OCA 86-1874
6 June 1986

MEMORANDUM FOR THE RECORD

SUBJECT: HFAC's Hearings on Terrorism and the War Powers Act

1. On 29 April and 1 May 1986, the Subcommittee on Arms Control, International Security and Science of the House Committee on Foreign Affairs held hearings on the subject of "Terrorism and the War Powers Act".

2. On 29 April, the witnesses were Abraham D. Sofaer, Legal Advisor, Department of State (statement attached) and J. Brian Atwood, Director, National Democratic Institute.

3. On 1 May, the witnesses were Archibold Cox, Chairman, Common Cause (statement attached), and W. Taylor Reveley III, Attorney, Hinton & Williams.

4. Issues directly affecting intelligence matters were not directly raised or addressed. The bulk of the hearings concerned discussions about the wisdom and constitutionality of the War Powers Act and its applicability to the use of military force in "terrorist situations", including the recent raid of Libya.

5. The second day's hearings were attended by Chairman Fascell, and Representatives Hyde, Solarz, Levine, and Berman. The two witnesses strongly supported the Act. Questions revolved around how it could be strengthened. There were, howver, no proposals to amend the Act. Instead, the proposals focused around Congressional "housekeeping" resolutions to create a joint committee to act as the sole Congressional body with which the Executive would consult under the act. There was discussion about such a committee and its composition. There seemed to be a tentative consensus it should include: the majority and minority leaders of both houses; the Speaker of the House; and, the chairmen and ranking minority members from the foreign affairs, armed services and intelligence committees of both houses. All agreed committee staff should be small. All agreed, however, it would be difficult to obtain Congressional agreement on formation of such a committee.

6. The Dole/Denton legislation exempting terrorism from the War Powers Act (with its counterpart in the House) was discussed but did not seem to be very favorably received.

7. It was not clear that any legislative action would flow from the hearing. [redacted] STAT

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OCA/LEG: [redacted] (3 June 1986) STAT

TESTIMONY OF

ARCHIBALD COX
Chairman, Common Cause

on

THE WAR POWERS RESOLUTION

before

THE COMMITTEE ON FOREIGN AFFAIRS

of the

UNITED STATES HOUSE OF REPRESENTATIVES

Thursday, May 1, 1986

Mr. Chairman and Members of the Committee:

I appreciate this opportunity to testify before the House Foreign Affairs Committee on the War Powers Act of 1973.

The Committee deserves the support and heartfelt thanks of the American people for undertaking a sensitive and difficult task of both urgency and grave national importance. On the one hand, all of us wish to be sure that the United States and its government are, insofar as possible, equipped to combat, prevent, deter, and punish the terrorists and sponsors of terrorism, who are so savagely destroying property and mutilating and murdering innocent people. On the other hand, it is essential to our survival as a self-governing people that the fear of terrorism and our passionate sense of outrage at acts of terrorism not be used, or even allowed, to rush us into hastily upsetting the constitutional allocation of war-making powers as clarified and implemented by the War Powers Resolution of 1973. What is required is the kind of careful, sober and informed inquiry that this Committee is equipped to give to two related questions:

I. Does the urgent need for effective action to prevent, punish and deter terrorism require modification of the War Powers Resolution?

II. Can and should the War Powers Resolution be improved and strengthened so as to assure that the United States is not committed to armed hostilities that may lead to war, without the full participation of the people of the United States through their representatives in Congress?

In approaching these questions I start from the premise that although we should be open-minded in considering whether there is need for change to meet present exigencies, the basic allocation of power between the Congress and the Executive defined by the War Powers Resolution is both constitutional and wise. The Constitution vests in Congress the power "to declare war." Madison's notes make plain that this means all power to make war is vested in Congress, except for the limited power to repel an armed attack upon the United States or its Armed Forces. That is the virtually unanimous meaning put upon the Constitution by its Framers, as demonstrated in oft-quoted passages from Thomas Jefferson, James Madison, James Iredell, James Wilson and William Patterson. The Supreme Court of the United States has adopted this interpretation when the issue has been raised. In Talbot v. Seeman 1 Cranch, 1, 26 (1801), Chief Justice Marshall said for a unanimous Court --

> The whole powers of war being, by the constitution of the United States vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry [into authority for the capture of a foreign vessel in time of international conflict].

Similarly, in the Prize Cases, 67 U.S. 635, 668 (1863), the Court said:

> By the Constitution, Congress alone has the power to declare a national or foreign war. . . . [The President] has no power to initiate or declare a war either against a foreign nation or a domestic state.

The constitutional designation of the President as the "Commander-in-Chief of the Army and Navy of the United States" is not inconsistent with this conclusion. As explained by Alexander Hamilton in The Federalist Papers --

> [T]he President is to be Commander in Chief of the Army and Navy of the United States. In this respect his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British King extends to the declaring of war and to the raising and regulating of fleets and armies; all which, by the Constitution under consideration, would appertain to the Legislature. (emphasis in original.)

The argument that history validates the assertion of broader executive authority rests upon a misconception. That Presidents did exercise broader authority for many years is beyond question; but as Justice Jackson pointed out in his concurring opinion in Youngstown Steel and Tube Co. v. Sawyer 343 U.S. 579, 634 (1952), the powers that the President may exercise with the silent acquiescence of Congress are much broader than the powers irretrievably vested in him by virtue of Article II and his Office. The Constitution also gives Congress explicit authority "to make rules for the government and regulation of the land and naval forces," and to "make all laws which shall be necessary and proper for carrying into execution" any power vested in the government of the United States or in any Officer.

By enacting the War Powers Resolution, Congress wisely reasserted its control in a time when the nature of hostilities was undergoing radical change, and thus constitutionally defined and confined the discretion of the President. That action too was responsive to an original theme. As explained by Thomas Jefferson in 1789 --

> We have already given in example one effectual check to the Dog of war by transferring the power of letting him

> loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.

I.

Does the urgent need for effective action to prevent, punish and deter terrorism require modification of the War Powers Resolution?

1. In considering whether other, new legislation is needed for the United States to cope with terrorism as effectively as possible the Committee will wish to take note of the flexibility already available to the President under the War Powers Resolution. The restrictions seem to me to be few and not unreasonable.

(a) The President may not initiate a war, even on a country that supports terrorists, without a declaration of war by Congress. Surely, both the Constitution and sound policy require that the people of the United States grant authority, through their representatives, before they are committeed to such hostilities. As Abraham Lincoln said, "no one man should hold the power of [making war]." Only an expression of the combined judgment of the President and the Congress can ensure that, if the American people must go to war, they will stand united.

(b) The only other advance restriction on the President's discretion in use of the Armed Forces to counter or prevent terrorism is Section 3 of the War Powers Resolution, which requires the President to consult Congress "in every possible instance" before --

> introducing the United States into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.

I would suppose, Mr. Chairman, that these words left considerable room for using without prior consultation small units of military personnel directly against terrorists where there is no attack upon a de jure or de facto government and there is no clear indication that the de jure or de facto government will resist the counter-terrorist measure. The steps that occur to me, if confined within this limitation, include, for example --

-- The direct prevention of acts of terrorism.

-- The direct protection of embassies, consulates and military installations.

-- Such activities as the use of the U.S. Air Force to intercept and force the landing of an Egyptian airplane believed to carry the terrorists responsible for the hijacking of the Achille Lauro cruise ship.

-- The participation of U.S. forces, alongside British forces, in an attempt to rescue American hostages hypothetically being held in the U.S. embassy in London by Libyan terrorists.

I repeat that these are examples of what might be done only if there is no attack upon a de jure or de facto government and no clear indication that the de jure or de facto government will resist the counter-terrorist measure. But the steps are not unimportant.

(c) I shall discuss the requirement of "consultation" -- not just notification but genuine consultation -- in more detail later as an illustration of the need to clarify and strengthen the War Powers Resolution. It is enough to say now that genuine

consultation with Congress seems hardly to be an onerous restriction when one bears in mind the need for bi-partisan support and national unity. The President retains the power of decision. Surely, any foreseeable "bugs" in establishing a format of consultation can be worked out in advance, if the National Security Establishment will substitute a new spirit of cooperation with the Congress for its present grudging resistance to the War Powers Resolution.

(d) The remaining restrictions on Presidential actions imposed by the Resolution similarly do not impair the President's flexibility to respond to terrorism. They require reports to Congress after the event and establish a 60-day deadline beyond which troops must be withdrawn absent Congressional action -- a declaration of war or authorization of their continued presence. If more than 60 days of foreign operations is required, the magnitude of the operation deserves a Congressional vote upon continuance.

(e) Still another course is open to the President under existing law. The President may seek specific statutory authorization to use the Armed Forces of the United States in such narrowly defined ways as he deems necessary from time to time against a specific country or countries supporting terrorism, for a specific period of time. The Joint Resolution authorizing participation in the international peace-keeping force in Lebanon shows the kind of procedure available, even though the occasion and the action authorized were altogether different.

It may be objected that seeking and granting such authority might exacerbate relations with the country sponsoring terrorism. Surely such action would never be taken unless relations with the government supporting terrorism were already as bad as could be, and that government had been warned that continuance of the same course would risk countermeasures designed to protect American lives. The resolution could not make the already intolerable situation worse. Nor would it increase the danger to Americans in the Armed Forces by detailing the time and place of specific countermeasures. Within the Congressionally prescribed range of tactics the choice should be left to the President and the Armed Services.

In pointing to this course I am not unmindful of the Tonkin Gulf Resolution of 1964. That unhappy source of later controversy warns not only of the dangers of acting loosely and rashly in a surge of emotion, but also of the need for skillful draftsmanship. The problems of draftsmanship undoubtedly require more thought now, in advance; but I am inclined to think that they are susceptible of wise resolution.

2. The bill offered in the other branch by Senators Dole and Denton and in the House by Representatives Barton, Hunter and Livingston is, in my judgment, an unnecessary, rash and highly dangerous over-reaction. If adopted, the bill would authorize the President to use the Armed Forces of the United States "as he deems necessary" to counter terrorism; in other words, in any way and on any scale he may choose. The bill would supersede the War Powers Resolution. As explained by Senator Dole, it gives

authority to preempt terrorism without waiting for any specific acts of terrorism. The net effect is to authorize use of the Armed Forces at any time and on any scale that the President may say is useful to deter terrorism. Libya, Syria, Iran, Bulgaria, Viet Nam and Nicaragua come quickly to mind.

To be specific, President Reagan has said that the Sandinista regime in Nicaragua is training and giving refuge to terrorists. The Dole bill would empower the President to send Armed Forces to Nicaragua at once to punish or topple that regime and to keep them there indefinitely.

We of Common Cause sincerely hope that this Committee and the Congress will reject any such legislation.

II.

Can and should the War Powers Resolution be improved and strengthened so as to assure that the United States is not committed to armed hostilities against a foreign nation that may lead to war, without the full participation of the people of the United States through their representatives in Congress?

1. In considering whether the War Powers Resolution should be improved and strengthened so as to prevent further erosion of the powers of Congress by executive action, the Committee may first wish to focus upon Section 3, which provides that the President --

> In every possible instance shall consult with Congress before introducing U.S. Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances. . . .

The bombing of Libyan military installations without prior consultation with representative Congressional leaders plainly violated the spirit and intent of Section 3. Very probably it also violated the literal words.

The use of 25 warplanes to invade the airspace of a foreign nation and to attack its military installations and armed forces would seem pretty clearly to fall within the words, "before introducing United States Armed Forces into hostilities." If not, surely the action introduces them into a situation "where imminent involvement in hostilities is clearly indicated by the circumstances." No one could rationally have supposed that the Libyan armed forces would not shoot back.

Equally clearly, this was a situation in which it was "possible" for the President to engage in consultation with representatives of Congress.

Again plainly, there was no consultation before the step was taken. The meaning of "consult" is plain enough. The report of this Committee in recommending the bill that became the War Powers Resolution explains the intended significance (H. Rep. No. 93-287, p. 6):

> A considerable amount of attention was given to the definition of consultation. Rejected was the notion that consultation should be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action being contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available.

In the case of the bombing of Libya, Congressional leaders were merely informed of the operation after the bombers had been underway for two hours. In a letter to the President, Senate Minority Leader Robert Byrd, Ranking Member of the Foreign Relations Committee Claiborne Pell, Ranking Member of the Armed Services Committee Sam Nunn, and Patrick Leahy, Vice Chairman of the Select Committee on Intelligence said --

> . . . the first indication of your decision was at a meeting Monday afternoon at the White House, after the operation was already underway, and this amounted to a notification of your actions rather than the consultation required by law.

In the course of commenting on the Libya attack, House Minority Leader Robert H. Michel said, "We really ought to have some sort of vehicle for getting Congress into the mix, so we're not left out in the cold."

Senator Nunn further commented, "I don't think there was enough consultation . . . there should have been more . . . when the President is examining some of the options, it would be helpful for Congressional leaders to look at some of those options, before he decides. That's consultation."

The only possible uncertainty about the justice of the charge of violation arises from the fact that Section 3 requires the President in such situations to consult "with Congress," if possible, before he acts. I would suppose that in this context those words pretty clearly mean "consult with Congress <u>through its representative leaders</u>." Perhaps no other course is possible when military action must be taken promptly and without advance warning.

The intent is already plain enough, but I suggest that the Committee should carefully consider removing any verbal uncertainty by an amendment specifying that the consultation shall take place with representatives of Congress. Here the proposal advanced by Senators Byrd, Leahy, Nunn and Pell in their letter to the President, specifying eighteen Senators and Representatives by office, may furnish a starting point for further deliberation by the Foreign Affairs Committee.

I can think of only two possible objections to this kind of clarification. The first -- that the President should not be required to consult anyone -- hardly deserves mention. The second -- that consultation might endanger secrecy -- seems to me equally without merit. Serious consideration of the introduction of United States Armed Forces into hostilities or into situations where hostilities are imminent, requires the involvement of at least thirty-five or forty individuals in the Executive Branch. The addition of a reasonable number of responsible Congressional leaders surely would not appreciably increase the danger of leaks, especially if their commitment to secrecy were made plain. Congressional leaders are no less responsible than Executive officials.

2. May I also suggest in this connection, Mr. Chairman, that the members of this Committee may wish to put their minds on establishing informally those further mechanisms for consultation that cannot wisely be frozen into statutory form. Such mechanisms might well call for continual informal consultation according to a set procedure even before the War Powers Resolution

requires it, as well as for the consultation that the Resolution mandates.

Such arrangements would require sincere cooperation from the Executive Branch. The past record is not encouraging in this respect, but, at least until the contrary is established, the opportunity deserves exploration. It is hard to believe that adamant insistence upon one view of Presidential prerogatives -- a view that excludes participation of the Congress as the most representative arm of the people -- will continue to lead the President to turn away from the only available mechanism for securing the bi-partisanship and national unity necessary to support measures that in the present troubled international situation may be required by terrorism and like hostilities short of war.

3. If the Committee decides to recommend legislation, I suggest that it also consider introducing a definition of "consult" that captures the essence of its 1973 report quoted above and thus leaves no room for evasion.

4. Finally, because of the decision of the U.S. Supreme Court in INS v. Chadha, 462 U.S. 919 (1983), the Committee may wish to give careful attention to Section 5 of the War Powers Resolution. As enacted, Section 5 not only limits to 60 days the duration of the power of the President to keep the Armed Forces engaged in hostilities or in situations in which an outbreak of hostilities is imminent; it also reserves to Congress the right to require the recall of the Armed Forces in less than 60 days by concurrent resolution. The Chadha decision casts no doubt upon

the 60 day limitation, but the Court's opinion presents a risk that the reservation of Congressional power to require an earlier halt would be held unconstitutional.

On the one hand, Chadha is distinguishable: first, because the case involved action by less than the whole Congress; second, because the War Powers Resolution regularizes and clarifies the constitutional division of power between Congress and the Executive whereas the immigration law was a straightout delegation of power; and third, because Section 5(c) may be fairly described as a limitation upon the duration of any Presidential authority whereas Chadha attempted to reserve Congressional power to overrule a President's decision in specific instances while leaving the delegated power unaffected.

On the other hand, if the language in the Chadha opinion indicating that Congress cannot act effectively except upon compliance with the Presentment Clause has universal application, then Section 5(c) cannot survive. (Because the War Powers Resolution contains a separability clause, the provisions of the Resolution would remain unaffected.)

If the Committee reviews Section 5(c), two alternatives deserve its careful consideration.

(a) One is to substitute words calling for a Joint Resolution in place of the present provision for a concurrent resolution. Presentation of a Joint Resolution to the President would seem to satisfy even the most expansive reading of Chadha, but it would also diminish the role of Congress because the Joint

Resolution would have to be signed by the President or passed over his veto.

(b) The second, and probably preferable, alternative is to shorten from 60 days to 30 days the period for which the President may use the Armed Forces in a manner short of making war without specific authority from Congress. We urge the Committee to give this step the most careful consideration. I am confident that, in situations where both the national honor and war and peace are at stake, Congress has the capacity to organize itself to act wisely and with all deliberate speed. In such situations, the constitutional balance of power, the need for bi-partisan support and national unity before going further in hostilities, and the preservation of democratic self-government, all require a decision by Congress as the most representative organ of the people.

III.

In weighing the need for any change in the War Powers Resolution the Committee must take account of the unhappy fact that the entire National Defense Establishment continues persistently to resist the participation of the people's elected representatives in decisions involving the introduction of Armed Forces into hostilities or situations in which the risk of hostilities is imminent; it resists even though the lives of hundreds or even thousands of Americans may be lost and the Nation may be precipitated into war. The War Powers Resolution is attacked as unconstitutional. Executive compliance has

usually been grudging and without acceptance of the statutory and constitutional obligation. The point is illustrated by U.S. military actions in Grenada, Lebanon, and Libya and very probably, in El Salvador and Nicaragua. The spirit, if not the letter, of the requirement for prior consultation has been repeatedly violated. Clearly, the utmost latitude will be read into any new exceptions or modifications. To say this is not to question or approve in any other respect the action the President took against Kaddafi.

Under these circumstances, I suggest, Mr. Chairman, that this Committee should seek an appropriate way of expressing its commitment and the commitment of Congress to the War Powers Resolution -- indeed its commitment not only to the Resolution but also to the constitutional right of the Congress to share in any decision to commit U.S. Armed Forces to hostilities or into situations where the risk of hostilities is imminent. The realities of today's complex international environment are such that there will be repeated need to consider the use of U.S. Armed Forces in hostilities short of war. We should not shrink from the choice when there is genuine necessity. But in making those choices the role of Congress and the balance of war-making powers envisioned by the Founding Fathers and laid out in the War Powers Resolution should be preserved. The decision to commit U.S. troops into hostilities is of such profound importance that it should be and must remain a shared responsibility of the Executive and Legislative branches.

The late Senator Javits warned that, "Whether or not the [War Powers] Resolution is enforced will . . . depend upon the determination of the Congress to stand up and fight for its constitutional rights respecting war, on the one hand, and the power of the President to get the country to side with him politically and thus make the Resolution a nullity, on the other." It is now up to the Congress, and through it the people, to reconfirm and exercise its constitutional responsibility so that this and future administrations follow the spirit and letter of the law and the Resolution is neither undermined nor eroded.

In our outrage at terrorists and the sponsors of terrorism we must not forget that the history of liberty is one of constant vigilance against the accumulation of power by an executive. We must take care, now more than ever, not to erode one of our most precious national legacies -- the system of checks and balances that for nearly two hundred years has kept out Nation free and preserved our people's liberties.

STATEMENT OF ABRAHAM D. SOFAER
LEGAL ADVISER OF THE DEPARTMENT OF STATE
TO THE SUBCOMMITTEE ON ARMS CONTROL,
INTERNATIONAL SECURITY AND SCIENCE OF THE
COMMITTEE ON FOREIGN AFFAIRS
OF THE HOUSE OF REPRESENTATIVES

TUESDAY, APRIL 29, 1986

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE:

I AM PLEASED TO HAVE THE OPPORTUNITY TO APPEAR BEFORE YOU TODAY TO DISCUSS THE WAR POWERS RESOLUTION IN THE CONTEXT OF RECENT EVENTS. I WOULD LIKE TO BEGIN BY SETTING OUT SOME GENERAL CONSIDERATIONS REGARDING THE RESOLUTION, AND THEN FOCUS ON THE APPLICATION OF THE RESOLUTION TO SPECIFIC CASES WHICH ARE OF PARTICULAR INTEREST TO THE SUBCOMMITTEE.

BASIC FRAMEWORK

THE WAR POWERS RESOLUTION WAS ENACTED IN 1973 IN ORDER TO ENSURE CONGRESSIONAL INVOLVEMENT IN SITUATIONS IN WHICH

THE UNITED STATES MAY BECOME ENGAGED IN HOSTILITIES WITH OTHER STATES. TO THAT END, THE RESOLUTION CONTAINS CERTAIN REQUIREMENTS CONCERNING CONSULTATION, REPORTING, AND TERMINATION OF THE USE OF U.S. ARMED FORCES. OF COURSE, THIS AND OTHER ADMINISTRATIONS HAVE EXPRESSED SERIOUS DOUBTS ABOUT THE WISDOM AND CONSTITUTIONALITY OF VARIOUS PARTS OF THE RESOLUTION.

THE CONSULTATION REQUIREMENT IS CONTAINED IN SECTION 3, WHICH PROVIDES:

> "THE PRESIDENT IN EVERY POSSIBLE INSTANCE SHALL CONSULT WITH CONGRESS BEFORE INTRODUCING UNITED STATES ARMED FORCES INTO HOSTILITIES OR INTO SITUATIONS WHERE IMMINENT INVOLVEMENT IN HOSTILITIES IS CLEARLY INDICATED BY THE CIRCUMSTANCES, AND AFTER EVERY SUCH INTRODUCTION SHALL CONSULT REGULARLY WITH THE CONGRESS UNTIL UNITED STATES ARMED FORCES ARE NO LONGER ENGAGED IN HOSTILITIES OR HAVE BEEN REMOVED FROM SUCH SITUATIONS."

THE RESOLUTION SPECIFIES ONLY THAT CONSULTATION OCCUR "BEFORE INTRODUCING" ARMED FORCES IN THE SITUATIONS

SPECIFIED, AS WELL AS "AFTER" EACH SUCH INTRODUCTION UNTIL THE SITUATION ENDS. IT DOES NOT DEFINE THE NATURE OF THE CONSULTATIONS REQUIRED, BUT ALLOWS THE PRESIDENT TO DETERMINE PRECISELY HOW SUCH CONSULTATIONS ARE TO BE CARRIED OUT. SIGNIFICANTLY, IN MAKING THE REQUIREMENT APPLICABLE ONLY WHERE CONSULTATION IS "POSSIBLE," THE RESOLUTION EXPRESSLY CONTEMPLATES THAT CONSULTATION IN A PARTICULAR CASE WILL DEPEND ON THE PREVAILING CIRCUMSTANCES.

OVER THE YEARS, BOTH BEFORE AND AFTER THE RESOLUTION WAS ADOPTED, THE EXECUTIVE BRANCH HAS ENGAGED IN CONSULTATIONS WITH THE CONGRESS IN A VARIETY OF CIRCUMSTANCES INVOLVING THE POSSIBLE DEPLOYMENT OF U.S. FORCES ABROAD. CONSULTATIONS HAVE OCCURRED IN CASES WHERE THE RESOLUTION MIGHT HAVE BEEN THOUGHT TO REQUIRE THEM AND IN CASES WHERE IT CLEARLY WOULD NOT (AND THE EXECUTIVE BRANCH HAS TYPICALLY BEEN CAREFUL TO PRESERVE ITS POSITION ON THESE MATTERS WHEN CONSULTING). THE PURPOSE OF SUCH CONSULTATIONS IS TO KEEP THE CONGRESS INFORMED, TO DETERMINE WHETHER THE CONGRESS APPROVES OF A PARTICULAR ACTION OR POLICY, AND TO GIVE THE CONGRESS AN OPPORTUNITY TO PROVIDE THE PRESIDENT WITH ITS VIEWS, ESPECIALLY WHERE IT MAY DISAGREE WITH THE POLICY. CONSULTATIONS ARE NOT INTENDED TO INVOLVE THE CONGRESS IN REVIEWING THE DETAILED PLANS OF A MILITARY OPERATION. THE DEGREE TO WHICH THE PRESIDENT IS IMPLEMENTING A POLICY OF

WHICH THE CONGRESS IS WELL AWARE AND WHICH IT HAS ALREADY APPROVED IN PRINCIPLE IS ONE IMPORTANT FACTOR TO BE CONSIDERED IN DETERMINING THE NATURE AND TIMING OF CONSULTATIONS.

IN PRACTICE, THE FORM AND SUBSTANCE OF CONSULTATIONS HAVE DEPENDED UPON THE CIRCUMSTANCES OF EACH CASE. IN SOME INSTANCES, SUCH AS THE INTRODUCTION OF U.S. FORCES INTO EGYPT TO PARTICIPATE IN PEACEKEEPING OPERATIONS, OR THE CASE OF THE VIETNAM EVACUATION, THE SITUATION PERMITTED DETAILED CONSULTATIONS WELL IN ADVANCE OF THE ACTION CONTEMPLATED. IN THE CASE OF THE TEHRAN RESCUE MISSION, PRIOR CONSULTATION WAS NOT POSSIBLE BECAUSE OF EXTRAORDINARY OPERATIONAL NEEDS.

SECTION 4 OF THE RESOLUTION REQUIRES THAT THE PRESIDENT SUBMIT, WITHIN 48 HOURS AFTER THE INTRODUCTION OF U.S. FORCES, A WRITTEN REPORT TO THE CONGRESS IN THREE CIRCUMSTANCES. A REPORT MUST BE SUBMITTED WHEN U.S. FORCES ARE INTRODUCED "INTO HOSTILITIES OR INTO SITUATIONS WHERE IMMINENT INVOLVEMENT IN HOSTILITIES IS CLEARLY INDICATED BY THE CIRCUMSTANCES." IN ADDITION, A REPORT MUST BE SUBMITTED WHEN U.S. FORCES ARE INTRODUCED "INTO THE TERRITORY, AIRSPACE OR WATERS OF A FOREIGN NATION, WHILE EQUIPPED FOR COMBAT" (WITH CERTAIN SPECIFIED EXCEPTIONS), OR WHEN SUCH FORCES ARE INTRODUCED "IN NUMBERS WHICH SUBSTANTIALLY ENLARGE UNITED

STATES ARMED FORCES EQUIPPED FOR COMBAT ALREADY LOCATED IN A FOREIGN NATION ...."

BOTH REPUBLICAN AND DEMOCRATIC PRESIDENTS HAVE PROVIDED WRITTEN REPORTS TO THE CONGRESS WITH RESPECT TO U.S. DEPLOYMENTS ABROAD AS A MEANS OF KEEPING THE CONGRESS INFORMED, WHILE RESERVING THE EXECUTIVE BRANCH'S POSITION ON THE TECHNICAL APPLICABILITY AND CONSTITUTIONALITY OF THE RESOLUTION. REPORTS WERE SUBMITTED BY PRESIDENT FORD IN CONNECTION WITH THE INDOCHINA EVACUATIONS AND THE MAYAGUEZ INCIDENT, AND BY PRESIDENT CARTER IN CONNECTION WITH THE TEHRAN RESCUE MISSION. DURING THE REAGAN ADMINISTRATION, REPORTS WERE SUBMITTED WITH RESPECT TO U.S. PARTICIPATION IN THE MULTINATIONAL FORCE AND OBSERVERS IN THE SINAI AND THE MULTINATIONAL FORCE IN LEBANON, THE DEPLOYMENT OF U.S. AIRCRAFT IN CONNECTION WITH THE SITUATION IN CHAD, AND THE INTRODUCTION OF U.S. FORCES INTO GRENADA. MORE RECENTLY, A REPORT WAS SUBMITTED CONCERNING THE ENCOUNTER WITH LIBYAN FORCES DURING U.S. MILITARY EXERCISES IN AND NEAR THE GULF OF SIDRA IN LATE MARCH, AND A REPORT WAS SUBMITTED WITH RESPECT TO THE APRIL 14 OPERATION AGAINST LIBYA. INDEED, THE EXECUTIVE BRANCH HAS PROVIDED INFORMATION TO THE CONGRESS IN MANY CASES WHERE NO RELEVANT STATUTORY REQUIREMENT EXISTED.

SECTION 5 OF THE RESOLUTION PROVIDES THAT WITHIN 60 DAYS AFTER A REPORT IS SUBMITTED OR REQUIRED TO BE SUBMITTED, THE PRESIDENT MUST TERMINATE THE USE OF U.S. FORCES UNLESS THE CONGRESS HAS DECLARED WAR OR SPECIFICALLY AUTHORIZED THE USE OF SUCH FORCES, HAS EXTENDED THE 60-DAY PERIOD OR IS PHYSICALLY UNABLE TO MEET AS A RESULT OF AN ARMED ATTACK ON THE UNITED STATES. THE SECTION ALSO PROVIDES THAT THE PRESIDENT MUST REMOVE U.S. FORCES FROM ENGAGEMENT IN HOSTILITIES ABROAD "IF THE CONGRESS SO DIRECTS BY CONCURRENT RESOLUTION." THE LEGISLATIVE VETO PROVISION OF THE RESOLUTION CANNOT STAND IN THE FACE OF THE SUPREME COURT'S 1983 DECISION IN INS V. CHADHA.

THE EXECUTIVE BRANCH HAS HISTORICALLY DIFFERED WITH THE CONGRESS OVER THE WISDOM AND CONSTITUTIONALITY OF THE 60-DAY PROVISION OF SECTION 5. AS PRESIDENT REAGAN MADE CLEAR IN SIGNING THE MULTINATIONAL FORCE IN LEBANON RESOLUTION ON OCTOBER 12, 1983, THE IMPOSITION OF SUCH ARBITRARY AND INFLEXIBLE DEADLINES CREATES UNWISE LIMITATIONS ON PRESIDENTIAL AUTHORITY TO DEPLOY U.S. FORCES IN THE INTERESTS OF U.S. NATIONAL SECURITY. SUCH DEADLINES CAN UNDERMINE FOREIGN POLICY JUDGMENTS, AND ADVERSELY AFFECT OUR ABILITY SAFELY AND EFFECTIVELY TO DEPLOY U.S. FORCES IN SUPPORT OF THOSE JUDGMENTS. MOREOVER, THE PRESIDENT'S CONSTITUTIONAL AUTHORITY CANNOT IN ANY EVENT BE IMPERMISSIBLY INFRINGED BY

STATUTE. SECTION 8(D) OF THE RESOLUTION ITSELF MAKES CLEAR THAT THE RESOLUTION WAS NOT INTENDED TO ALTER THE CONSTITUTIONAL AUTHORITY OF THE PRESIDENT. THE PRESIDENT HAS CONSTITUTIONAL POWER, AS COMMANDER-IN-CHIEF AND AS THE NATION'S PRINCIPAL AUTHORITY FOR THE CONDUCT OF FOREIGN AFFAIRS, TO DIRECT AND DEPLOY U.S. FORCES IN THE EXERCISE OF SELF-DEFENSE, INCLUDING THE PROTECTION OF AMERICAN CITIZENS FROM ATTACKS ABROAD. FROM THE TIME OF JEFFERSON TO THE PRESENT, PRESIDENTS HAVE EXERCISED THEIR AUTHORITY UNDER THE CONSTITUTION TO USE MILITARY FORCE TO PROTECT AMERICAN CITIZENS ABROAD.

I WOULD ALSO MENTION THAT SERIOUS CONSTITUTIONAL PROBLEMS EXIST WITH RESPECT TO SECTION 8(A) OF THE RESOLUTION, WHICH PURPORTS TO LIMIT THE MANNER IN WHICH THE CONGRESS MAY IN THE FUTURE AUTHORIZE THE USE OF U.S. FORCES. I DO NOT BELIEVE THAT ONE CONGRESS BY STATUTE CAN SO LIMIT THE CONSTITUTIONAL OPTIONS OF FUTURE CONGRESSES. NOR CAN CONGRESS CONTROL THE LEGAL CONSEQUENCES OF ITS OWN ACTIONS. IF A PARTICULAR CONGRESSIONAL ACTION CONSTITUTES LEGAL AUTHORITY FOR THE PRESIDENT TO UNDERTAKE A SPECIFIC OPERATION, I DOUBT THAT ONE CONGRESS CAN CHANGE THAT FACT FOR ALL FUTURE TIMES BY REQUIRING A SPECIFIC FORM OF APPROVAL.

RECENT CASES

THE WAR POWERS RESOLUTION WAS ENACTED IN THE SHADOW OF U.S. INVOLVEMENT IN THE VIETNAM WAR, AND OF THE SO-CALLED WATERGATE SCANDALS. IN MORE RECENT YEARS, HOWEVER, ISSUES HAVE BEEN RAISED UNDER THE RESOLUTION IN SITUATIONS THAT BEAR NO RESEMBLANCE TO THE VIETNAM WAR AND, IN FACT, MAY NOT HAVE BEEN CONTEMPLATED AT THE TIME OF ITS ADOPTION.

IT IS A REGRETTABLE REALITY IN TODAY'S WORLD THAT AMERICANS ABROAD ARE INCREASINGLY SUBJECTED TO MURDER, KIDNAPPINGS AND OTHER ATTACKS BY TERRORISTS WHO SEEK TO FURTHER THEIR POLITICAL ENDS THROUGH SUCH MEANS. THE HIJACKING LAST YEAR OF TWA FLIGHT 847, WITH THE MURDER OF NAVY DIVER STETHEM, IS A WELL-KNOWN RECENT EXAMPLE. IN THAT CASE, WE HAD NO REASON TO BELIEVE THAT THE GOVERNMENT OF LEBANON HAD ENCOURAGED OR OTHERWISE SUPPORTED THE TERRORISTS: IT WAS SIMPLY UNABLE TO CONTROL THEM. IN SUCH A SITUATION, THE PRESIDENT MAY DECIDE TO DEPLOY SPECIALLY-TRAINED ANTI-TERRORIST UNITS IN AN EFFORT TO SECURE THE RELEASE OF THE HOSTAGES OR TO CAPTURE THE TERRORISTS WHO PERPETRATED THE ACT. DOES THE WAR POWERS RESOLUTION REQUIRE CONSULTATION AND REPORTING IN THIS KIND OF SITUATION?

WE HAVE SUBSTANTIAL DOUBT THAT THE RESOLUTION SHOULD, IN GENERAL, BE CONSTRUED TO APPLY TO THE DEPLOYMENT OF SUCH ANTI-TERRORIST UNITS, WHERE OPERATIONS OF A TRADITIONAL MILITARY CHARACTER ARE NOT CONTEMPLATED AND WHERE NO CONFRONTATION IS EXPECTED BETWEEN OUR UNITS AND FORCES OF ANOTHER STATE. TO BE SURE, THE LANGUAGE OF THE RESOLUTION MAKES NO EXPLICIT EXCEPTION FOR ACTIVITIES OF THIS KIND, BUT SUCH UNITS CAN REASONABLY BE DISTINGUISHED FROM "FORCES EQUIPPED FOR COMBAT" AND THEIR ACTIONS AGAINST TERRORISTS DIFFER GREATLY FROM THE "HOSTILITIES" CONTEMPLATED BY THE RESOLUTION.

NOTHING IN THE LEGISLATIVE HISTORY INDICATES, MOREOVER, THAT THE CONGRESS INTENDED THE RESOLUTION TO COVER DEPLOYMENTS OF SUCH ANTI-TERRORIST UNITS. THESE UNITS ARE NOT CONVENTIONAL MILITARY FORCES. A RESCUE EFFORT OR AN EFFORT TO CAPTURE OR OTHERWISE DEAL WITH TERRORISTS, WHERE THE FORCES OF A FOREIGN NATION ARE NOT INVOLVED, IS NOT A TYPICAL MILITARY MISSION, AND OUR ANTI-TERRORIST FORCES ARE NOT EQUIPPED TO CONDUCT SUSTAINED COMBAT WITH FOREIGN ARMED FORCES. RATHER, THESE UNITS OPERATE IN SECRECY TO CARRY OUT PRECISE AND LIMITED TASKS DESIGNED TO LIBERATE U.S. CITIZENS FROM CAPTIVITY OR TO ATTACK TERRORIST KIDNAPPERS AND KILLERS. WHEN USED, THESE UNITS ARE NOT EXPECTED TO CONFRONT THE MILITARY FORCES OF A SOVEREIGN STATE. IN A REAL SENSE,

THEREFORE, ACTION BY AN ANTI-TERRORIST UNIT CONSTITUTES A USE OF FORCE THAT IS MORE ANALOGOUS TO LAW ENFORCEMENT ACTIVITY BY POLICE IN THE DOMESTIC CONTEXT THAN IT IS TO THE "HOSTILITIES" BETWEEN STATES CONTEMPLATED BY THE WAR POWERS RESOLUTION.

I MIGHT NOTE, IN THIS CONNECTION, THAT OTHER TYPES OF CASES INVOLVING MILITARY DEPLOYMENTS, SUCH AS THE MOVEMENT OF WARSHIPS INTO OR THROUGH FOREIGN TERRITORIAL WATERS, THE DEPLOYMENT ABROAD OF SECURITY PERSONNEL SUCH AS MARINE EMBASSY GUARDS, AND TRANSITS OF COMBAT AIRCRAFT THROUGH FOREIGN AIRSPACE, HAVE GENERALLY BEEN CONSIDERED TO BE OUTSIDE THE SCOPE OF THE RESOLUTION. THE RATIONALE FOR REGARDING THE RESOLUTION INAPPLICABLE IS AT LEAST AS STRONG IN THE CASE OF LIMITED, ANTI-TERRORIST DEPLOYMENTS AS IT IS IN THESE OTHER CASES, ABSENT THE INVOLVEMENT OF THE ARMED FORCES OF A FOREIGN STATE.

EVEN ASSUMING THE RESOLUTION WERE APPLICABLE TO THE DEPLOYMENT OF SPECIAL ANTI-TERRORIST UNITS, THE FACT IS THAT CONSULTATIONS MAY NOT -- AND GENERALLY WILL NOT -- BE POSSIBLE IN SUCH CASES. THE EXISTENCE AND PURPOSE OF THESE UNITS IS WELL-KNOWN TO THE CONGRESS. THE NEED FOR SWIFTNESS AND SECRECY INHERENT IN THE NATURE OF THOSE ACTIVITIES IS SO EXTRAORDINARY THAT CONSULTATIONS PRIOR TO DEPLOYMENT MIGHT

WELL JEOPARDIZE THE LIVES OF OUR UNITS AND THE HOSTAGES THEY MAY SEEK TO LIBERATE.

ISSUES UNDER THE WAR POWERS RESOLUTION HAVE ALSO BEEN RAISED WHERE U.S. FORCES HAVE ENGAGED IN A MILITARY EXERCISE IN CONFORMITY WITH INTERNATIONAL LAW. THE INCIDENT IN THE GULF OF SIDRA IN LATE MARCH ILLUSTRATES THE SITUATION. DOES THE RESOLUTION REQUIRE THE PRESIDENT TO CONSULT AND REPORT IN THIS KIND OF CASE?

SOME FACTUAL BACKGROUND WILL HELP TO PUT THIS QUESTION IN PERSPECTIVE. THE UNITED STATES IS COMMITTED TO THE EXERCISE AND PRESERVATION OF NAVIGATION AND OVERFLIGHT RIGHTS AND FREEDOMS AROUND THE WORLD. THAT IS THE PURPOSE OF THE FREEDOM OF NAVIGATION PROGRAM. A DELIBERATE DECISION WAS MADE DURING THE CARTER ADMINISTRATION TO DISCOURAGE OR NEGATE UNLAWFUL CLAIMS TO EXTENDED JURISDICTION IN THE OCEANS. THAT POLICY WAS AFFIRMED IN 1982 UNDER PRESIDENT REAGAN, AND IN 1983 THE ESSENCE OF THE POLICY BECAME PUBLIC IN A STATEMENT ON U.S. OCEANS POLICY. THAT STATEMENT MADE CLEAR THAT THE UNITED STATES WOULD CONTINUE TO WORK WITH OTHER COUNTRIES TO DEVELOP AN ACCEPTABLE OCEANS REGIME. IT ALSO MADE CLEAR THAT THE UNITED STATES WOULD PROTEST THE UNILATERAL ACTS OF OTHER STATES DESIGNED TO RESTRICT THE RIGHTS AND FREEDOMS OF THE INTERNATIONAL COMMUNITY IN THE USE OF THE OCEANS, AND THAT

THE UNITED STATES WOULD EXERCISE AND ASSERT THOSE RIGHTS AND FREEDOMS ON A WORLDWIDE BASIS.

THE EXERCISE OF OUR RIGHTS PROVIDES VISIBLE AND POWERFUL EVIDENCE OF OUR REFUSAL TO ACCEPT UNLAWFUL CLAIMS. THE UNITED STATES HAS ACCORDINGLY PROTESTED AND EXERCISED RIGHTS AND FREEDOMS WITH RESPECT TO CLAIMS OF VARIOUS KINDS: UNRECOGNIZED HISTORIC WATERS CLAIMS, TERRITORIAL SEA CLAIMS GREATER THAN 12 NAUTICAL MILES, AND TERRITORIAL SEA CLAIMS THAT IMPOSE IMPERMISSIBLE RESTRICTIONS ON THE INNOCENT PASSAGE OF ANY TYPE OF VESSELS (SUCH AS REQUIRING PRIOR NOTIFICATION OR PERMISSION). SINCE THE POLICY WAS ESTABLISHED THE UNITED STATES HAS EXERCISED ITS RIGHTS AGAINST THE OBJECTIONABLE CLAIMS OF OVER 35 COUNTRIES, INCLUDING THE SOVIET UNION, AT A RATE OF ABOUT 30 TO 40 FREEDOM OF NAVIGATION EXERCISES PER YEAR.

THE UNITED STATES HAS FOLLOWED THIS POLICY IN CONNECTION WITH LIBYA. WHEN QADHAFI CAME TO POWER IN LIBYA, IT WAS NOT LONG BEFORE PRIVATE FIRMS SAW THEIR INTERESTS EXPROPRIATED. THEN, ON OCTOBER 9, 1973, QADHAFI BROADENED THE SCOPE OF HIS INTEREST IN EXPROPRIATING THE RIGHTS OF OTHERS, AND ASSERTED HIS CLAIM TO OWNERSHIP OF THE GULF OF SIDRA. THE UNITED STATES VIGOROUSLY PROTESTED THAT ASSERTION ON FEBRUARY 11, 1974, AND IN THE YEARS SINCE THEN WE HAVE EXERCISED OUR RIGHTS IN THAT AREA ON NUMEROUS OCCASIONS.

THE WAR POWERS RESOLUTION WAS NOT INTENDED TO REQUIRE CONSULTATION BEFORE CONDUCTING MANEUVERS IN INTERNATIONAL WATERS OR AIRSPACE IN THE CONTEXT OF THIS GLOBAL FREEDOM OF NAVIGATION PROGRAM. WE ARE AWARE OF NO PREVIOUS SUGGESTION THAT THE RESOLUTION WOULD REQUIRE CONSULTATION IN SUCH SITUATIONS. THIS QUESTION WAS CAREFULLY CONSIDERED IN CONNECTION WITH THE SIDRA EXERCISE IN MARCH, AND THE DECISION WAS MADE THAT THE CONDUCT OF THOSE OPERATIONS DID NOT PLACE U.S. FORCES INTO HOSTILITIES OR INTO A SITUATION IN WHICH IMMINENT INVOLVEMENT IN HOSTILITIES WAS "CLEARLY INDICATED BY THE CIRCUMSTANCES." THE UNITED STATES HAS CONDUCTED ITS EXERCISES NOT ONLY IN SIDRA BUT AROUND THE WORLD, NOT ONLY IN MARCH BUT FOR YEARS -- AND IN MOST INSTANCES WITHOUT HOSTILE RESPONSE. WE HAVE IN FACT BEEN IN THE GULF OF SIDRA AREA 16 TIMES SINCE 1981, AND WE HAVE CROSSED QADHAFI'S SO-CALLED "LINE OF DEATH" 7 TIMES BEFORE THE OPERATION LAST MARCH. ONLY ONCE BEFORE DID QADHAFI RESPOND WITH MILITARY ACTION, AND IN THAT INSTANCE HE WAS SINGULARLY UNSUCCESSFUL. WHILE WE MUST ALWAYS BE AWARE OF THE RISKS AND BE PREPARED TO DEAL WITH ALL CONTINGENCIES, WE HAVE EVERY RIGHT TO EXPECT THAT NEITHER LIBYA NOR ANY OTHER COUNTRY WILL TAKE HOSTILE ACTION AGAINST U.S. FORCES WHILE THEY ARE LAWFULLY IN AND OVER AREAS OF THE HIGH SEAS. THE THREAT OF A POSSIBLE HOSTILE RESPONSE IS NOT SUFFICIENT TO TRIGGER THE CONSULTATION REQUIREMENT OF SECTION 3, WHICH REFERS ONLY TO ACTUAL HOSTILITIES AND TO

SITUATIONS IN WHICH IMMINENT INVOLVEMENT IN HOSTILITIES IS "CLEARLY INDICATED" BY THE CIRCUMSTANCES.

WHERE A PEACEFUL, LAWFUL EXERCISE DOES IN FACT RESULT IN HOSTILE ACTION TO WHICH U.S. FORCES MUST RESPOND IN IMMEDIATE SELF-DEFENSE, SUCH AN ISOLATED ENGAGEMENT SHOULD NOT NORMALLY BE CONSTRUED AS CONSTITUTING THE INTRODUCTION OF U.S. ARMED FORCES INTO A SITUATION OF ACTUAL OR IMMINENT HOSTILITIES FOR THE PURPOSE OF THE REPORTING REQUIREMENT OF SECTION 4 OF THE RESOLUTION. NO REPORT WAS SUBMITTED IN THE CASE OF THE 1981 SIDRA INCIDENT, IN WHICH TWO LIBYAN AIRCRAFT WERE SHOT DOWN AFTER THEY FIRED AT U.S. AIRCRAFT. SIMILARLY, DURING THE PERIOD IN WHICH U.S. PEACEKEEPING FORCES WERE DEPLOYED IN THE BEIRUT AREA IN 1983, MANY INCIDENTS OCCURRED IN WHICH HOSTILE FORCES ATTACKED AND U.S. PEACEKEEPING FORCES RESPONDED IN IMMEDIATE SELF-DEFENSE. YET, NO SEPARATE WAR POWERS REPORT WAS SUBMITTED FOR EACH OF THESE INCIDENTS. OF COURSE, A DIFFERENT SITUATION MIGHT BE PRESENTED IF U.S. FORCES WITHDREW FROM AN AREA AND SUBSEQUENTLY RETURNED FOR THE PURPOSE OF UNDERTAKING FURTHER MILITARY ACTION.

AS A PRACTICAL MATTER, HOWEVER, THIS QUESTION SEEMS ACADEMIC. IN THE CASE OF THE MARCH INCIDENT IN THE GULF OF SIDRA, FOR EXAMPLE, REGARDLESS OF THE APPLICABILITY OF THE WAR POWERS RESOLUTION, THE ADMINISTRATION PROVIDED CONGRESS

WITH ALL THE INFORMATION IT NEEDED TO REVIEW THE INCIDENT. AS SOON AS HOSTILE LIBYAN ACTIONS OCCURRED, THE ADMINISTRATION TOOK STEPS TO ENSURE THAT CONGRESS WAS INFORMED OF THE SITUATION AND WAS KEPT INFORMED THROUGHOUT THE REMAINDER OF THE EXERCISE. IN PARTICULAR, SEVERAL CALLS WERE MADE TO CONGRESSIONAL LEADERS TO INFORM THEM OF THE EVENTS; EXTENSIVE BRIEFINGS WERE CONDUCTED FOR THE BENEFIT OF ALL INTERESTED MEMBERS, AT WHICH EXPERTS FROM THE DEPARTMENTS OF STATE AND DEFENSE PROVIDED PERTINENT INFORMATION AND RESPONDED TO ALL QUESTIONS ASKED BY MEMBERS; AND THE PRESIDENT SENT A WRITTEN REPORT TO CONGRESS DESCRIBING THE EVENTS OF MARCH 24 AND 25, THE ACTIONS TAKEN BY U.S. FORCES, AND THE LEGAL JUSTIFICATION FOR THOSE ACTIONS.

THE THIRD KIND OF SITUATION IN WHICH WAR POWERS CONSIDERATIONS HAVE BEEN RAISED RECENTLY IS THAT IN WHICH U.S. FORCES TAKE LEGITIMATE ACTION IN SELF-DEFENSE AGAINST FACILITIES OR FORCES OF ANOTHER STATE BECAUSE OF ITS SPONSORSHIP OF TERRORIST ATTACKS AGAINST AMERICANS. IN THE APRIL 14 OPERATION AGAINST LIBYA, U.S. FORCES UNDERTOOK MILITARY ACTION IN SELF-DEFENSE AGAINST FIVE TERRORIST-RELATED TARGETS IN ORDER TO PREEMPT AND DETER LIBYA'S UNLAWFUL AGGRESSION THROUGH TERRORIST FORCE AGAINST THE UNITED STATES AND ITS NATIONALS. DOES THE WAR POWERS RESOLUTION APPLY TO A CASE OF THIS KIND?

THE USE OF U.S. FORCES TO CONDUCT A MILITARY STRIKE AGAINST THE FACILITIES OF A HOSTILE, SOVEREIGN STATE IN ITS OWN TERRITORY FALLS WITHIN THE SPECIFIC TERMS OF THE CONSULTATION REQUIREMENT OF SECTION 3 OF THE RESOLUTION. IN THIS CONTEXT, HOWEVER, A CRITICAL ELEMENT IS FLEXIBILITY. AS INDICATED EARLIER, SECTION 3 EXPRESSLY ENVISIONS THE POSSIBILITY THAT IN SOME INSTANCES THE PRESIDENT MIGHT HAVE TO ACT WITHOUT PRIOR CONSULTATIONS. IN ANY EVENT, HE MUST SEEK TO CONSULT IN A MANNER APPROPRIATE TO THE CIRCUMSTANCES, AND THE NEED FOR SWIFTNESS AND SECRECY IN CARRYING OUT A MILITARY OPERATION IS A VITAL FACTOR TO BE WEIGHED IN DETERMINING THE NATURE AND TIMING OF CONSULTATIONS THAT MAY BE APPROPRIATE IN A GIVEN SITUATION.

IN THE CASE OF THE APRIL 14 OPERATION, EXTENSIVE CONSULTATIONS OCCURRED WITH CONGRESSIONAL LEADERS. THEY WERE ADVISED OF THE PRESIDENT'S INTENTION AFTER THE OPERATIONAL DEPLOYMENTS HAD COMMENCED, BUT HOURS BEFORE MILITARY ACTION OCCURRED. THIS SATISFIED THE RESOLUTION'S REQUIREMENT THAT CONSULTATION OCCUR "BEFORE" THE "INTRODUCTION" OF TROOPS INTO HOSTILITIES OR A SITUATION OF IMMINENT HOSTILITIES. CONGRESSIONAL LEADERS HAD AMPLE OPPORTUNITY TO CONVEY THEIR VIEWS TO THE PRESIDENT BEFORE ANY IRREVOCABLE ACTIONS WERE TAKEN (IN FACT, NO ONE WHO WAS CONSULTED OBJECTED TO THE ACTIONS UNDERTAKEN). THE PRESIDENT TOOK A SERIOUS RISK IN

CONDUCTING THESE CONSULTATIONS. THE PRESS OBSERVED LEGISLATIVE LEADERS ENTERING THE WHITE HOUSE FOR THE CONSULTATIONS, AND SPECULATION ABOUT POSSIBLE MILITARY ACTION ENSUED. THE PRESS ALSO LEARNED IMMEDIATELY AFTER THE CONSULTATIONS THAT THE PRESIDENT WAS TO MAKE AN ADDRESS LATER THAT EVENING, AND THIS LED TO RUMORS OF IMMINENT MILITARY ACTION THAT COULD HAVE JEOPARDIZED THE SUCCESS OF THE OPERATION.

THE CONSULTATIONS IN THIS CASE WERE CONSISTENT WITH THE PROVISIONS OF THE WAR POWERS RESOLUTION. THEY WERE ALSO CONSISTENT WITH AND IN MANY RESPECTS EXCEEDED IN SCOPE AND DEPTH THE CONSULTATIONS CONDUCTED ON PREVIOUS OCCASIONS. FOR EXAMPLE, PRESIDENT FORD'S MEETING WITH CONGRESSIONAL LEADERS TO DISCUSS THE MAYAGUEZ OPERATION OCCURRED AT A POINT IN TIME MUCH CLOSER TO THE ONSET OF MILITARY ACTION THAN WAS THE CASE HERE. PRESIDENT CARTER, AS I NOTED EARLIER, DID NOT CONSULT AT ALL PRIOR TO THE TEHRAN RESCUE MISSION.

WHERE A MILITARY ACTION CONSTITUTES THE INTRODUCTION OF U.S. FORCES INTO ACTUAL OR IMMINENT HOSTILITIES FOR THE PURPOSE OF THE CONSULTATION REQUIREMENT OF SECTION 3 OF THE RESOLUTION, THE ACTION ALSO TRIGGERS THE REPORTING REQUIREMENT OF SECTION 4. IN THE CASE OF THE APRIL 14 OPERATION, THE PRESIDENT SUBMITTED A FULL REPORT CONSISTENT

WITH THE WAR POWERS RESOLUTION. AS THE PRESIDENT NOTED IN HIS REPORT, THE ACTIONS TAKEN WERE PURSUANT TO HIS AUTHORITY UNDER THE CONSTITUTION, INCLUDING HIS AUTHORITY AS COMMANDER IN CHIEF. THAT AUTHORITY IS MOST COMPELLING IN A SITUATION SUCH AS THIS, WHERE THE USE OF FORCE IS ESSENTIAL TO DETER AN IMMEDIATE AND SUBSTANTIAL THREAT TO THE LIVES OF AMERICANS.

IN RECENT WEEKS THE QUESTION HAS BEEN RAISED PUBLICLY AS TO THE PRESIDENT'S RIGHT TO TAKE MILITARY ACTION WITHOUT THE EXPRESS APPROVAL OF CONGRESS. THIS IS A QUESTION THAT HAS BEEN ADDRESSED BY EXECUTIVE BRANCH OFFICIALS ON MANY OCCASIONS OVER THE YEARS, AND THEIR STATEMENTS ARE WELL-KNOWN TO THIS COMMITTEE. WITHOUT GOING INTO THE SPECIFICS OF THOSE STATEMENTS, IT IS CLEAR THAT THE LIMITED ACTIONS UNDERTAKEN BY PRESIDENT REAGAN IN RESPONSE TO ATTACKS ON THE UNITED STATES AND ITS CITIZENS FALL WELL WITHIN THE PRESIDENT'S AUTHORITY UNDER THE CONSTITUTION. AS NOTED EARLIER, THE WAR POWERS RESOLUTION DOES NOT CONFER POWER ON THE PRESIDENT, BUT IT CLEARLY RECOGNIZES THAT THE PRESIDENT HAS INDEPENDENT CONSTITUTIONAL AUTHORITY TO TAKE APPROPRIATE MILITARY ACTION.

IT IS ALSO IMPORTANT TO NOTE, IN THIS REGARD, THAT THE PRESIDENT IS NOT SIMPLY ACTING ALONE, UNDER HIS INHERENT CONSTITUTIONAL AUTHORITY, WHEN TAKING THE TYPES OF ACTIONS WE

ARE DISCUSSING TODAY. THE CONGRESS HAS, OVER THE YEARS, LEARNED OF, CONSIDERED, AND EFFECTIVELY ENDORSED IN PRINCIPLE THE USE OF U.S. FORCES FOR A VARIETY OF PURPOSES THROUGH ITS ADOPTION OF LAWS AND OTHER ACTIONS. MOST SIGNIFICANTLY, CONGRESS HAS AUTHORIZED AND APPROPRIATED MONEY FOR THE CREATION OF FORCES SPECIFICALLY DESIGNED FOR ANTI-TERRORIST TASKS. FOR EXAMPLE, SECTION 1453 OF THE 1986 DEPARTMENT OF DEFENSE AUTHORIZATION ACT SPECIFICALLY STATES THAT IT IS THE DUTY OF THE GOVERNMENT TO SAFEGUARD THE SAFETY AND SECURITY OF U.S. CITIZENS AGAINST A RAPIDLY INCREASING TERRORIST THREAT, AND THAT U.S. SPECIAL OPERATIONS FORCES PROVIDE THE IMMEDIATE AND PRIMARY CAPABILITY TO RESPOND TO SUCH TERRORISM; AND THE CONGRESS HAS APPROPRIATED FUNDS FOR THE SPECIFIC PURPOSE OF IMPROVING U.S. CAPABILITIES TO CARRY OUT SUCH OPERATIONS. LIKEWISE, THE CONGRESS HAS APPROPRIATED CONSIDERABLE SUMS TO CREATE THE NAVAL AND AIR FORCES THAT ARE NEEDED TO RESPOND TO AND DETER STATE-SPONSORED TERRORIST ATTACKS IN THE MANNER THAT WAS DONE ON APRIL 14, AND TO CARRY OUT THE EXERCISES NECESSARY TO MAINTAIN SUCH CAPABILITIES AND TO ASSERT AND PROTECT OUR RIGHTS ON THE HIGH SEAS. IN THIS SENSE, CONGRESS HAS PARTICIPATED IN THE CREATION AND MAINTENANCE OF THE FORCES WHOSE FUNCTION, AT LEAST IN PART, IS TO DEFEND AMERICANS FROM TERRORISM THROUGH THE MEASURED USE OF FORCE. THE PRESIDENT HAS OPENLY DISCUSSED AND EXPLAINED THE NEED FOR AND PROPRIETY OF THESE USES OF FORCE.

WHICH HE HAS CORRECTLY ASSUMED ARE WIDELY SUPPORTED BY CONGRESS AND THE AMERICAN PEOPLE. ALL OF THE ACTIONS UNDERTAKEN WERE CLEARLY SIGNALLED WELL IN ADVANCE, AND THEREFORE POSED NO THREAT TO THE ROLE OF CONGRESS UNDER THE CONSTITUTION IN MILITARY AND FOREIGN AFFAIRS.

CONCLUSION

IT SEEMS FAIR TO SAY, IN CONCLUSION, THAT IT IS NOT CLEAR HOW THE WAR POWERS RESOLUTION, WHICH WAS ORIGINALLY DESIGNED TO PROVIDE AN APPROPRIATE ROLE FOR THE CONGRESS WITH RESPECT TO U.S. INVOLVEMENT IN HOSTILITIES WITH OTHER STATES, SHOULD APPLY TO THE USE OF U.S. FORCES IN OTHER KINDS OF SITUATIONS. SOME SUCH SITUATIONS -- THE DEPLOYMENT OF ANTI-TERRORIST UNITS -- WOULD SEEM TO FALL COMPLETELY OUTSIDE THE SCOPE OF THE RESOLUTION. OTHER SITUATIONS -- THE CONDUCT OF PEACEFUL, LAWFUL EXERCISES WHICH RESULT IN A HOSTILE RESPONSE -- DO NOT REQUIRE CONSULTATIONS BUT, SOME MIGHT ARGUE, MAY IN SPECIAL SITUATIONS REQUIRE A REPORT. STILL OTHER CASES -- THE USE OF U.S. FORCES IN A LEGITIMATE, DEFENSIVE STRIKE AGAINST ANOTHER STATE -- CAN CLEARLY BE SAID TO FALL WITHIN BOTH THE CONSULTATION AND THE REPORTING PROVISIONS, BUT WITH THE FORM OF CONSULTATION NECESSARILY VARYING WITH THE PARTICULAR CIRCUMSTANCES.

A CONSIDERATION OF THE APPLICATION OF THE WAR POWERS RESOLUTION TO SITUATIONS SUCH AS THESE DOES MORE THAN RAISE DIFFICULT AND INEVITABLY CONTROVERSIAL ISSUES OF INTERPRETATION. ON A BROADER LEVEL, IT ALSO HIGHLIGHTS SOME OF THE SIGNIFICANT NEGATIVE ASPECTS OF THE WAR POWERS RESOLUTION, WHOSE EFFECTS ON THE CONGRESS ARE PERHAPS EVEN MORE PROFOUND THAN ON THE EXECUTIVE. THE NEED THAT SOME MEMBERS OF CONGRESS FEEL TO DEFEND THE RESOLUTION'S VIABILITY, EVEN IN SITUATIONS WELL BEYOND THOSE CONTEMPLATED AT THE TIME OF ITS ADOPTION, CAUSES CONGRESS TO SHIFT ITS CONCERN, DELIBERATIONS, AND POLITICAL LEVERAGE AWAY FROM EVALUATING THE MERITS OF MILITARY ACTIONS TO TESTING THEIR LEGALITY, AND TO FOCUS ON FORMAL AND INSTITUTIONAL ISSUES RATHER THAN ON THE SUBSTANCE OF OUR POLICIES. OUR HISTORY AMPLY DEMONSTRATES THAT CONGRESS HAS ADEQUATE MEANS, THROUGH THE BUDGETARY PROCESS AND OTHERWISE, TO PROVIDE AN EFFECTIVE CHECK ON PRESIDENTIAL POWER TO EMPLOY MILITARY FORCE. BUT THE WAR POWERS RESOLUTION OFTEN UNWISELY DIVERTS OUR LEADERS FROM ISSUES OF POLICY TO ISSUES OF LAW.

I WILL BE HAPPY TO RESPOND TO QUESTIONS FROM YOU AND OTHER MEMBERS OF THIS SUBCOMMITTEE.

THANK YOU.