CONGRESSIONAL OVERREACHING IN FOREIGN POLICY*

by

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The eight years of President Reagan's Administration were a rocky period for legislative-executive relations in foreign policy. Broadly speaking, the sharper the disagreement between congressional Democrats and the Republican President over substantive issues, the more likely were those disagreements to spill over into procedural and constitutional turf battles. The procedural fights in turn would raise institutional jealousies that would feed back to harm substantive policies.

In the early months of President Bush's Administration, as these words are being written, it appears that players on both ends of Pennsylvania Avenue are trying to tone down the institutional rhetoric. The President, Speaker of the House and Majority Leader of the Senate all have been talking about the need for bipartisanship. Far be it for me to dissent here from this salutary tone. Nevertheless, one does have to prepare for

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eventualities. Sooner or later, under this President or a future one, some foreign policy issue is bound to provoke a sharp disagreement between the White House and Congress. Before that day comes, it is important to reflect on the institutional issues raised by the clashes just past.

This essay is about patterns of Congressional overreaching during the years of the Reagan Administration. By choosing that subject, I do not mean to suggest that overreaching was limited to Capitol Hill. Anyone who followed the Iran-Contra affair knows that not to have been so. However, congressional aggrandizement does seem less generally understood, more systemic and more institutionally ingrained, than does its White House counterpart. Members of Congress may be asking for bipartisanship, but they have not given up what I would consider to be some of the more problematic aspects of their institutional self-understanding.

POSING THE ISSUE

Congress and the President both have important roles to play in shaping the conduct of U.S. foreign policy. Both will have to be involved for any major policy to be successful over the long term. But this does not mean that all forms of joint participation work equally well. The odds for success become much worse if either branch steps beyond its institutional competence. It is crucial, therefore, to understand: (1) just what is the institutional competence of each branch; (2) what

is the connection between institutional competence and constitutional authority; and (3) how has Congress, in an attempt to force joint participation, overstepped the bounds of its competence and authority with harmful effects.

I am posing these questions because I want to get beyond the usual legal arguments to look at the practical consequences of abusing the separation of powers. (For readers interested in the legal and constitutional history, I refer them to the relevant chapters in the Iran-Contra committees' minority report.[1]) The problem with most legal arguments is that they tend to become debates about the precise application of this or that group of words. In too many judicial opinions, the Constitution appears almost as if it were a collection of disembodied clauses, each with its own legal history, parceling power every which way. But individual clauses are not the best prisms for viewing the separation of powers, a subject suffusing the whole Constitution.

The Constitution does not really distribute powers at random. It does give the separate branches distinct levers for influencing the same set of policy decisions. But the powers are separated, and the levers of influence conferred, according to a consistent set of underlying principles. Broadly speaking, the Congress was intended to be a collective, deliberative body. When working at its best, it would slow down decisions, improve their substantive content, subject them to compromise, and help build a consensus behind general rules before they

were to be applied to the citizen body. The Presidency, in contrast, was designed as a one-person office to insure it would be ready for action. Its major characteristics, to use the language of Federalist No. 70, were to be "decision, activity, secrecy and dispatch."[2]

I am convinced that the history of the past few years once again confirms the Framers' wisdom. When Congress stays within its capacities, it can be a helpful participant in formulating policy. In a wide range of recent disagreements with the President, however, the Congress has used policy levers that go well beyond the ones the Constitution intended for the legislative branch. The issue is not limited to a formal violation of a parchment document. When Congress steps beyond its capacities, it takes traits that can be helpful to collective deliberation and turns them into a harmful blend of vacillation, credit-claiming, blame avoidance and indecision. The real world effect often turns out, as Caspar Weinberger has said, not to be transfer of power from the President to the Congress, but a denial of power to the government as a whole.[3]

The following pages examine three policy areas: diplomacy, covert operations and war powers. In all three, congressional overreaching has systematic policy effects. It is important to be clear at the outset that my argument is about systematic effects, not individual policy disagreements. For example, Congress's efforts to dictate diplomatic bargaining tactics, as well as the efforts by individual members to con-

duct back channel negotiations of their own, make it extremely difficult for the country to sustain a consistent bargaining posture for an extended time period, whomever the President and whatever the policy. In intelligence, the problem goes beyond consistency to a more basic conflict between action and inaction. One proposal made in the wake of Iran-Contra would have required the President to notify Congress of all covert actions within 48 hours, without any exceptions. By refusing to allow the President any leeway, no matter how urgent the circumstances, that proposal would have set up a direct conflict between Congress's procedural requirements and the President's constitutional obligation to act. The War Powers Act combines both of these problems in one statute. Just as congressional diplomacy tilts the balance away from patient diplomacy, so does the War Powers Act tilt the balance away from a patient, measured application of force toward either a quick strike or inaction. And just as requiring 48 hour notification for all covert operations favors inaction over action in rare but important circumstances, so does the War Powers Act favor inaction over measured action in the more common circumstances in which that act might be applied. In all of these cases, the underlying issues are the same: the relationships between deliberation and action, and between procedure and substance. To explain why, let us begin with congressional diplomacy.

CONGRESSIONAL DIPLOMACY

Congressional diplomacy has two different aspects: (1)Congress's attempts to tie the President's negotiating hands, and (2)back channel negotiations conducted by some leading members of Congress with foreign governments. The first is familiar and therefore will be treated more briefly. I shall concentrate on one major bill to illustrate, but any of a dozen would do just as well.

Instructing the President: In 1987 and 1988, the House of Representatives added provisions to the Defense Authorization bill that would have required the President to abide by provisions of the unratified, decade old strategic arms limitation treaty between the United States and Soviet Union (SALT II). Although the House bills did not mention SALT II by name, they tried to prohibit the President from deploying weapons that would have taken our nuclear arsenals above three of the treaty's "sublimits" for submarines, missiles and bombers. The Senate rejected the House's sublimits in both years, but House and Senate conferees required the President to retire old submarines to keep the United States warhead total near the overall SALT II limit.

President Reagan opposed the restriction in both years because (1) the Soviet Union was violating other aspects of the SALT II treaty, (2) the Soviet Union was deploying 30 per cent more multiple warhead missiles (820) than the United States (550), (3) the President was in the midst of trying to negoti-

ate a 50% reduction of nuclear arms in a Strategic Arms Reduction Treaty (START) and (4) unilateral adherence to SALT II would have undercut the President's negotiating position in the START talks. For tactical reasons, the President was willing to sign a bill in 1987 that required him to retire one old submarine. But in 1988, he decided to veto the authorization bill to make a principled defense of his position during an election year. House Democrats backed down, but they did not change their views about the propriety of the original bill.

No one can dispute Congress's constitutional power to determine what weapons should be funded and deployed. The issue therefore is not one of constitutional law, but of Congress's willingness to second guess the President's bargaining tactics. To put the point bluntly, liberal Democrats doubted the President was telling the truth when he said he was trying to negotiate a verifiable arms treaty that would involve major reductions. They seemed to believe that the best way to negotiate a treaty was to place limits on our side and then politely ask the Soviet Union to follow.

At least they were consistent. The framework almost exactly paralleled 1982, when liberal Democrats in the House failed by two votes to pass a nuclear freeze resolution that would have prevented us from deploying intermediate range missiles in Europe, even though the Soviets had already deployed similar missiles of their own. At that time, House Democrats said that deployment would make the Russians angry and break up

Intermediate Nuclear Force (INF) negotiations. The President replied that we had to deploy -- that is, we had to assure our defenses would be strong even if there were no agreement -- before the Soviets would have a reason to talk. President Reagan's view prevailed, narrowly. The missiles were deployed, the Soviet Union returned to the bargaining table, and in 1988 a treaty was ratified that for the first time banned a whole class of nuclear weapons from the arsenals of both major superpowers.

There is an important lesson here that goes beyond the specific predispositions Republicans and Democrats have about military strength. Congress does have the constitutional power to prevent missiles from being built or deployed. When it makes those decisions based on its budgetary and strategic priorities, it is making the kind of decision a legislature is equipped institutionally to make. But trying to dictate bargaining tactics is another matter. President Reagan's record on INF shows that negotiating success with the Soviets requires a willingness to stick patiently to a tough strategy. But patience, the willingness to stand pat, is in reality a form of decisive action -- the kind of action a single person is better able than a collective body to deploy over time. Congress, made up of 535 people most of whom have to stand for reelection every two years, finds it difficult to speak with one voice for a sustained time period. A significant number of

its members at any given moment, on any given issue, are looking for quick results -- something to show the voters before the next election.

It would be the better part of prudence, therefore, for Congress to maintain a collective silence in its formal lawmaking capacity about ongoing negotiations. Presidents do need, of course, to consult with members of Congress. Any negotiation that proceeds without paying attention to the need for Senate ratification, or the participation of both chambers in passing implementing legislation, is a negotiation that is headed for trouble. But consultation, advice and influence are far removed from binding instructions conveyed through formal legislative acts. There is time enough for formal action after a negotiation is finished, when Congress can deliberate responsibly and collectively about a real product.

MEMBERS AS DIPLOMATS

As troubling as congressional negotiating instructions may be, they pale when compared to the disturbing tendency of some members to conduct their own back channel negotiations with foreign leaders. Increasingly, members of Congress have set themselves up as alternative Secretaries of State. Senators and Representatives from both parties have crossed the line separating what I would consider to be legitimate legislative fact-finding from the realm of diplomatic communication. Some recent examples will show how serious the problem has become.

The Speaker and Nicaragua: The Speaker of the House symbolically represents the House's self-understanding of its role. The first example, therefore, will be about his actions at one of the many potential turning points in negotiations between the Communist government of Nicaragua and the Nicaraguan Democratic Resistance. To place the events in context, the Organization of American States was scheduled to meet in Washington in the middle of November, 1987.

On November 9, a few days before the OAS sessions, President Reagan announced for the first time that the United States would be willing to negotiate security issues with Nicaragua, but only if the representatives of four other Central American countries were also involved. The question of direct U.S.-Nicaragua talks had been a sticky one for some time. The Sandinistas were trying to portray the Resistance as puppets of the United States. Their aim was to negotiate a deal that would cut off U.S. support for the Contras in return for a promise that the Nicaraguan government would not export arms to the Communists in El Salvador and elsewhere. Left out of the Sandinista equation would have been any limitations on the military support Nicaragua had been receiving from the Soviet Union and Cuba, or any meaningful reforms that would move the Managua regime toward genuine political freedom.

President Reagan's November 9 statement was a carefully measured response to the ongoing stalemate. The President was saying that we are, and always have been, open to discussing

some issues directly with Nicaragua and the other countries of Central America. But Nicaragua's main dispute is not with us, the President was saying. The Sandinistas still ought to begin direct talks with the Contras to negotiate a domestic political settlement conducive to pluralism and political freedom.

At this point, the Speaker of the House, Jim Wright, entered the picture. Here is Congressional Quarterly's description of the next few days.

> At his ornate office in the Capitol, Wright met with [Nicaraguan President Daniel] Ortega for more than an hour on Nov. 11. The next day, he met with Ortega again for nearly an hour, then spent about 90 minutes with three members of the Contra "directorate," the civilian leadership of the guerrilla force. Wright talked later in the day with Cardinal [Miguel] Obando [y Bravo] after he arrived in Washington from Managua.
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> On Nov. 13, Wright travelled to the Vatican Embassy in Washington for a final 90-minute session between Ortega and Cardinal Obando. At that session, Ortega gave the Cardinal a copy of his government's multi-point plan for a cease-fire....
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> [Rep. David E.] Bonior [D-Mich.], the House chief deputy majority whip, was the only other member of Congress at Wright's sessions with the Nicaraguans.
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> In his sessions with Ortega, Wright apparently discussed in detail the Nicaraguan's proposal for implementing a cease-fire. Sources said the plan originally contained nearly 20 points but was eventually reduced to 11 points, partly as a result of the Wright-Ortega discussions.[4]

These three days of meetings clearly were a series of negotiations, under any ordinary understanding of that term. Interestingly, they were conducted in secret, without including or adequately informing the State Department. After the sessions were over, the Sandinista leader crowed to the press on November 13 that his dealings with Wright would "leave the Administration totally isolated."[5]

Other Members and Nicaragua: Speaker Wright's November 1987 meetings were not isolated examples. Unfortunately, they built upon, and helped lend a sense of legitimacy to, a growing pattern of legislative branch intrusions into a field that was clearly intended to be executive in character. Consider the following examples, all of which also involved Nicaragua.

In April 1985, the House decided against Contra aid by two votes. The next week, Ortega took a trip to Moscow. His trip was a public relations fiasco for House Democrats who had voted against the Contras. Shortly afterward, Reps. Bonior and George Miller (D-CA) visited Managua, where they reportedly held a series of meetings with government officials and barred U.S. embassy officials from attending. According to one unnamed House Democratic leader who was quoted in a press account, the meetings were "dangerously close to negotiations." The point, according to one report, was to inform the Sandinistas that unless their government took steps toward pluralism, some congressional Democrats would be likely to switch votes and support Contra aid.[6]

At least Miller and Bonior gave the embassy a summary of their meetings after the fact. Sometimes, not even that much occurs. The same press account said, for example, that shortly before the same 1985 House vote, Senators John Kerry of Massachusetts and Tom Harkin of Iowa made a similar trip to Managua. That time, the two Senators not only kept embassy officials out of the meeting, but they did not even give a report to them afterwards.

Members of Congress do not need a personal meeting to intrude in the realm of diplomacy. On March 20, 1984, while the U.S. was still legally aiding the Contras, 10 House Democrats -- including then Majority Leader Wright, Michael Barnes, chairman of the Western Hemisphere subcommittee of the Foreign Affairs Committee, and other prominent members -- sent the famous (or infamous) "Dear Commandante" letter to Ortega. After declaring their opposition to Contra aid, the signers said, "we want to commend you and the members of your government for taking steps to open up the political process of your country." Although those steps were barely visible and clearly opportunistic, the signers went on to urge Ortega to continue what he had started to "strengthen the hands of those in our country who desire better relations."[7] In other words, the letter was telling Ortega how to behave to strengthen the legislative position those members of Congress who were opposed to official U.S. policy.

More Members, Other Countries: The following year, a different group of 13 non-leadership Democrats delivered a letter to Prime Minister Wilfried Martens of Belgium during the Prime Minister's state visit to the United States.[8] That letter mistakenly praised a (non-existent) "recent announcement by your Government to delay the initial deployment of Cruise missiles in your country." In fact, as one newspaper column noted, Martens strongly supported deployment against strong domestic political opposition.[9] As it turns out, the missiles were

deployed, and their deployment was an essential building block in negotiating the INF Treaty with the Soviet Union. The point, however, is not that these members of Congress were wrong. The point is that they stepped beyond the normal and fully legitimate realm of domestic political debate about foreign policy, to communicate directly with another government in an attempt to influence that government to behave in a manner that was contrary to U.S. foreign policy.

The problem, as I said earlier, is not limited to one party. One former Republican House member who stepped over what I think are appropriate lines was George Hansen of Idaho. Hansen made a ten day visit to Teheran In November 1979, two weeks after more than 60 Americans were taken hostage in the U.S. Embassy. His aim, Hansen said at the time, was to "get in on an unofficial basis and do business."[10]

Neither is the problem confined to the House. During the Iran-Contra hearings, the House and Senate investigating committees' received a series of 1986 State Department cables about American citizens who allegedly were visiting Eden Pastora "at [the] request of Sen. Jessie Helms." Pastora at that time was a Contra leader based south of Nicaragua. According to one of the cables (from Central America to Washington,) the Americans agreed that the United States would send supplies to Pastora in return for his willingness to undertake specific activities on behalf of the Nicaraguan Resistance. In

reply, the State Department fired back that it was "astounded" because the private citizens were "not in a position to commit the U.S. government."[11]

A Recurring Problem: The problem of private diplomacy is not new. In 1798, a Dr. George Logan was accused of meddling in negotiations between the United States and France. Although there was dispute over the facts, he was suspected by many Federalists of having been a secret envoy sent to France to represent the Jeffersonian Democrats. In response, Congress passed a law the next year that made it criminal for any citizen of the United States, without the permission of the U.S. government,

> Directly or indirectly [to] commence, or carry on, any verbal or written correspondence or intercourse with any foreign government, or any agent or officer thereof, with an intent to influence the measures or conduct of any foreign government, or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or defeat the measures of the government of the United States.

The only exception in the act was for individuals seeking to redress a personal injury to themselves.[12]

The Logan Act is still a part of the U.S. Code, with only minor grammatical changes.[13] Although aimed at the most obvious level against private citizens, congressional debate at the time made it clear that the function belonged to the executive branch, and outrage was expressed not only at Dr. Logan's own role, but at the alleged support he received from members of the opposition political party who did not have the President's blessings. It

is significant, as the noted constitutional historian Charles Warren wrote when he was Assistant Attorney General, that the more than two hundred pages of debate about the act are printed in the Annals of Congress under the heading, "Usurpation of Executive Authority."[14]

Unfortunately, political and legal difficulties have made the Logan act all but a dead letter in practical terms. As a result, it is important to find a less confrontational, more enforceable way to restore the President's constitutional role as the sole organ of diplomacy. To meet that objective, some of us drafted a measure in 1988 that would have required members of Congress to report any communications with foreign representatives within 48 hours after they occur. This modest proposal may not prevent individual members from overstepping the bounds, but at least it would insure that the government's only official channel knows what is going on.

The basic issue is not about a reporting requirement, however. Congress's diplomatic interventions undermine the country's ability to act effectively in the international arena. Domestic disputes over foreign policy are fully legitimate, but the Constitution's Framers were explicit about the dangers of projecting our internal disputes externally. Their debates referred to situations that almost exactly parallel the one in the 1984 "Dear Commandante" memorandum. Every foreign leader in a dispute with this country has an incentive to play upon divisions inside the United States. To the extent that we let mem-

bers of Congress behave as if they are diplomats, we guarantee foreign opportunism under all future Presidents of either party. The United States needs to speak to other countries with one voice. Congress, by its nature, cannot do so. That is why the Framers separated the foreign policy powers as they did. While some other constitutional issues may be in dispute, there can be no doubt that the President was meant to be the "sole organ" -- the eyes, ears and mouth -- of this country's diplomacy.[15]

COVERT OPERATIONS

The idea of a 48-hour "reverse notification" for members of Congress was originally proposed as an amendment to an ill advised 1988 attempt to revise the Intelligence Oversight Act of 1980. Under the 1980 law, all agencies and entities of the United States involved in intelligence activities are required to notify the House and Senate intelligence committees (or, under special conditions, the chairmen and ranking minority members of the two committees, and four leaders of the House and Senate) before beginning any significant, anticipated intelligence activity. The law also contemplated, however, that there might be some conditions under which prior notice would not be given. In those situations, it required the President "to fully inform the intelligence committees in a timely fashion."

Under this law, the intelligence committees have become significant players whose support any prudent Administration would do well to encourage. The 1980 law did not challenge the Presi-

dent's inherent constitutional authority to initiate covert actions. In fact, that law specifically denied any intention to require advance congressional approval for such actions. Nevertheless, Congress does have a very strong lever for controlling any operation that lasts more than a short period of time.

Operations undertaken without prior approval have to be limited to the funds available through a contingency fund. Constitutionally, Congress could abolish that fund and require project-by-project financing. Of course, such a decision would be suicidal because it would deprive the country of the ability to react quickly to breaking events. But because Congress does have this draconian power in principle, the intelligence committees can and do use the annual budget process to review every single ongoing operation. Any time Congress feels that an operation is unwise, it may step in to prohibit funds in the coming budget cycle from being used for that purpose. As a result, all operations of extended duration have the committees' tacit support. Considering how many people in Congress and the general public have reservations about all covert operations, this is an important political base for any Administration concerned about the country's long-term intelligence capabilities.

Proposed 48-Hour Rule: The intelligence committees can only review covert operations if they know about them, however. President Reagan did not notify the intelligence committees of his Administration's 1986 sales of arms to Iran for almost eleven

months after signing a formal finding to authorize them. I do not think anyone in Congress believes this was timely. The important question for the future is, how should Congress respond?

In 1988, the Senate passed and two House committees reported legislation that would have required the President under all conditions, with no exceptions, to notify Congress of all covert operations within 48 hours of their start. Early in 1989, Speaker Wright announced that the bill temporarily would be shelved "as an opening gesture of good faith on our part" toward the new Administration. However, the Speaker also specifically reserved the option to reintroduce the bill if the situation calls for it.[16] Therefore, the underlying theoretical issues remain to be addressed.

At the heart of the dispute over requiring notification within 48 hours was a deeper one over the scope of the President's inherent constitutional power. I believe the President has the authority, without statute, to use the resources placed at his disposal to protect American lives abroad and to serve certain other important foreign policy objectives. The range of the President's discretion does vary, as Justice Jackson said in his famous concurring opinion in the Steel Seizure Case. When the President's actions are consonant with express congressional authorizations, discretion can be at its maximum. A middle range of power exists when Congress is silent. Presidential power is at its lowest ebb when it is directly opposed to congressional mandate.[17] What is interesting about this typology, however, is

that even when Congress speaks, and the President's power is at its lowest, Jackson acknowledged that there are limits beyond which Congress cannot legislate.[18] Those limits are defined by the scope of the inviolable powers inherent in the Presidential office itself.

Let me now apply this mode of analysis to the sphere of covert action. Congress was legislatively silent about covert action for most of American history, knowing full well that many broad ranging actions had been undertaken at Presidential initiative, with congressionally provided contingency funds.[19] For most of American history, therefore, Presidents were acting in the middle range of the authority Jackson described. Congress does have the power, however, to control the money and material resources available to the President for covert actions. The 1980 oversight act, and its predecessors since 1974, were attempts by Congress to place conditions on the President's use of congressionally provided resources. Those conditions, for the most part, have to do with providing information to Congress. Because Congress arguably cannot properly fulfill its legislative function on future money bills without information, the reporting requirements can be understood as logical and appropriate extensions of a legitimate legislative power.

The constitutional question is: what are the limits to what Congress may demand as an adjunct of its appropriations power? Broadly speaking, Congress may not use the money power to achieve purposes that it would be unconstitutional for Congress to

achieve directly. It may not place a condition on the salaries of judges, for example, to prohibit the judges from spending any time (i.e., any part of their salaries) to reach a particular constitutional conclusion.[20] In the same way, Congress may not use its clearly constitutional powers over executive branch resources and procedures to invade an inherently Presidential power. For example, Congress may not use an appropriations rider to deprive the President of his authority as the "sole organ of diplomacy" to speak personally, or through any agent of his choice, with another government about any subject at all.

How would this reasoning apply to the proposed 48-hour rule? Congress properly justified the 1980 notification requirement in terms of the need for information as a necessary adjunct to the legislative power to appropriate money. By using this justification, Congress stood squarely within a line of cases upholding Congress's contempt power. In the 1821 case of Anderson v. Dunn the Supreme Court upheld the use of contempt as an implied power needed to implement others given expressly by the Constitution. In a statement that applies to all of the government's branches, the Court said: "There is not in the whole of that admirable instrument, a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate."[21]

Using this reasoning, the Court argued that even though courts were vested with the contempt power by statute, they would have been able to exercise that power without a statute. For the

same reason, the court held, Congress must have inherent authority to exercise a similar power.[22] Later cases tried to circumscribe Congress's contempt power, but the power itself was always held to be an adjunct to Congress's legislative functions and therefore to rest on an implied constitutional foundation.[23]

The Court's argument might seem to support Congress's implied right to demand information. But what happens if one branch's right to demand information confronts another implied power, equally well grounded on an explicit constitutional foundation, claimed by another one of the government's branches? That was the issue in the executive privilege case of U.S. v. Nixon.[24] In that case, we learned that the decision in any specific case will depend upon the competing claims of the two branches at odds with each other.

The proposed 48-hour bill explicitly recognized the President's inherent power to initiate covert actions. The 1980 oversight act and the 48-hour bill both took pains to say that by requiring notification, Congress was not asserting a right to approve Presidential decisions in advance. But if the President has the inherent power to initiate covert actions, then the same rule about implied powers that gives Congress the right to demand information, also gives the President the implied powers he may need to put his acknowledged power into effect.

In most cases, there is no conflict between the President's power to initiate an action, and requiring the President to notify the intelligence committees (or a smaller group of leaders) of

that operation in advance. In a few very rare circumstances, however, there can be a direct conflict. Consider a clear cut example from the Carter Administration.

According to Admiral Stansfield Turner, who was the Director of Central Intelligence at the time, there were three occasions, all occurring while Americans were being held hostage in Iran, in which the President Carter withheld notification during an ongoing operation. In each case, Turner said, "I would have found it very difficult to look ... a person in the eye and tell him or her that I was going to discuss this life threatening mission with even half a dozen people in the CIA who did not absolutely have to know".[25] Of the three cases mentioned by Turner, the one that raised the key issue most directly occurred when notification was withheld for about three months until six Americans could be smuggled out of the Canadian Embassy in Teheran. In that operation, the Canadian government -- whose own embassy was being placed at extreme risk -- apparently made withholding notification a condition of their participation.[26] Since Congress cannot tell another government what risks that government should be willing to take with the safety of its own personnel, the decision to go forward had to be made on Canada's terms or not at all. Under these conditions, the President could not have fulfilled his constitutional obligation to protect American lives if he insisted on notifying Congress within 48 hours.

The Iranian hostage examples show that the situations under which notification may have to be withheld depend not on how much time has elapsed, but on the character of the operations them-

selves.[27] There can be no question that when other governments place specific security requirements on cooperating with the United States, the no-exceptions aspect of the proposed 48-hour rule would be equivalent to denying the President his constitutionally inherent power to act.

Leaks: Supporters of the 48 hour bill tried to respond to the concerns about foreign government cooperation by sidestepping the precise issue and describing the concern about congressional leaks as being ill founded. I wish that were so. It is true that President Reagan gave timely reports to the Intelligence Committees about every operation during his Administration (except the Iran arms sales), and that most of the information was kept secure. It is wrong to suggest, however, that Congress is leak proof. An entire chapter of the minority report of the Iran-Contra investigating committees was devoted to congressional leaks.[28]

It is bad enough when any member of Congress or staff person discloses classified information. It is far more serious when a leak comes from the so-called Gang of Eight (House and Senate Intelligence Committee chairmen and ranking minority members, Speaker and Minority Leader of the House, Majority and Minority Leader of the Senate).[29] This is the select group the oversight act designates for notification of operations considered too sensitive to be shared with the full committees. But the most remarkable situation of all comes when a member of this group tries to justify leaks as a matter of policy.

That is exactly what happened during the closing weeks of the 100th Congress. The 48 hour bill never came up for House floor debate because of the public outcry over a possible leak by the Speaker of the House. At his September 20 daily press briefing, Speaker Wright told reporters: "We have received clear testimony from CIA people that they have deliberately done things to provoke an overreaction on the part of the government in Nicaragua."[30] Based on the press reports, Minority Leader Robert Michel and I sent a letter the next day to the House Select Committee on Standards of Official Conduct (the "ethics committee",) asking it to investigate whether the Speaker had violated Rule 48 of the House, governing the disclosure of classified information.[31]

It would be wrong of me at this stage, before the Ethics Committee concludes its investigation, to comment on or speculate about whether a leak did occur. Whatever the conclusion on this matter, however, the Speaker's immediate public response to the issue was troubling. "The fact that a matter is classified secret, doesn't mean it's sacrosanct and immune from criticism," Wright told a group of reporters. "It is not only my right but my responsibility to express publicly my opposition to policies I think are wrong."[32] The premise underlying this statement is not new. At least one Senator and one former member of the House have been quoted as saying similar things.[33] But familiarity in this case does not breed acceptance. If Congress is to have any role in overseeing covert operations, it must take seriously its

responsibility to protect the information it receives. What Wright asserted was that it might be acceptable for a single member of Congress to "blow" a covert action, with all the danger that implies, by discussing it overtly.

Now consider the Speaker's stated position in light of (1) the characteristic differences between a legislature and an executive, and (2) the fact that a decision to leak in effect is a decision to kill an operation. Virtually no policy of any consequence will have unanimous support in a democratic legislature. That may be good for deliberation, but makes it very tough to maintain operational security. If more members took the Speaker's position, maintaining secrecy after congressional notification would not just be hard: it would be literally impossible.[34] There would be a direct conflict between notification and the country's ability to do anything covertly. That is one reason -- however important reporting and consultation may be -- why the final decision about when to notify Congress about unusually sensitive cases is a decision that ultimately must rest with the President.

The Constitutional Balance: So, on the one side of the scale, we see from the Canadian example, and from the problem of leaks, that the President's implied power to withhold notification may, in rare and extraordinary cases, be a necessary adjunct to the inherent power to act. What is on Congress's side of the constitutional scale to warrant notification within 48 hours, without any exceptions? The best argument, to quote the Senate Intelli-

gence Committee's 1988 report, is that notification is needed "to provide Congress with an opportunity to exercise its responsibilities under the Constitution."[35] The problem is that there is no legislative power that requires notification under all conditions during any precisely specified time period. All Congress needs to know is whether to continue funding ongoing operations. We have had that information in every case, with the exception of President Carter's and President Reagan's hostage-related Iran initiatives.

I suppose you could argue that failure to notify might, in the extreme, deprive us of our ability to decide about continuing to fund a particular operation. Iran-Contra was such an extreme. But the choice is not one-sided. The price of assuring notification about all operations within a specific time period is to make some potentially life-saving operations impossible. On the scale of risks, I am more concerned about depriving the President of his ability to act than I am about Congress's alleged inability to respond. I feel this way not because I am sanguine about every decision Presidents might take. Rather, it is because I am confident Congress eventually will find out in this leaky city about decisions of any consequence. When that happens, Congress has the political tools to take retribution against any President whom it feels withheld information without adequate justification. President Reagan learned this dramatically in the Iran-Contra affair. It is a lesson no future President is likely to forget.

Underlying Issue -- Substitution For Public Debate: Underlying the dispute over notification is a more basic issue. Congress insists on notification because the executive's consultations with the intelligence committees substitute for the open debate and deliberation available in other policy arenas. The committees thus serve as a forum for mediating the tension between the Constitution's two-sided concern for security and informed consent. On the whole, the committees are not simply barriers for Presidents to overcome. They can help Presidents build needed political support when the normal public tools cannot be used.

But what happens if there is no consent? That is, what if the committee, or a significant proportion of its members, thinks a particular covert operation is a bad idea? Sometimes, the committee can persuade the executive branch to change its mind. But what if persuasion does not work?

One answer offered by some of my colleagues is that no covert action should be undertaken unless it is supported by a bipartisan consensus. It is a good idea to begin from a presumption in favor of bipartisanship, but wishing for consensus provides no guidance about how to behave when there are real disagreements. To insist upon consensus as a precondition for action is equivalent to saying the President should not act in the face of disagreement. In effect, it is equivalent to taking the President's power and giving it to Congress. In fact, demanding consensus could be worse than requiring an up or down vote. If

taken seriously, the President would need the support of a super-majority before he could do anything. He might even need unanimity, if more members come to accept the view that leaking is legitimate. A consensus requirement, therefore, would be a decision rule weighted heavily toward the inaction side of any action-versus-inaction dispute. In the real world of breaking events, it is important to recognize that inaction <u>is</u> a form of action or decision.

To require or expect a consensus before action, in other words, is only one possible answer to questions that should be articulated more clearly and openly. Some of the questions are: Who should hold what levers at what stage of the process? Under what political and legislative conditions should the presumption be weighted toward the President or toward Congress? That is, what rules should decide who prevails under conditions of stalemate? These questions apply not only to covert operations, but to national security more generally. To broaden the discussion, therefore, I turn now to the War Powers Act.

WAR POWERS

Like the proposed 48 hour bill, the War Powers Resolution[36] is a classic example of the problems with "never again" legislation. The act was written to insure that the United States would "never again" be drawn into a war without a specific congressio-

nal declaration authorizing U.S. participation.* The main "teeth" consisted of four provisions. (1) The President was required to submit a report to the Speaker of the House and President pro tempore of the Senate, within 48 hours, describing the reasons for introducing U.S. armed forces into hostilities, or into situations in which imminent involvement in hostilities was clearly indicated by the circumstances, or under certain other conditions. (2) The President was required to terminate the involvement of U.S. forces within 60 calendar days, unless Congress specifically declared war or extended the time period. (3) Congress may require the President to withdraw U.S. forces at any time by passing a concurrent resolution -- a form of congressional action that does not require a Presidential signature. (4) Neither appropriations acts nor treaties count as congressional authorizations to use force, even if the use of force is clearly required by the terms of a previously ratified treaty.

The third provision needs little discussion because it involves a legislative veto of the sort the Supreme Court declared unconstitutional in 1983.[37] The others have never been tested authoritatively in court, but the entire framework strikes me as being unworkable and of dubious constitutionality. The War Powers Resolution explicitly assumes, and states, that the President may not constitutionally use force without a formal declara-

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*Let us put aside, for the moment, the historical fact that the Tonkin Gulf Resolution, authorizing the Vietnam War, clearly would have satisfied the terms of the War Powers Act.

tion of war or statutory authorization unless the country is under attack.[38] Only upon this assumption does the act's most essential feature -- its use of the clock -- make any sense. In the view of the act's main sponsors, the sixty day clock was granting the President authority that it was fully within Congress's constitutional power to withhold. That authority was set to expire after two months because that should be enough time for Congress to reauthorize. If Congress fails to do reauthorize, the sponsors concluded that the Constitution requires withdrawal because the President has no independent authority to act without Congress.[39]

I cannot accept such a limited view of the President's inherent constitutional powers. When the Constitutional Convention debated the war power on August 17, 1787, it decided to change draft language that would have given Congress the power to <u>make</u> war to the power to <u>declare</u> war. James Madison and Elbridge Gerry defended the change in the congresisonal power by saying it was necessary for "leaving the Executive the power to repel sudden attacks." Because of this statement, the advocates of a weak executive have claimed that the convention intended to limit the President's inherent power to that single situation. What these advocates fail to note, however, is that in the very next speech of the same debate, Roger Sherman said that the new language giving Congress only the power to declare war would mean that the President would have the power "to commence war" and not simply defend against invasion.[40] It is no wonder, therefore, that the

narrow view of the President's power has been rejected throughout American history. From the earliest years, Presidents have deployed force without statutory authorization for purposes well beyond a defense against sudden attacks.[41]

I believe the Constitution gives the President not only the power, but the obligation to protect American lives, to enforce valid treaties and to defend other vital U.S. national interests. But the precise boundary of the President's inherent power is not crucial to my argument. Once one accepts the idea that there is any inherent Presidential power to act, the framework of the War Powers Act collapses of its own weight. Whatever the boundary, if the President's power to act comes directly from the Constitution, and not from Congress, then the same conditions that make an action valid on the first day of a crisis, would make the same action equally valid on the sixty-first day. The Constitution talks about who may exercise what power. It does not talk about how long. Congress cannot constitutionally set up a framework that declares an inherent Presidential power to be inoperative after a specific date.

I promised earlier, however, that I would not let my argument rest solely on legal abstractions. If the United States has to use force for an extended period, it clearly would be better for the country if the President were to show the world that he had support for what he is doing. Unfortunately, the War Powers Act paradoxically seems to make effective interbranch cooperation more difficult instead of less. It grates against the underlying

logic of the separation of powers and brings Congress's institutional proclivities to bear in exactly the ways the Framers understood would be harmful.

To understand why this is so, it is worth thinking about what a sixty day deadline could mean. The ticking clock could have at least three dangerous effects. It could easily encourage Presidents to escalate the use of force in the hope of obtaining a quick victory. In addition, it declares to our allies that our treaties express wishes, not dependable obligations. Finally, it tells any adversary that rather than negotiate, it should wait us out for sixty days to see whether we are serious.

These dangers arise from the way Congress works. By forcing a withdrawal in the absence of a specific congressional authorization, the act gives the political advantage to those members who oppose the President. Because bills have to go through a multi-stage process -- House committee, House floor, Senate committee, Senate floor, conference committee, and then back to the House floor and Senate floor -- it is always easier for opponents to derail a controversial bill than for supporters to pass it. The War Powers Resolution tries to get around this with expedited procedures to guarantee an initial House and Senate vote within a prescribed time period. But one vote cannot ensure that Congress will reach a conclusion. Because the act rests on the assumption that the power at issue comes from Congress, it preserves the constitutional right of both chambers to amend whatever resolution it may choose to discuss. As a result, the act, as a matter

of principle, cannot assure an agreement between the two chambers. That is more than enough of a wedge for a determined set of opponents or fence straddlers.

The opponents and fence straddlers will be abetted by Congress's institutional tendencies. Several recent studies of the act have shown that Congress typically tries to avoid responsibility for a clear decision, avoids confrontation when Presidents refuse to invoke the Act's terms, and prefers instead to praise successful Presidential actions or criticize unsuccessful ones after the fact.[42] In 1987, for example, the Senate spent a long time debating whether the War Powers Act should have been triggered by the President's decision to have the U.S. Navy escort reflagged Kuwaiti oil tankers in the Persian Gulf. The net result was a resolution that did nothing more than promise a future debate and decision. When it became apparent in 1988 that the President's policy was bearing positive fruits -- largely because our allies and the Gulf countries finally became convinced we were not going to cut and run -- the issue was dropped.

The War Powers Act's supporters say that the Senate's non-decision was possible only because President Reagan, like all of his predecessors, refused to submit the kind of report that would have triggered an expedited vote. But who can have any doubt, after debates over the order of battle, and after the Senate's final action, that a formal use of the act probably would have produced only a short term extension of the deadline to allow

more second guessing in the next round? Formally invoking the act would not have changed the political realities and therefore would not be likely to have changed the result.

The root question raised by the War Powers Act is not about the desirability of consultation, deliberation, or formal resolutions of congressional support. The more basic question, as I said in connection with intelligence oversight, is about finding an appropriate balance that will encourage deliberation without destroying the ability to act. I am firmly convinced that Congress would be no less likely to deliberate if there were no War Powers Act than when there is one. If anything, the absence of a sixty-day crutch would be more likely to force Congress to find a common denominator with the President. Meanwhile, as Congress goes through its normal bargaining gyrations, the nation's adversaries would at least be aware that the country's highest elected official is empowered to maintain a predictable course.

The War Powers Act therefore should be repealed. The idea of a ticking clock is based on wrongheaded constitutional assumptions that produce mischievous and dangerous results. Congress has plenty of constitutional and political power to stop a President whenever it wants to. Anyone who doubts this should look at the long list of foreign policy limitation amendments to the appropriations acts of the past decade. If Congress does not have the will to support or oppose the President definitively, the nation should not be paralyzed by Congress's indecision.

CONCLUSION

At its best, Congress is a deliberative body whose internal checks and balances favor delay as a method for stimulating compromise. At its worst, it is a collection of 535 individual, separately elected politicians, each of whom seeks to claim credit and avoid blame. Which ever of these faces Congress may put on at any given moment, the legislative branch is ill equipped to handle the foreign policy tasks it has taken upon itself over the past 15 years.

The purpose of the United States Constitution is to protect and promote liberty. But protecting liberty has at least two facets. In domestic policy, it has to do with insuring that proposed changes in law receive a proper airing to guard against minority or majority factional tyranny. The emphasis, therefore, is on forcing compromise and coalition, with the constitutional preference -- albeit not always the practice -- weighted toward inaction until compromise has been achieved.

The other aspect of liberty has to do with preservation and protection. According to the Declaration of Independence, governments are instituted not to create rights (which are "inalienable") but to secure them. Securing rights means, among other things, preserving the government's ability to react internationally to countries that may want to harm us. In the face of danger, a tilt toward inaction would have just the opposite effect from a tilt toward inaction in domestic law. Instead of helping secure our liberty, it would help those foreign powers

who want to endanger it. That is why the Constitution allowed a much greater scope for executive power in foreign than in domestic policy.

Underlying all this was the Framers' hard headed view of the tough world of international politics. They saw a world, much like today's, in which at least some states would work actively against our interests. They saw a world in which we would have adversarial relationships as well as friendly ones, a world in which force might have to buttress reason, a world in which there would always be some nation eager to exploit an inability to respond. Their world was different from ours in some important ways. Technology has shrunk the globe, making the need for quick response and predictability of purpose all that much more important. But the fundamentals of human nature -- from the motivations of sovereign states to the proclivities of domestic politicians -- remain unchanged. We would do well, therefore, to reinvigorate the Framers' understanding of the separation of powers as we head toward the 21st century.

ENDNOTES

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[1]U.S. House of Representatives, Select Committee to Investigate Covert Arms Transactions with Iran and U.S. Senate, Select Committee On Secret Military Assistance to Iran and the Nicaraguan Opposition, 100th Congress, 1st Session, Report of the Congressional Committees Investigating the Iran-Contra Affair, With Supplemental, Minority, and Additional Views, H.Rept. 100-433, S.Rept. 100-216 (Washington, D.C.: 1987), Minority Report, chap. 2-4, pp. 457-79.

[2]Alexander Hamilton, James Madison, and John Jay, The Federalist (Jacob Cooke, ed., 1961), No. 70, p. 471-72. Hereafter cited as Federalist.

[3]"Contrary to the political maxim that power abhors a vacuum, it is simply not the case that powers removed or stripped away from one branch will find a home in another. Power can be dissipated and lost. There are some tasks that one branch can perform that others simply cannot." Caspar Weinberger, "Non-Partisan National Security Policy: History, War Powers and the Persian Gulf," remarks prepared for delivery by Secretary of Defense Weinberger to the Naval Postgraduate School, Monterey California, November 2, 1987, as printed in U.S. Department of Defense, News Release 564-87, of the same date.

[4]John Felton, "Nicaragua Peace Process Moves to Capitol Hill," Congressional Quarterly, November 14, 1987, p. 2791.

[5]Ibid., p. 2789.

[6]Rowland Evans and Robert Novak, "Dash to Managua", The Washington Post, May 15, 1985.

[7]Letter from Jim Wright et al. to Commandante Daniel Ortega, March 20, 1984.

[8]Letter from Ronald V. Dellums et al. to Prime Minister Wilfried Martens, January 11, 1985.

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[9]Rowland Evans and Robert Novak, "Message to Martens," The Washington Post, February 6, 1985, p. A19.

[10]John Felton, "Iran: Tensions Mount as Crisis Continues," Congressional Quarterly, December 1, 1979, p. 2704.

[11]U.S. Congress, 100th Congress, First Session, Joint Hearings Before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Committee to Investigate Covert Arms Transactions with Iran, The Iran-Contra Investigation, Vol. 100-5, pp. 571-75. See also Vol. 100-3, pp. 92, 387 and Vol. 100-5, pp. 26-27.

[12]1 Stat. 613 (1799).

[13]18 U.S.C. 953.

[14]Charles Warren, Assistant Attorney General, History of Laws Prohibiting Correnspondence With a Foreign Government and Acceptance of a Commission, U.S. Senate, 64th Congress, 2d Sess., S.Doc. 64-696 (1917), p. 7. See also, Annals of Congress, Fifth Congress, 3d Sess., (Dec. 3, 1798 - March 3, 1789), pp. 2487-2721.

[15]See Iran-Contra Minority Report, chap. 3, pp. 463-66 and chap.4, pp. 472-73.

[16]John Goshko, "Wright, in 'Good Faith,' Delays Legislation Requiring Fast Notice of Covert Acts," The Washington Post, February 1, 1989; Bill Gertz, House Won't Ask 48-Hour Disclosure of Covert Operations," The Washington Times, February 1, 1989; Michael Oreskes, "Wright in Gesture to Bush, Shelves Bill on Covert Acts," The New York Times, February 1, 1989.

[17]Youngstown Sheet and Tube Co. v. Sawyer 343 U.S. 579, 635-38 (1952).

[18]Ibid. at 645.

[19]For a summary, see U.S. House of Representatives, 100th Congress, First Session, Select Committee to Investigate Covert Arms Transactions with Iran and U.S. Senate, 100th Congress, First Session, Select Committee On Secret Military Assistance

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to Iran and the Nicaraguan Opposition, Report of the Congressional Committees Investigating the Iran-Contra Affair, H.Rept. 100-433, S.Rept. 100-216 (November 1987), pp. 467-69.

[20]For a somewhat analogous but less absurd case, see Brown v. Califano 627 F. 2d 1221 (1980).

[21]Anderson v. Dunn, 6 Wheat. 204, 225-26 (1821).

[22]Ibid. at 628-29.

[23]Kilbourn v. Thompson, 103 U.S. 168 (1881), read the power narrowly, but McGrain v.Dougherty, 273 U.S. 135 (1927) and Sinclair v. U.S., 279 U.S. 263 (1929) in turn read Kilbourn narrowly. Later cases have tended to involve conflicts between the contempt power and the First Amendment, Watkins v. U.S., 354 U.S. 178 (1957) and Barenblatt v. U.S., 360 U.S. 109 (1959).

[24]U.S. v. Nixon 418 U.S. 683 (1974).

[25]U.S. House of Representatives, Permanent Select Committee on Intelligence, Subcommittee on Legislation, 100th Cong., 1st Sess., Hearings on H.R. 1013, H.R. 1371, and Other Proposals Which Address the Issue of Affording Prior Notice of Covert Actions to the Congress, April 1 and 8, June 10, 1987, p. 45. See also 46, 49, 58, 61.

[26]Ibid.,p. 158. Also see: Letter from Secretary of Defense Frank Carlucci to David Boren, chairman of the Senate Select Committee on Intelligence, August 8, 1988.

[27]It is worth emphasizing that the proposed bill would have required notification within 48 hours of an operation's start -- that is, when the U.S. began putting people in place, not when the operation is finished.

[28]Iran-Contra Minority Report, ch. 13, pp. 575-80.

[29]The Iran-Contra Minority Report indicated two occasions when there apparently were inadvertant, unauthorized disclosures from past Senate committee members in this group of eight. Ibid., p. 577.

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[30]"Wright Says CIA Operatives Aim at Provoking Sandinistas," by Jim Drinkard, Associated Press wire service, September 20, 1988; "CIA Attempted to Provoke Sandinistas, Wright Asserts," by Joe Pichirallo, The Washington Post, September 21, 1988, A1 and A28; "CIA Tied to Nicaragua Provocations," by Susan F. Rasky, The New York Times, September 21, 1988; "Wright Draws Fire for Spilling Secrets," by Bill Gertz and Peter LaBarbera, The Washington Times, September 21, 1988, A1 and A11.

[31]See also H.Res. 561, 100th Congress, 2d Session, filed September 30 by the six Republican members of the House Select Committee on Intelligence.

[32]"Wright's Confident House Panels Will Drop Complaints About CIA Disclosures," by Jim Drinkard, Associated Press wire service, September 26, 1988; "Congressmen Have Right to Reveal Secrets, Wright Says," by Bill Gertz and Peter LaBarbera, The Washington Times, September 27, 1988, A1.

[33](1) "The late Rep. Leo Ryan told me (in 1975) that he would condone such a leak if it was the only way to block an ill conceived operation." See Daniel Schorr, "Cloak and Dagger Relics," The Washington Post, November 14, 1985, A23. (2) Senator Joseph Biden, then a member of the Intelligence Committee, told a reporter he had "twice threatened to go public with covert action plans by the Reagan Administration that were harebrained." See Brit Hume, "Mighty Mouth," The New Republic, September 1, 1986, p. 20.

[34]In the 1970s, when operations had to be reported to many more committees, former Director of Central Intelligence William Colby said that "every new project submitted to this procedure leaked, and the 'covert' part of CIA's covert action seemed almost gone." See William Colby, Honorable Men (1978), p. 423.

[35]U.S. Senate, 100th Congress, 2d Session, Select Committee on Intelligence, Intelligence Oversight Act of 1988, S.Rept. 100-276 (Jan. 27, 1988), p. 21.

[36]P.L. 93-148 [H.J.Res. 542], 87 Stat. 555, 50 U.S.C. 1541-48, passed over the President's veto November 7, 1973.

[37]Immigration and Naturalization Service v. Chadha 462 U.S. 919 (1983).

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[38]P.L. 93-148, Sec. 2 (c).

[39]See, for example, U.S. Senate, Committee on Foreign Relations, 92nd Congress, 2nd Sess., War Powers, S.Rept. 92-606, to accompany S.2956 (Feb. 9, 1972), pp. 4,12.

[40]Max Farrand, The Records of the Federal Convention of 1787, (New Haven, Conn.: Yale University Press, 1937), 4 vols., Vol. II, pp. 318-19.

[41]See Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power (1976), passim. Also see J.T. Emerson, "War Powers Legislation," 74 W.Va.L.Rev. 53, 88-119 (1972). Emerson's article ends with a long listing of the occasions on which force was used without a declaration of war. A revised version of the list appears in U.S. House of Representatives, Committee on Foreign Affairs, 93rd Cong., 1st Sess., War Powers, Hearings Before the Subcommittee on National Security Policy and Scientific Developments, Exhibit II, pp. 328-376 (1973).

[42]See Pat M. Holt, The War Powers Resolution (Washington, D.C.: American Enterprise Institute, 1978), p. 33; Robert F. Turner, The War Powers Resolution: Its Implementation in Theory and Practice (Philadelphia, Pa.: Foreign Policy Research Institute, 1983), pp. 119-25.