From Henry Mark Holzer, Commentary on Current Legal Events

BUSH vs. CONGRESS:  
THE WAR POWERS RESOLUTION

On September 4, 2002, amidst a national guessing game over President Bush's intentions regarding Iraq and the role of Congress in his plans, he sent a carefully worded letter to Speaker of the House of Representatives, Dennis Hastert. After establishing that America and the civilized world are at a crossroads regarding Iraq, Mr. Bush wrote (the emphasis is mine):

I am in the process of deciding how to proceed. This is an important decision that must be made with great thought and care. Therefore, I welcome and encourage discussion and debate. The Congress will hold hearings on Iraq this month, and I have asked members of my Administration to participate fully.

Doing nothing in the face of a grave threat to the world is not an option. At an appropriate time and after consultations with the leadership, I will seek congressional support for U.S. action to do whatever is necessary to deal with the threat posed by Saddam Hussein's regime. The Congress can play an important role in building a national consensus for action.

This letter was prompted by a federal law that has been largely ignored in the current debate over the roles of President Bush and Congress in the forthcoming attack on Iraq. The statute is the one law that slightly ties the Commander-in-Chief's hands: the War Powers Resolution (WPR) [Title 50, United States Code, Sections 1541-1548].

Spawned by what many believed was an arrogation of war-making power by Presidents Kennedy and Johnson (and to a lesser extent by President Nixon), Congress in late 1973, more than a year after American troops were pulled out of Vietnam, passed the WPR over Nixon's veto.

Of the WPR's eight sections - characterized by some as "more politics than law" - only two sections are significant.

The first (Section 1541 - "Purpose and policy") nakedly reveals, in three subsections, the power grab Congress intended by means of the WPR:

(a) Congressional declaration

It is the purpose of this [statute] to fulfill the intent of the framers of the Constitution of the United States and 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.

Translation: Congress - not the judicial branch, not the Supreme Court of the United States or any lower federal court - annointed itself interpreter of the Constitution. As such, Congress somehow divined that the Framers intended the President, as Commander-in-Chief, and the Legislature were to be partners in "the introduction of United States Armed Forces into hostilities . . . and to the continued use of such forces . . .." Not surprisingly, Congress' WPR did not adduce a shred of historical evidence to support its fanciful interpretation of the Framer's intent.

(b) Congressional legislative power under necessary and proper clause

Under article I, section 8, of the Constitution, it is specifically provided that the 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, or in any department or officer thereof.

Translation: Since Congress could implement through legislation the powers of all three branches, it could also limit the Article II power expressly granted to the Commander-in-Chief. We shall see in a moment what Congress purported to do pursuant to its "necessary and proper" power, and what became of that attempt.

(c) Presidential executive power as Commander-in-Chief; limitation

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to 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.

Translation: Without even a fig leaf of historical or precedential cover, and despite the fact that Article II contains neither express nor implied limitations on the President's power as Commander-in-Chief, Congress purported to define the Constitutional powers of the President. To the WPR-writing Congress, the fundamental Constitutional principle of separation of powers simply did not exist.

Thus, in this first section of the WPR one can readily see Congress' avowed "purpose and policy": to arrogate unto itself the power of Constitutional interpretation, to create a war-making partnership with the Commander-in-Chief, to restrict his Article II power as Commander-in-Chief - and, in the process, to significantly tilt the Constitution's textual separation of powers in favor of the Legislature.
With its "purpose and policy" as the predicate, Congress then required in Section 1542 that the President "in every possible instance shall consult with Congress before introducing United States Armed Forces" into situations described in the previous section. Section 1543 required that the President regularly report to Congress "(A) the circumstances necessitating the introduction of United States Armed forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement." Plus anything else Congress wanted to know.

If that were as far as Congress went, one could make a case that the Legislature remained within its proper role, especially since it would be the funding source for military activity. But in the next section - "1544, Congressional action, (b) Termination of use of United States Armed Forces; exceptions; extension period" - Congress crossed the line:

Within sixty calendar days after a report is submitted . . . the President shall terminate any use of United States Armed Forces . . . unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet a result of an armed attack upon the United States.

(d) Concurrent resolution for removal by President of United States Armed Forces

Notwithstanding subsection (b) of this section, at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

No wonder President Nixon, unsuccessfully, vetoed the War Powers Resolution.

Understand this. Section 1544, subsection (b) limits the commitment of troops to a short, finite period. Whether this enactment pursuant to the Article I power of Congress to legislate - even if it be a proper subject for judicial review - trumps the Article II power of the President as Commander-in-Chief, no one knows because the Supreme Court has never ruled on the question.

We do, however, know the answer to whether Congress can order the President to remove troops in the field - and that answer is a resounding "no."

In a case entitled Immigration and Naturalization Service v. Chadha, the Supreme Court held that under separation of powers doctrine - a lynchpin of American constitutionalism - it is unconstitutional for Congress to invalidate, by means of what amounts to a "legislative veto," an act of the Executive Branch.

So, since under the War Powers Resolution, President Bush must "consult" with Congress before invading Iraq, that's the process his Hastert letter has begun.
Note, however, that only "at an appropriate time" and after "consultations with the leadership," will the President ask Congress, not for a declaration of war, but rather only for its "support" - because "Congress can play an important role in building a national consensus for action."

Both the tone of the Hastert letter and its substance reveal that the President is playing by the book, adhering to the consultative requirement of the WPA - confident in the knowledge that Congress cannot force him to withdraw troops once committed. In light of Congress' powerlessness in this regard, it can be said that the short time frame during which the President is allowed to commit troops (Section 1544(b)), is meaningless - if not legally, then practically.

*Once American troops are in the field, Congress' only recourse is to defund their support.*

Although Congress did just that in 1973 - when it attached a provision to the veto-proof Social Security Act that prohibited "use of any past or present appropriations for financing U.S. combat activities in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia," we then had no ground troops remaining in that theater. It will be a far different story if Congress tries to pull the plug on material support for Americans fighting in Iraq. That would - and should - be political suicide. Something for which our elected Congress is not noted.