

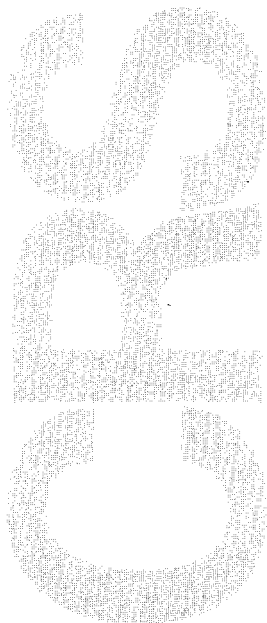
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THE WAR POWERS RESOLUTION: A DECADE OF EXPERIENCE

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## ABSTRACT

The War Powers Resolution was passed by Congress to insure a congressional voice in decisions to send U.S. armed forces abroad into hostilities or situations of imminent hostilities. This report analyzes the provisions of the Resolution and a decade of experience with it.



## THE WAR POWERS RESOLUTION: BACKGROUND AND ISSUES

Under the Constitution, the war powers are divided between Congress and the President. Among other relevant grants, Congress has the power to declare war and raise and support the armed forces (Article I, section 8), while the President is Commander in Chief (Article II, section 2). It is generally agreed that the Commander in Chief role gives the President power to utilize the armed forces to repel attacks against the United States, but there has long been controversy over whether he has the power to send forces into hostile situations abroad without a declaration of war or other congressional authorization.

During the Vietnam war, when the United States found itself involved for many years in an undeclared and unpopular war, Congress sought to reassert its authority to decide when the United States should become involved in a war or the armed forces utilized in circumstances that might lead to war. On Nov. 7, 1973, it passed the War Powers Resolution (P.L. 93-148) over the veto of President Nixon. The main purpose of the Resolution was to circumscribe the President's authority to use armed forces abroad in hostilities or potential hostilities without a declaration of war or other congressional authorization, yet provide enough flexibility to permit him to respond to attack or other emergencies.

After ten years, the War Powers Resolution remains controversial. Some Members of Congress believe the Resolution has served as a restraint on the use of armed forces by the President and has given Congress a vehicle for asserting its war powers. Others have proposed amendments to the Resolution because they believe it has not been effective in assuring a congressional voice in committing U.S. troops to potential conflicts abroad. Still other Members of Congress, along with many executive branch officials, contend that the President needs more flexibility in the conduct of foreign policy and that the time limitation in the War Powers Resolution is unconstitutional and impractical. A few have suggested it be repealed. The central issue remains whether the War Powers Resolution is an effective and appropriate instrument for assuring that the President and Congress share in decisions to send U.S. forces into conflict abroad.

This paper examines the provisions of the War Powers Resolution and the experience with it in its first ten years.

## I. PROVISIONS OF THE WAR POWERS RESOLUTION

### Title

Section 1 establishes the title, "The War Powers Resolution." The law is frequently referred to as the "War Powers Act," the title of the measure passed by the Senate. Although the latter is not technically correct, it does serve to emphasize that the War Powers Resolution, embodied in a joint resolution which complies with constitutional requirements for lawmaking, is a law.

### Purpose and policy

Section 2 states the Resolution's purpose and policy, with Section 2(a) citing as the primary purpose to "insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."

Section 2(b) points to the Necessary and Proper Clause of the Constitution as the basis for legislation on the war powers. It provides that "Under Article I, section 8, of the Constitution it is specifically provided that Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States...."

Section 2(c) states the policy that the powers of the President as Commander in Chief to introduce U.S. armed forces into situations of hostilities or imminent hostilities "are exercised only pursuant to --

- (1) a declaration of war,
- (2) specific statutory authorization, or
- (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."

### Consultation and reporting requirements

Section 3 requires the President to consult with Congress prior to introducing U.S. armed forces into hostilities or imminent hostilities. The consultation provision is discussed in more detail in Part IV of this report.

Section 4 requires the President to report to Congress whenever he introduces U.S. armed forces abroad in certain situations. Of key importance is Section 4(a)(1), which requires the President to report the introduction of troops "into hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances," because it triggers the time limit in section 5(b). Part III of this report discusses further the reporting requirements.

### Congressional action

Section 5(a) deals with congressional procedures for receipt of a report under section 4(a)(1). It provides that if a report is transmitted during a congressional adjournment, the Speaker of the House and the President pro tempore of the Senate, when they deem it advisable or if petitioned by at least 30 percent of the Members of their respective Houses, shall jointly request the President to convene Congress in order to consider the report and take appropriate action.

Section 5(b) was intended to be the main teeth of the War Powers Resolution. After a report "is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier," section 5(b) requires the President to terminate the use of U.S. Armed Forces after 60 days unless Congress (1) has declared war or authorized the action; (2) has extended the period by law; or (3) is physically unable to meet as a result of an armed attack on the United States. The 60 days can be extended for 30 days by the President if he certifies



that "unavoidable military necessity respecting the safety of United States Armed Forces" requires their continued use in the course of bringing about their removal.

Section 5(c) requires the President to remove the forces at any time if Congress so directs by concurrent resolution; the effectiveness of this subsection is uncertain because of the Supreme Court's decision on the legislative veto. It is discussed in Part II of this report.

#### Priority procedures

Section 6 establishes expedited procedures for congressional consideration of a joint resolution or bill introduced to authorize the use of armed forces under section 5 (b). They provide for:

(a) A referral to the House Foreign Affairs or Senate Foreign Relations Committee, the committee to report one measure not later than 24 calendar days before the expiration of the 60 day period, unless the relevant House determines otherwise by a vote.

(b) The reported measure to become the pending business of the relevant House and be voted on within three calendar days, unless that House determines otherwise by vote. In the Senate the debate is to be equally divided between proponents and opponents.

(c) A measure passed by one House to be referred to the relevant committee of the other House and reported out not later than 14 calendar days before the expiration of the 60 day period, the reported bill to become the pending business of that House and be voted on within 3 calendar days unless determined otherwise by a vote.

(d) Conferees to file a report not later than four calendar days before the expiration of the 60 day period. If they cannot agree within 48 hours, the conferees are to report back in disagreement, and such report is to be acted on by both Houses not later than the expiration of the 60 day period.

Section 7 establishes similar priority procedures for a concurrent resolution to withdraw forces under section 5(c). In addition to the legislative veto decision of the Supreme Court, recent legislation has implications on this subsection and is discussed in Part II below.

Interpretive provisions

Section 8 sets forth certain interpretations relating to the Resolution.

Section 8(a) states that authority to introduce armed forces is not to be inferred from any provision of law or treaty unless it specifically authorizes the introduction of armed forces into hostilities or potential hostilities and states that it is "intended to constitute specific statutory authorization within the meaning of this joint resolution." This language was derived from a Senate measure and was intended to prevent a security treaty or military appropriations legislation from being used as authorization for the introduction of troops. It was also aimed against using a broad resolution like the Tonkin Gulf Resolution (P.L. 88-408, approved Aug. 10, 1964; repealed in 1971) to justify hostilities abroad. This resolution had stated that the United States was prepared to take all necessary steps, including use of armed force, to assist certain nations, and it was cited by Presidents for several years as congressional authorization for the Vietnam war.

Section 8(b) states that further specific statutory authorization is not required

to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

This section was added by the Senate to make clear that the resolution did not prevent U.S. forces from participating in certain joint military exercises with allied or friendly organizations or countries. The conference report stated that the "high-level" military commands meant the North Atlantic Treaty Organization, (NATO), the North American Air Defense Command (NORAD) and the United Nations command in Korea.

Section 8(c) defines the introduction of armed forces to include the assignment of armed forces to accompany regular or irregular military forces of other countries when engaged, or potentially engaged, in hostilities. The conference report on the War Powers Resolution explained that this was language modified from a Senate provision requiring specific statutory authorization for assigning members of the Armed Forces for such purposes. The report of the Senate Foreign Relations Committee on its bill said:

The purpose of this provision is to prevent secret, unauthorized military support activities and to prevent a repetition of many of the most controversial and regrettable actions in Indochina. The ever deepening ground combat involvement of the United States in South Vietnam began with the assignment of U.S. "advisers" to accompany South Vietnamese units on combat patrols; and in Laos, secretly and without congressional authorization, U.S. "advisers" were deeply engaged in the war in northern Laos. 1/

Section 8(d) states that nothing in the Resolution is intended to alter the constitutional authority of either the Congress or the President. It also specifies that nothing is to be construed as granting any authority to introduce troops that would not exist in the absence of the Resolution. The House report said that this provision was to help insure the constitutionality of the Resolution by making it clear that nothing in it could be interpreted as changing the powers delegated by the Constitution. In addition, it was to emphasize that the Resolution did not grant the President any new authority or any freedom of action during the time limits that he did not already have.

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1/ U.S. Congress. Senate Report 93-220, p. 24.

Section 9 is a separability clause, stating that if any provision or its application is found invalid, the remainder of the Resolution is not to be affected.

II. EFFECT OF SUPREME COURT DECISION AGAINST LEGISLATIVE VETO

President Nixon in his veto message challenged the constitutionality of two parts of the War Powers Resolution. 2/ He contended that the legislative veto provision, permitting Congress to direct the withdrawal of troops by concurrent resolution, was unconstitutional. He also contended the provision requiring withdrawal of troops after 60-90 days unless Congress passed legislation authorizing such use was unconstitutional because it allowed Presidential powers to lapse without affirmative congressional action.

On June 23, 1983, the Supreme Court supported the first of the Nixon arguments when in INS v. Chadha, it ruled unconstitutional the legislative veto provision in section 244 (c)(2) of the Immigration and Nationality Act. 3/ Although the case involved the use of a one-House legislative veto, the decision cast doubt on the validity of any legislative veto device that was not presented to the President for signature. The Court held that to accomplish what the House attempted to do in the Chadha case "requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." On July 6, 1983, the Court summarily affirmed the decision of the D.C. Court of Appeals striking down a provision of the Federal Trade Commission Improvements Act of 1980 that provided for a disapproval by concurrent (two-House) resolution. 4/

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2/ Congressional Record, November 7, 1973, p. S20093.

3/ 103 S. Ct. 2764 (1983).

4/ U.S. Senate v. Federal Trade Commission, 103 S. Ct. 3556 (1983).

Since section 5(c) provides for Congress to direct a withdrawal of troops by a concurrent resolution, which does not require presentment to the President, it is constitutionally suspect under the reasoning applied by the Court. 5/

Because the War Power Resolution contains a separability clause in section 9, most analysts take the view that the remainder of the joint resolution would not be affected. On July 20, 1983, Deputy Attorney General Edward Schmults told the House Foreign Affairs Committee that "the Supreme Court's decision does not affect any of the procedural mechanisms contained in the War Powers Resolution other than that procedure specified in section 5(c), which purported to authorize Congress effectively to recall our troops from abroad by a resolution not presented to the President for his approval or disapproval." Deputy Secretary of State Kenneth W. Dam stated the same day that while the concurrent resolution provision was clearly unconstitutional, in his view, the issue of the time limits set on Presidential use of troops abroad did not fall within the scope of the Chadha decision.

Congress has taken action to fill the gap left by the apparent invalidity of the concurrent resolution mechanism for the withdrawal of troops. On October 20, 1983, the Senate passed an amendment to the State Department authorization bill (S. 1324) to amend the War Powers Resolution by substituting a joint resolution which requires presentment to the President for the concurrent resolution in section 5(c), and providing that it would be handled under the expedited procedures in section 7. The House and Senate conferees agreed not

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5/ Celada, Raymond. J. Effect of the Legislative Veto Decision on the Two-House Disapproval Mechanism to Terminate U.S. Involvement in Hostilities Pursuant to Unilateral Presidential Action. C.R.S. Report, August 24, 1983.

to amend the War Powers Resolution itself, but they did adopt a free standing provision relating to a joint resolution for the withdrawal of troops.

The measure provided that any joint resolution or bill to require the removal of U.S. armed forces engaged in hostilities outside the United States without a declaration of war or specific statutory authorization would be considered in accordance with the procedures of section 601(b) of the International Security and Arms Export Control Act of 1979, except that it would be amendable. The measure was agreed to by both Houses. 6/ The priority procedures embraced by this provision apply in the Senate only. Handling of such a joint resolution by the House is apparently left to that Chamber's discretion. The implications of this congressional action are not fully apparent at the moment.

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6/ Public Law 98-164, approved Nov. 22, 1983.





III. REPORTING REQUIREMENTS

The reporting requirements in the War Powers Resolution deserve special attention because one of them, section 4(a)(1), triggers the time limitation of section 5(b). Section 4(a)(1) requires the reporting within 48 hours, in the absence of a declaration of war or congressional authorization, of the introduction of U.S. armed forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." Apparently because of its connection with the time limit, Presidents have been reluctant to report under the War Powers Resolution, especially under section 4(a)(1). Section 4(a)(1) has been cited by a President in a report on only one occasion, the Mayaguez incident.

A controversial issue has become the meaning of "hostilities" and "situations where imminent involvement in hostilities is clearly indicated by the circumstances." Some indication of the meaning of this phrase is given in the House report (H. Rept. 93-287) on its War Powers bill:

The word hostilities was substituted for the phrase armed conflict during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. "Imminent hostilities" denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.

Section 4(a)(2) requires the reporting of the introduction of troops "into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces." According to the House report this was to cover

the initial commitment of troops in situations in which there is no actual fighting but some risk, however small, of the forces being involved in hostilities. A report would be required any time combat military forces were sent to another nation to alter or preserve the existing political status quo or to make the U.S. presence felt. Thus, for example, the dispatch of Marines to Thailand in 1962 and the quarantine of Cuba in the same year would have required Presidential reports. Reports would not be required for routine port supply calls, emergency aid measures, normal training exercises, and other noncombat military activities. 7/

Section 4(a)(3) requires the reporting of the introduction of troops "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation." The House report elaborated:

While the word "substantially" designates a flexible criterion, it is possible to arrive at a common-sense understanding of the numbers involved. A 100% increase in numbers of Marine guards at an embassy -- say from 5 to 10 -- clearly would not be an occasion for a report. A thousand additional men sent to Europe under present circumstances does not significantly enlarge the total U.S. troop strength of about 300,000 already there. However, the dispatch of 1,000 men to Guantanamo Bay, Cuba, which now has a complement of 4,000 would mean an increase of 25%, which is substantial. Under this circumstance, President Kennedy would have been required to report to Congress in 1962 when he raised the number of U.S. military advisers in Vietnam from 700 to 16,000. 8/

Section 4(b) requires the President to furnish such other information as Congress may request to fulfill its responsibilities relating to committing the nation to war.

Section 4(c) requires the President to report to Congress periodically, and at least every six months, whenever U.S. forces are introduced into hostilities or any other situation in section 4(a).

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7/ U.S. Congress. H. Rept. 93-287, p.7.

8/ Ibid., 93-287, p. 8.

The objectives of these provisions, the conference report stated, was to "ensure that the Congress by right and as a matter of law will be provided with all the information it requires to carry out its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad." 9/

#### Instances Formally Reported Under the War Powers Resolution

Presidents have submitted reports under the War Powers Resolution on ten different occasions in the first decade of its existence. These included three instances related to evacuations at the end of the Vietnam war and the Mayaguez incident in 1975, the Iranian hostage rescue attempt in 1980, the Sinai multinational force and two occasions regarding Lebanon in 1982, and assistance to Chad and the action in Grenada in 1983. Brief descriptions of these incidents follow together with the provision of the War Powers Resolution and the constitutional or other legislative authority for the action cited in the report.

(1) Danang. On April 4, 1975, President Ford reported the use of naval vessels, helicopters, and marines to transport refugees from Danang and other seaports to safer areas in Vietnam. His report mentioned section 4(a)(2) of the War Powers Resolution and said the action was pursuant to the President's constitutional authority as Commander in Chief and Chief Executive in the conduct of foreign relations, and pursuant to authorizations under the Foreign Assistance Act of 1961 for humanitarian assistance to refugees suffering from the hostilities in South Vietnam.

(2) Cambodia. On April 12, 1975, President Ford reported the use of ground combat Marines, helicopters, and supporting tactical air elements to assist with the evacuation of U.S. nationals from Cambodia. The

report took note of both section 4 and section 4(a)(2) and cited as authority for the action the President's constitutional executive power and authority as Commander in Chief.

(3) Vietnam. On April 30, 1975, President Ford reported the use of helicopters, Marines, and fighter aircraft to aid in the evacuation of U.S. citizens and others from South Vietnam. The report took note of section 4 and cited as authority for the action the President's constitutional executive power and his authority as Commander in Chief.

(4) Mayaguez. On May 15, 1975, President Ford reported that he had ordered U.S. military forces to rescue the crew of and retake the ship Mayaguez that had been seized by Cambodian naval patrol boats on May 12, that the ship had been retaken, and that the withdrawal of the forces had been undertaken. The report took note of section 4(a)(1) of the War Powers Resolution and cited as authority the President's executive power and authority as Commander in Chief.

(5) Iran. On April 26, 1980, President Carter reported the use of six aircraft and eight helicopters in an unsuccessful attempt of April 24 to rescue the American hostages in Iran. Stating the report was submitted "consistent with the reporting provision" of the War Powers Resolution, he cited as authority the President's powers as Chief Executive and Commander in Chief.

(6) Sinai. On March 19, 1982, President Reagan reported the deployment of military personnel and equipment to the Multinational Force and Observers (MFO) in the Sinai to assist in carrying out the August 1981 treaty of peace between Egypt and Israel. The force was to patrol a buffer zone in the eastern

Sinai after Israel withdrew its forces. The President said the report was provided "consistent with section 4(a)(2) of the War Powers Resolution." President Reagan cited as authority for the deployment Public Law 97-132, the Multinational Force and Observers Participation Resolution, approved December 29, 1981, and his "constitutional authority with respect to the conduct of foreign relations and as Commander in Chief...."

(7) Lebanon. On August 21, 1982, President Reagan reported the dispatch of 800 Marines to serve in the multinational force to assist in the withdrawal of members of the Palestine Liberation force from Lebanon. The report did not cite any specific provision of the War Powers Resolution. As authority for the action, the President cited his "constitutional authority with respect to the conduct of foreign relations and as Commander in Chief."

(8) Lebanon. On September 29, 1982, President Reagan reported the deployment of 1,200 Marines to serve in a temporary multinational force to facilitate the restoration of Lebanese government sovereignty. He said the report was being submitted consistent with the War Powers Resolution, but did not mention a specific section of the Resolution. He cited as authority "the President's constitutional authority with respect to the conduct of foreign relations and as Commander in Chief of the United States armed forces."

The President sent a second report citing section 4 on the use of this force on August 30, 1983, after the Marines were fired upon and two were killed. (For further information, including related legislative action, see section below on congressional invoking of the War Powers Resolution.)

(9) Chad. On August 8, 1983, President Reagan reported the deployment of two AWACS electronic surveillance planes and eight F-15 fighter planes and ground logistical support forces to Sudan to assist Chad and other friendly governments helping Chad against Libyan and rebel forces. He said the report

was being submitted consistent with Section 4 of the War Powers Resolution and that the deployment was taken under his constitutional authority with respect to foreign relations and as Commander in Chief. On August 23, 1983, State Department spokesman Alan D. Ronberg announced that the planes were being withdrawn.

(10) Grenada. On October 25, 1983, President Reagan reported that U.S. Army and Marine personnel had begun landing in Grenada to join collective security forces of the Organization of Eastern Caribbean States in assisting in the restoration of law and order in Grenada and to facilitate the protection and evacuation of U.S. citizens. He submitted the report "consistent with the War Powers Resolution" and cited as authority his "constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief of the United States Armed Forces."

Many in Congress contended that the President's report should have cited section 4(a)(1) of the War Powers Resolution, which would have triggered the 60-90 day time limitation. On November 1, 1983, the House supported this interpretation when it adopted, by a vote of 403-23, H. J. Res. 402 declaring that the requirements of section 4(a)(1) had become operative on October 25. The Senate adopted a similar measure on October 28 by a vote of 64 to 20, but on November 17 the provision was deleted in the conference report on the debt limit bill to which it was attached. <sup>10/</sup> On November 17, White House spokesman Larry Speakes said the Administration had indicated that there was no need for action as the combat troops would be out within the 60-90 day time period. Speaker Thomas O'Neill took the position that, whether or not Congress passed specific legislation, the War Powers Resolution had become operative on October 25.

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<sup>10/</sup> U.S. Congress. H. Rept. 98-566 on H. J. Res. 308; Senate amendment numbered 3. Congressional Record November 17, 1983, p. H10189.

By December 15, 1983, all U.S. combat troops had been removed from Grenada but 300 support forces remained.

Instances Not Formally Reported to the Congress

In some instances where armed forces have been used abroad, questions were raised in Congress because reports were not filed.

Brief uses of military forces

In four unreported cases, the military action was brief and congressional concern about the lack of a report under the War Powers Resolution was short-lived.

-- Cyprus. On July 22 and 23, 1974, helicopters from five U.S. naval vessels evacuated approximately 500 Americans and foreign nationals from hostilities in Cyprus.

-- Lebanon. On June 20, 1976, a U.S. Navy landing craft evacuated 263 Americans and Europeans from Lebanon during fighting between Lebanese factions. An overland convoy evacuation to Damascus had been blocked by hostilities.

-- Korea. In August 1976, two American military personnel who had entered the demilitarized zone in Korea to cut down a tree were killed by North Korean soldiers, and additional forces were sent to Korea during the surrounding period of tension. Representative Elizabeth Holtzman raised the question of compliance with the War Powers Resolution at hearings on September 1, 1976. The Administration took the position that it would be an undesirable precedent to construe the resolution as requiring a report when a "relative handful" of people had been added to the 41,000 troops already in Korea. <sup>11/</sup> The augmenting forces included a squadron of 20 F-111s and a squadron of 18 F-4s.

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<sup>11/</sup> U.S. Congress. House Committee on International Relations. Deaths of American military personnel in the Korean demilitarized zone. Sept. 1, 1976. Washington, U.S. Govt. Print. Off., 1976. p. 16.

-- Zaire. From May 19 through June 1978, the United States utilized transport aircraft to provide logistical support for Belgian and French rescue operations in Zaire. The President did not submit a report on the operation under the War Powers Resolution. In August, the House Foreign Affairs Committee held hearings on the question of compliance with the War Powers Resolution in that instance. Chairman Clement Zablocki agreed with the Department of State that the Zaire airlift operation did not fall within the scope of action requiring a report. Representative Paul Findley, on the other hand, contended that the operation had placed American servicemen in a situation of "imminent hostilities," and introduced a resolution (H. Con. Res. 689) requesting the President to submit such a report. <sup>12/</sup> No further action was taken on the resolution.

El Salvador: When are military advisers in imminent hostilities?

Considerable controversy over whether the President was required to report under the War Powers Resolution has surrounded the sending of U.S. military advisers to El Salvador.

At the end of February 1981, the Department of State announced the dispatch of 20 additional military advisers to El Salvador to aid its government against guerilla warfare. There were already 19 military advisers in El Salvador sent by the Carter Administration. The Reagan Administration said the insurgents were organized and armed by Soviet bloc countries, particularly Cuba. By March 14 the Administration had authorized a total of 54 advisers, including experts in intelligence, combat training, helicopter maintenance, communications, and counterinsurgency.

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<sup>12/</sup> U.S. Congress. House. Committee on International Relations. Congressional oversight of War Powers compliance: Zaire Airlift. Hearing, August 10, 1978. p. 2.



The President did not report the situation under any provision of the War Powers Resolution. A State Department memorandum said a report was not required because the U.S. personnel were not being introduced into hostilities or situations of imminent hostilities.

A justification for not reporting under section 4(a)(2) was that the military personnel being introduced were not equipped for combat. <sup>13/</sup> They would, it was maintained, carry only personal sidearms which they were authorized to use only in their own defense or the defense of other Americans.

The State Department held that section 8(c) of the War Powers Resolution was not intended to require a report when U.S. military personnel might be involved in training foreign military personnel if there were no imminent involvement of U.S. personnel in hostilities. In the case of El Salvador, the memorandum said, U.S. military personnel "will not act as combat advisors, and will not accompany Salvadoran forces in combat, on operational patrols, or in any other situation where combat is likely."

The situation immediately raised questions in Congress about the applicability of the War Powers Resolution and legislation was introduced to require the President to report under the War Powers Resolution.

On May 1, 1981, eleven Members of Congress challenged (Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982)) the President's action on grounds that he had violated Constitution and the War Powers Resolution by sending the advisers to El Salvador. Eventually there were 29 co-plaintiffs, but by June 18, 1981, an equal number of Members (13 Senators and 16 Representatives) filed a motion to intervene in the suit, contending that a number of legislative measures were then pending before Congress and that Congress had had ample opportunity to vote to end military assistance to El Salvador if it had wished.

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<sup>13/</sup> Congressional Record, Mar. 5, 1981: E901.

On October 4, 1982, U.S. District Court Judge Joyce Hens Green dismissed the suit. She ruled that Congress, not the court, must resolve the question of whether the U.S. forces in El Salvador are involved in a hostile or potentially hostile situation. While there might be situations in which a court could conclude that U.S. forces were involved in hostilities, she ruled, the "subtleties of fact-finding in this situation should be left to the political branches." She noted that Congress had taken no action to show it believes the President's decision is subject to the War Powers Resolution. Representative Crockett filed an appeal on March 9, 1983.

As the involvement continued, casualties occurred among the U.S. military advisers, and reports circulated that the number of military advisers might be increased, various legislative proposals relating to the War Powers Resolution and El Salvador were introduced. One approach taken by these proposals was to amend the War Powers Resolution to require a specific authorization prior to the introduction of U.S. forces into hostilities or combat in El Salvador. <sup>14/</sup> The other approach was to declare that the commitment of U.S. Armed Forces in El Salvador necessitated compliance with section 4(a) of the War Powers Resolution, requiring the President to submit a report. <sup>15/</sup>

Neither approach was adopted in legislation, however, and on July 26, 1983, the House rejected an amendment to the Defense Authorization bill (H.R. 2969) that

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<sup>14/</sup> On March 8, 1982, Senator Robert Byrd introduced the War Powers Resolution Amendments of 1982 (S. 2179) specifically providing that U.S. armed forces shall not be introduced into El Salvador for combat unless (1) the Congress has declared war or specifically authorized such use; or (2) such introduction was necessary to meet a clear and present danger of attack on the United States or to provide immediate evacuation of U.S. citizens. Similar bills were introduced in the House, e.g. H.R. 1619 and H.R. 1777 in the 98th Congress.

<sup>15/</sup> H.Con. Res. 87, 97th Congress.

sought to limit the number of active duty military advisers in El Salvador to 55, unless the President reported them under section 4(a)(1) of the War Powers Resolution. 16/

Central America: When are military exercises more than training?

The need to report military exercises under the War Powers Resolution became a controversial matter in 1983 in regard to military exercises in Central America and the Caribbean.

On July 27, 1983, President Reagan explained the planning of two "joint training exercises" in Central America and the Caribbean. One would be a series of ground exercises in Honduras with the combined forces of Honduras and the United States involving 3,000 to 4,000 U.S. Army and Marine combat troops; the second would be a series of ocean exercises with the U.S. fleet. The first contingent of U.S. troops for the maneuvers called "Big Pine II" landed in Honduras on August 8. The number expected to be involved was raised to between 5,000 and 6,000 ground troops plus 19 warships and 140 fighter planes.

The President did not submit a report under the War Powers Resolution. He characterized the maneuvers as routine and said the United States had been regularly conducting joint exercises with Latin American countries since 1965. Some Members of Congress, on the other hand, contended that the exercises increased the U.S. military involvement in Central America and called for reporting them under the War Powers Resolution.

Other Members of Congress sought other vehicles for maintaining congressional control. Senator Hart introduced a bill entitled the "War Powers in Central America Act" which would permit an increase in military involvement in

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16/ Congressional Record, July 26, 1983, p. H5623.

Central America only after a joint resolution of Congress or a written request by the President stating that an increase was necessary to protect the lives of American citizens or respond to the danger of an attack on the United States. 17/

The major congressional efforts centered on placing restrictions on covert military aid to anti-Communist factions in Nicaragua rather than on seeking compliance with the War Powers Resolution.

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17/ S. 1692.

#### IV. CONSULTATION WITH CONGRESS

One of the ways that the War Powers Resolution sought to assure a congressional voice in decisions that might involve the United States in war was by mandating consultation. Section 3 of the War Powers Resolution requires the President "in every possible instance" to consult with Congress before introducing U.S. Armed Forces into situations of hostilities and imminent hostilities, and to continue consultations as long as the armed forces remain in such situations. Some observers contend that promoting such consultation is a major purpose of the War Powers Resolution.

Has the executive branch complied with the consultation requirements? Has consultation been adequate to permit congressional views to be factored into decisions?

In almost every instance involving the use of armed forces since the passage of the Resolution, some in Congress have complained about lack of consultation. In only one instance, the U.S. participation in the international peacekeeping force in the Sinai that was authorized by Congress, has consultation appeared clearly adequate to permit a significant congressional voice in advance of the use of the forces. Other observers contend that the executive branch has complied with the consultation requirements. A number of ambiguities, loopholes, and problems -- in addition to the different institutional interests of Congress and the President -- account for the controversy.

One problem is the occasion when consultation is required. A frequently expressed congressional view is that consultation should occur in any situation mentioned in the War Powers Resolution. Yet the War Powers Resolution established different criteria for consultation than for reporting. Consultation is required only before introducing armed forces into "hostilities or into

situations where imminent involvement in hostilities is clearly indicated by the circumstances." Reporting is required in these circumstances plus the additional ones listed in section 4(a)(2) and 4(a)(3) dealing with the introduction or increase of troops equipped for combat. Thus, consultation is not necessarily required even though a report may be. Moreover, consultation is required only under circumstances that trigger the time limitation, and Presidents have proved reluctant to acknowledge and report the existence of these circumstances.

A second problem is the meaning of the term consultation. Differences of opinion exist on the timing, nature, and extent of consultation. The executive branch may count informational briefings as consultations, whereas Members of Congress may expect consultation to mean that they have an opportunity to express an opinion before the decision is made. The House report on the measure said, "...consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated." 18/

Consultation does not mean congressional authorization, which can be given only by the entire Congress through the legislative process. 19/ On the other hand, the seeking of authorization from Congress is perhaps the highest form of consultation, and the process of obtaining authorization presumably assures a great deal of consultation.

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18/ U.S. Congress. H. Rept. 93-287.

19/ Javits, Jacob, K. Prepared statement. In U.S. Congress. House. Committee on International Relations. War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Valaquez Incident. Hearings, May 7 and June 4, 1975, p. 68.

A third problem involves what constitutes congressional representation for consultation purposes. It has been generally recognized that, since there are 535 Members of Congress, it would be extremely difficult to consult them all, except by seeking a formal authorization. The House version specifically called for consultation between the President and the leadership and appropriate committees. This was changed to less specific wording in conference, however, in order to provide some flexibility.

#### The Record of Consultation Under the War Powers Resolution

In the first four cases reported under the War Powers Resolution, the executive branch held that it had met the consultation requirement because the President had directed that Congress be notified prior to the actual commencement of the introduction of armed forces.

Monroe Leigh, Legal Adviser to the Department of State, testified that in the case of the Danang sealift, the President "advised the members of the Senate and House leadership that a severe emergency existed in the coastal communities of South Vietnam and that he was directing American naval transports and contract vessels to assist in the evacuation of refugees from coastal seaports." 20/

In the case of the evacuations from Cambodia and Saigon, Mr. Leigh said, on April 3, 1975, the same day that the President authorized the Ambassador to evacuate the American staff, he directed that the leaders of the Senate and House be advised of the general plan of evacuation. On April 28, the President

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20/ U.S. Congress. House. Committee on International Relations. War Powers: A test of compliance relative to the Danang sealift, the evacuation of Phnom Penh, the evacuation of Saigon, and the Mayaguez incident. Hearings, May 7 and June 4, 1975. Washington, U.S. Govt. Printing Off., 1975. p. 3.

directed that congressional leaders be notified that the final phase of the evacuation of Saigon would be carried out by military forces within the next few hours. 21/

In the Mayaguez case, Mr. Leigh said, 10 Members from the House and 11 Senators were "contacted regarding the military measures directed by the President" to prevent the crew of the Mayaguez from being transferred to the Cambodian mainland and on three additional occasions as the action progressed. 22/

In the case of the Iranian hostage rescue attempt, the executive branch decided that consultation could endanger the success of the mission. Since the War Powers Resolution requires consultation "in every possible instance" there was disagreement among Members of Congress as to whether the lack of consultation was a violation of the War Powers Resolution.

After the abortive attempt to rescue the hostages in Iran, the Senate Foreign Relations Committee held hearings on the incident. In hearings published after the hostages were released, Chairman Frank Church stressed three points as guidelines for the future. First, consultation required giving Congress an opportunity to participate in the decision making process, not just informing Congress that an operation was underway. Second, the judgment could not be made unilaterally but should be made by the President and Congress. Third, the Iranian hearings showed lack of agreement on the question of whom in Congress should be consulted. The leadership of the House and Senate?

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21/ Ibid., p. 6.

22/ Ibid., p. 78.



The leadership plus the leaders of the Senate Foreign Relations Committee and the House Foreign Affairs Committee? The entire membership of those committees? Members of other committees? Senator Church concluded: "These are matters that Congress itself must decide." 23/

In the first dispatch of Marines to Lebanon in 1982, President Reagan began discussions with congressional leaders on July 6 after the plan had been publicly announced, and after leaks in the Israeli press indicated that he had approved the plan on July 2. 24/ On the second Multinational Force in Lebanon there was a considerable amount of negotiation between the executive branch and Congress that eventually led to legislation authorizing U.S. participation for eighteen months, but most of it occurred after the decision to participate had been made and the Marines were in Lebanon. 25/

In the 1983 action in Grenada, President Reagan met with several congressional leaders at 8 p.m. on October 24. 26/ This was after the directive ordering the landing had been signed at 6 p.m., but before the actual invasion that began at 5:30 a.m., October 25.

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23/ U.S. Congress. Senate. Committee on Foreign Relations. The situation in Iran. Hearing, 96th Congress, 2d session. May 8, 1980. Washington, U.S. Govt. Print. Off., 1980. p. iii.

24/ Oberdorfer, Don and John M. Goshko. Peace-keeping Force. Washington Post, July 7, 1982, p. 1.

25/ Gwetzman, Bernard. U.S. To Send Back Marines to Bierut. New York Times, Sept. 21, 1982, p. 1.

26/ U.S. Declares Goal in to Protect Americans and Restore Order. Washington Post, Oct. 26, 1983. p. A7.



V. LEBANON: CONGRESS INVOKES THE WAR POWERS RESOLUTION

The War Powers Resolution faced perhaps its greatest test to date when Marines sent to participate in a Multinational Force in Lebanon in 1982 became the targets of hostile fire in August 1983. During this period President Reagan filed 3 reports under the War Powers Resolution, but he did not report under section 4(a)(1) that the forces were being introduced into hostilities or imminent hostilities, thus triggering the 60-90 day time limit.

On September 29, 1983, Congress passed the Multinational Force in Lebanon Resolution determining that the requirements of section 4(a)(1) of the War Powers Resolution became operative on August 29, 1983. 27/ In the same resolution, Congress authorized the continued participation of the Marines in the Multinational Force for 18 months. The resolution was a compromise between Congress and the President. Congress obtained the President's signature on legislation invoking and thus implicitly recognizing the application of the War Powers Resolution for the first time, but the price for this concession was a congressional authorization for the U.S. troops to remain in Lebanon for 18 months.

The events leading to the compromise began on July 6, 1982, when President Reagan announced he had agreed to contribute a small contingent of U.S. troops to a multinational force for temporary peacekeeping in Lebanon. That same day the late Chairman of the House Foreign Affairs Committee Clement Zablocki wrote President Reagan expressing concern that if such a force were sent, the United States would be introducing forces into imminent hostilities and a report under section 4(a)(1) would be required. However, when the forces

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27/ P.L. 98-119, approved Oct. 12, 1983.

began to land on August 25, President Reagan did not cite section 4(a)(1) and said the agreement with Lebanon ruled out any combat responsibilities. After overseeing the departure of the Palestine Liberation Organization force, the Marines in the first Multinational Force left Lebanon on September 10, 1982.

The second dispatch of Marines to Lebanon began on September 20, 1982. President Reagan announced that the United States, France, and Italy had agreed to form a new multinational force to return to Lebanon for a limited period of time to help maintain order until the lawful authorities in Lebanon could discharge those duties. The action followed three events that took place after the withdrawal of the first group of Marines: the assassination of President-elect Bashir Gemayel, the entry of Israeli forces into West Beirut, and the massacre of Palestinian civilians by Lebanese Christian militiamen.

On September 29, 1982, President Reagan submitted a report that 1,200 Marines had begun to arrive in Beirut, but again he did not cite section 4(a)(1), saying the American force would not engage in combat. As a result of incidents in which Marines were killed or wounded, there was again controversy in Congress on whether the President's report should have been filed under section 4(a)(1), but Congress did not pass any legislation on the subject. On November 28, 1982, the end of the sixty day period following their introduction, the Marines were still in Lebanon.

Nevertheless, Congress passed the Lebanon Emergency Assistance Act of 1983 requiring statutory authorization for any substantial expansion in the number or role in Lebanon of U.S. Armed Forces. It also included Section 4(b) that stated:

Nothing in this section is intended to modify, limit, or suspend any of the standards and procedures prescribed by the War Powers Resolution of 1983. 28/

President Reagan reported on the Lebanon situation for the third time on August 30, but still not citing section 4(a)(1), after fighting broke out between various factions in Lebanon and the Marines were fired upon and two Marines were killed. The level of fighting heightened. On September 1, President Reagan ordered a naval task force including 2,000 Marines, fighter planes, and artillery to the shores of Lebanon. On September 12, President Reagan authorized the marines in Beirut to call in air strikes against forces shelling their position. On September 13, the Administration announced that defense of the Marines could include the use of U.S. airpower and artillery to assist other members of the multinational force or the Lebanese armed forces in certain circumstances.

As the Marine casualties increased and the action enlarged, there were more calls in Congress for invocation of the War Powers Resolution. Several Members of Congress said the situation had changed since the President's first report and introduced legislation that took various approaches. Senator Mathias introduced S.J. Res. 159 effectively stating that the time limit specified in the War Powers Resolution had begun on August 31, 1983, and authorizing the forces to remain in Lebanon for a period of 120 days after the expiration of the 60-day period. Representative Downey introduced H.J. Res. 348 directing the President to report under section 4(a)(1) of the War Powers Resolution. Senator Robert Byrd introduced S.J. Res. 163 finding that section 4(a)(1) of the war powers resolution applies to the present circumstances in Lebanon. The House Appropriations Committee approved an amendment to the continuing resolution for fiscal year 1984, sponsored by Rep. Clarence Long, providing that after 60 days funds could not be "obligated or expended for peacekeeping

activities in Lebanon by United States Armed Forces" unless the President had submitted a report under section 4(a)(1) of the War Powers Resolution.

On September 20, congressional leaders and President Reagan agreed on a compromise resolution invoking section 4(a)(1) and authorizing the Marines to remain for 18 months.

The resolution became the first legislation to be handled under the expedited procedures of the War Powers Resolution. On September 27, the House Rules Committee reported the resolution providing for consideration under a rule permitting two hours of general debate with only three specified amendments in order. On September 28, the House passed H.J. Res. 364 by a vote of 270 to 161. The House rejected the amendment relating to a cutoff of funds unless the President invoked section 4(a)(1) of the War Powers Resolution.

After three days of debate, on September 29, the Senate passed S.J. Res. 159 by a vote of 54 to 46. The Senate rejected an amendment by Senator Byrd to require the President to submit to Congress the report required under section 4(a)(1) of the War Powers Resolution. Among other amendments rejected were ones designed to shorten the authorized period of participation and to clarify the purpose of the mission.

The House accepted the Senate bill by a vote of 253 to 156. As passed, the resolution contained four occurrences that would terminate the authorization before eighteen months: (1) the withdrawal of all foreign forces from Lebanon, unless the President certified continued U.S. participation was required to accomplish the purposes specified in the September 25, 1982, exchange of letters providing for the establishment of the Multinational Force In Lebanon; (2) the assumption by the United Nations or the Government of Lebanon of the

responsibilities of the Multinational Force; (3) the implementation of other effective security arrangements; or (4) the withdrawal of all other countries from participation in the Multinational Force.

When he signed the resolution on October 13, 1983, President Reagan stated that Congress had made a number of findings, determinations, and assertions in the bill, which, while it was appropriate for Congress to make, he did not necessarily agree with. He used as an example the congressional determination that the requirements of section 4(a)(1) became operative on August 29, 1983, and said, "I would note that the initiation of isolated or infrequent acts of violence against United States armed forces does not necessarily constitute actual or imminent involvement in hostilities, even if casualties to those forces result. I think it reasonable to recognize the inherent risk and imprudence of setting any precise formula for making such determinations." 29/ In addition, he said:

Nor should my signing be viewed as any acknowledgment that the President's constitutional authority can be impermissibly infringed by statute, that congressional authorization would be required if and when the period specified in section 5(b) of the War Powers Resolution might be deemed to have been triggered and the period had expired or that section 6 of the Multinational Force in Lebanon Resolution may be interpreted to revise the President's constitutional authority to deploy United States armed forces. 30/

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29/ New York Times, October 13, 1983.

30/ Ibid. Section 6 of the Multinational Force in Lebanon Resolution authorizes participation for eighteen months and provides for earlier termination in certain circumstances.





VI. PROPOSED AMENDMENTS

The first decade of experience with the War Powers Resolution has been mixed. Controversy continues over its effectiveness and appropriateness as a vehicle for maintaining a congressional role in the use of armed forces in conflict.

One view is that War Powers Resolution has been effective in moderating Presidents' responses to crisis situations because of their awareness that certain actions might invoke various provisions in the War Powers Resolution. Presidents have acknowledged the resolution by reporting ten separate uses of armed forces abroad. Congress, in passing the Multinational Force in Lebanon Resolution, demonstrated that it can utilize the War Powers Resolution to assert itself in the use of forces abroad. Moreover, even though legislation invoking the resolution was not finally adopted, the threat appeared helpful in getting U.S. forces out of Grenada.

A contrary view is that the War Powers Resolution is not accomplishing its objectives. In this view, Presidents have continued to introduce U.S. armed forces into hostilities without consulting Congress and without congressional authorization, and this has been obscured by emphasis on the reporting requirements and time limitation provisions. They have cited section 4(a)(1) on only one occasion -- Mayaguez -- and never in a situation that has been likely to continue beyond 60 or 90 days. With the provision permitting Congress to withdraw troops by concurrent resolution under a cloud because of the Chadha decision, such a decision would now require legislation that would have to be signed by the President or passed over his veto.

Some supporters of the resolution have proposed amendments to strengthen the War Powers Resolution, although others believe that opening the resolution to amendments might result in its weakening or repeal.

In 1977, Senator Eagleton proposed that the War Powers Resolution return to the original language of the version passed by the Senate, requiring prior congressional authorization for the introduction of forces into conflict abroad except to respond to an armed attack against the United States or its forces or to protect U.S. citizens while evacuating them. This amendment would eliminate the concept that the President has 60 to 90 days in which he can militarily act without authorization. On the other hand, the House originally opposed this version in the belief that such language would provide a blanket authorization to rescue American citizens abroad that might be abused, yet that it might not provide flexibility in other circumstances. On September 29, 1983, after the passage of the Multinational Force in Lebanon Resolution, Senators Cranston, Eagleton, and Stennis introduced such an amendment again. 31/

Other proposed amendments have focused on improving consultation under the resolution. After the Mayaguez crisis Senator Thomas Eagleton and Representative John F. Seiberling introduced amendments that called for the President to seek the "advice and counsel" of Congress before taking an action that firmly committed the United States to hostilities. The amendments specified that consultation should include but not be limited to the Senate and House leadership and the ranking and minority members of the foreign policy and armed services committees. 32/

Another proposal would attempt to improve consultation by broadening the instances in which the President is required to consult to cover all situations in which a President is required to report, rather than only circumstances that invoke the time limitation, as is now the case. 33/

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31/ 98th Cong., S. 1906.

32/ 94th Congress, H.R. 7594 and S. 1790.

33/ Strengthening Executive-Legislative Consultation on Foreign Policy. Foreign Affairs Committee Print, October 1983, p. 67.

On the issue of appropriateness, Congress has demonstrated continued support for the War Powers Resolution on various occasions in addition to the votes on Lebanon and Grenada. When considering the establishment of the Rapid Deployment Force, the Senate adopted an amendment stating the sense of the Congress "that the provisions of the War Powers Resolution be strictly adhered to and that the congressional consultation process specified by such Resolution be utilized in a meaningful manner." 34/ On August 11, 1982, the Senate adopted an amendment by Senator Bumpers to the supplemental appropriations bill, stating that the Symms amendment it had adopted regarding Cuba did "not constitute the statutory authorization for introduction of United States Armed Forces contemplated by the War Powers Resolution." 35/

Some members, however, believe that the War Powers Resolution is an inappropriate instrument that restricts the President's effectiveness in foreign policy. On October 31, 1983, Senator Barry Goldwater introduced S. 2030 to repeal the War Powers Resolution. In his view, the basic premise of the War Powers Resolution was wrong because in it Congress attempted to assume the controlling power over the use and deployment of U.S. military forces and this was a responsibility of the President. 36/

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34/ Section 102 of P.L. 96-533, approved Dec. 16, 1980.

35/ The Symms amendment reiterated the 1962 Cuban resolution and expressed determination to prevent by whatever means necessary the extension by Cuba of terrorism or aggression in the Western Hemisphere. P.L. 97-257, approved Sept. 10, 1982.

36/ Congressional Record, July 12, 1983, p. S9670.



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