis, *Victims of Group Think* (Boston: Houghton Mifflin, 1972), 9.

⁴⁵ *U.S. Department of State Dispatch*, 2, 2 (January 14, 1991), 25.

⁴⁶ *Congressional Quarterly* (January 19, 1991), 198.

the first member of Congress, House Minority Leader Robert Michel at 5:20 P.M.⁴⁷ This incident shows that while Congress authorizes war, the President makes it; and that the phone calls were mere protocol made not to consult Congress, but to notify it.⁴⁸

Conclusion

The framers of the American Constitution empowered the Legislative as well as the Judicial branches of the American government and the War Powers Act has failed to address how the Commander-in-Chief can be effective, given the necessarily speedy and secret nature of a presidential response in cases of national emergency, if he is required to consult with a divided Congress.

As a result, Presidents have not always respected the constitutionality of the War Powers Act in times of national emergency. As demonstrated by the evacuation of Americans in Saigon in 1975 and the American experience in Lebanon in the 1980s under Reagan, the President and Congress tend to respond to circumstances based on what they feel they can get away with. Presidential actions are criticized whenever they fail while they are celebrated in times of success and victory. Furthermore, and as the Gulf War demonstrated, Presidents have learned that once they commit troops to action, it is politically difficult for Congress not to support their actions. This experience helps to cement the notion that Congress is less than a co-equal partner with the President in the formulation and execution of American foreign policy.

It is difficult to resolve the constitutional dilemma facing the President and Congress in terms of who determines the action of the United States on issues of war and peace, unless there is a constitutional amendment in the future. That would involve an arduous process and given the ideological climate in the United States regarding the role of government in society and the extent to which it will go about fulfilling those roles, a constitutional amendment is unlikely. As the Constitution is now, both the President and Congress have enough reasons to either restrict or not inform each other. In the meantime, American foreign policy experience is more likely to mirror the American experience in the Gulf, where the President made policy while Congress legitimized it.

⁴⁷ *Ibid.*, 182.

⁴⁸ *Ibid.*