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WAR POWERS RESOLUTION

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HEARINGS

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

NINETY-FIFTH CONGRESS

ON

A REVIEW OF THE OPERATION AND EFFECTIVENESS OF THE WAR POWERS RESOLUTION

JULY 13, 14 AND 15, 1977

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WAR POWERS RESOLUTION

WEDNESDAY, JULY 13, 1977

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, D.C.

The committee met at 10:00 a.m., pursuant to notice, in room 4221, Dirksen Senate Office Building, Hon. John D. Sparkman (chairman) presiding.

Present: Senators Sparkman, Sarbanes, and Javits.

The CHAIRMAN. The committee will come to order, please.

OPENING STATEMENT

The Committee on Foreign Relations today begins 3 days of hearings on the operation and effectiveness of the War Powers Resolution. The Resolution, which was enacted in November 1973 over President Nixon's veto, has been through three tests since then: the Cambodian evacuation, the Vietnam evacuation, and the *Mayaguez* incident. Happily, these tests have been only partial; only the reporting requirements have been called into play. The time limitation and the concurrent resolution procedure remain untested. Nevertheless, a track record of sorts has been established, and it is the committee's intent to review thoroughly how well the War Powers Resolution has worked. If there are problems with the Resolution or if it leaves the role of either the executive branch or the Congress uncertain, then those matters should be cleared up now. These questions are far too important to be resolved haphazardly in the frenzy of some future crisis.

The administration will present its views on the War Powers Resolution this Friday. Tomorrow, the committee will hear the comments of a panel of legal scholars. Today, our witnesses are distinguished members of Congress: Senator Eagleton, Senator Goldwater, and Congressman Solarz.

Senator Eagleton, we are glad to have you with us today, and will you proceed with your testimony, please, as you see fit.

Senator JAVITS. May I make a brief statement?

The CHAIRMAN. Indeed, Senator Javits; I meant to call on you.

STATEMENT OF SENATOR JAVITS

Senator JAVITS. Mr. Chairman, I welcome this review of the War Powers Act. I think it is one of the most basic pieces of legislation respecting the powers of the branches of our government in the history of our country, and it must be constantly tested in the light of experience. The experience so far, as the Chair said, has been marginal. Nonetheless, our limited experience is of importance in

casting light on how we must handle the procedures established, as well as its concepts.

Senator Eagleton had an important hand in evolution of this legislation. At the end, he found himself unable to agree with the compromises which we were compelled to work out in the conference with one House, which had a very different viewpoint. I did not in any way consider that to be a derogation of his support and convictions respecting the essentiality of this legislation and I believe he is here this morning on the same mission. I would like to state Senator Eagleton expects to introduce or have prepared some legislation respecting the War Powers bill, essentially to restore important Senate provisions which lost out in conference.

I am looking into the matters which he will testify to. I am very sympathetic to a good many of the views expressed by that proposed legislation. Indeed both he and his associates have graciously asked me join them to handle the legislation. I consider it a real contribution to the historic inquiry on which we embark in this next few days to have Senator Eagleton as lead-off witness.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Javits. Senator Eagleton, we have a copy of your statement. You may present that as you see fit—read it, summarize it, discuss it. It will be printed in full in the record.

STATEMENT OF HONORABLE THOMAS F. EAGLETON, U.S. SENATOR FROM THE STATE OF MISSOURI

Senator EAGLETON. I will try to move very quickly, Mr. Chairman. I appreciate the constraints of time and let me express my gratitude both to you, Mr. Chairman, and to Senator Javits for the convening of these hearings. I guess there is no more important decision a nation can make as to how, when, why, and where to go to war. The decisions this committee will make in the future and perhaps the Congress as a whole will affect the totality of the lives of all Americans and in a sense the entire world in this day and age of super nuclear powers.

This is the fourth time, Mr. Chairman, that I have been privileged to testify on this subject before the committee. But it is the first opportunity, as the distinguished Chairman of this committee, Senator Sparkman, has said, "to reflect on normally heated questions in a period of peace and tranquility."

In my judgment, the existing War Powers Resolution is tragically flawed. If we take this opportunity to amend the legislation in order to restore to Congress its rightful and constitutional role in the process by which we go to war, at some near or distant occasion, when our nation's will is again being tested in the international arena, we will be glad we took this quiet time to strengthen our constitutional system.

WAR POWERS LEGISLATION

The effort to write war powers legislation in the late 1960's and early 1970's resulted from the excessive claim of Presidents of both parties of unilateral, inherent powers to commit the Nation to war to the exclusion of any congressional role in the decision-making process.

With respect to Southeast Asia, our Nation had suffered a series of frustrating deceptions—from the Tonkin Gulf to the illegal secret bombing of Cambodia. A phrase coined by Anthony Austin in his prize-winning chronicle of our official entry into the Vietnam War, "The President's War," seemed to sum up our fears: "the war-bred tyranny of kings." After the 1970 Cambodia invasion had driven home with vengence the congressional erosion of war powers, a number of bills were introduced to restore the balance.

The bill that emerged from this committee in 1971 was premised on the central principle that the decision to go to war, under our Constitution, is a decision for Congress alone to make. It sought to fulfill the intent of the framers of our Constitution, expressed so well by Alexander Hamilton, who said the war-making power—and I quote him—"is the peculiar and exclusive province of Congress."

The Senate bill was faithful to the original intent of the framers of our Constitution. The framers' central premise on war-making authority was clear: the decision to go to war, under our Constitution, is a decision for Congress alone to make.

CONGRESSIONAL POWERS VESTED BY CONSTITUTION

Under our Constitution it is the Congress vested with numerous war-related powers: "to declare War," "to provide for the common Defense," "to define and punish . . . offenses against the Law of Nations," "to raise and support Armies . . .," "to provide and maintain a Navy," "to make Rules for the Government and Regulations of the land and naval forces," "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," "to provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States." Congress also has the exclusive power to appropriate funds from the Treasury, and "to make all Laws which shall be necessary and proper for carrying into Execution . . . all powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

PRESIDENTIAL POWERS UNDER CONSTITUTION

Mr. Chairman, the President, under our Constitution, is vested, not with independent authority as sovereign, but with "executive power" of the United States. He has the duty to "take care that the Laws be faithfully executed." And the President is the commander-in-chief of our armed forces. James Madison had words to say about who would decide questions of war and peace under our system, and I will skip the quote as I here summarize my prepared statement.

I fail to see how our Constitution could have made it clearer that Congress would provide *prior* authorization when American forces were committed to battle.

1973 WAR POWERS LEGISLATION

The legislation endorsed by the Senate in 1973 was consistent with our Constitution. Parenthetically, it is this 1973 bill which passed the Senate which will be the basic framework perhaps of

some legislation that Senator Javits said he is considering and perhaps Senator Stennis would consider, he being one of the leading activists in these deliberations in the year of 1973.

Senator JAVITS. And Congressman Zablocki.

Senator EAGLETON. Zablocki on the House side. And Senator Cranston has an active interest in this.

In that bill we recognized that in certain emergency situations requiring an immediate response—fast-moving crises where events would certainly overtake the deliberative nature of legislative response—the President had a limited unilateral power to respond. These exceptions were carefully circumscribed to avoid Presidential misuse. They were enumerated as follows:

First, the President could repel an armed attack upon the Central States, its territories and possessions; he could take necessary and appropriate retaliatory action in the event of such an attack; and he could act to forestall the direct and imminent threat of such an attack.

Second, he could respond to an attack on American forces legally deployed abroad.

And, third, under specified conditions the President could rescue American citizens abroad to provide for their immediate evacuation from a danger zone.

Each of the exceptions is a defensive action. Even those actions would have been submitted in time to Congress. We spelled out those emergency-type situations where the President could act unilaterially. In a way each of the exceptions now printed in the record is a defensive action and even those actions would have been submitted in time to Congress.

Within 30 days, unless Congress acted to provide continued authority, the action was to have been terminated.

But it was a different sort of law which emerged from Conference with the House in October-November 1973. That law, now the existing War Powers Resolution, does not involve Congress in the decision-making process until after forces were committed to battle. The words about emergency authority are nonbinding and nonenforceable. The President has the unilateral authority to commit American troops anywhere in the world, under any conditions he decides, for 60 to 90 days. He gets a free 60 days, and a self-executing option for an additional 30 days, making it 90. Congress must be notified only 48 hours after the deployment of our forces.

In retrospect, we can see how difficult were the circumstances when the War Powers Resolution was passed. Between October and November 1973 Vice President Agnew resigned after pleading no contest to a charge of income tax evasion. President fired Watergate special prosecutor Archibald Cox and abolished the office—the now infamous "Saturday night massacre." The President found it necessary to go on television to announce "I'm not a crook," then the 18½ minute gap was disclosed. The House Democratic leadership agreed to have the Judiciary Committee begin an impeachment inquiry, and Republican Senators began discussing resignation in public.

We in Congress were frustrated with our failure to override eight successive Presidential vetoes, and, considering the tremendous pressures then created by the Watergate scandal, it is understanda-

ble how this Congress overrode President Nixon's war power veto. The irony, of course, is that we were actually expanding, not limiting Presidential war-making powers.

I think this has to be viewed in the political context at the time. We knew at the end of 1973 the President of the United States was in a political sense in a beleagured siege situation. His Vice President had announced his resignation I think either the very day of or the day before maybe the War Powers bill came on the floor of the Senate in terms of the veto override and there was a movement going through Congress to in essence put President Nixon in his place, and we were frustrated with our failure to override eight successive Presidential vetoes.

In considering the previous pressures of Watergate and the Agnew resignation, Congress overrode President Nixon's war power veto. As I view it, this was truly an ironic situation because as I viewed the final bill we were actually expanding, not limiting, Presidential war-making powers.

NEED FOR PRIOR RESTRAINTS

I believe the question of prior constitutional restraints is so essential to our system of Government that the original legislation which twice passed the Senate should be passed again. [The proposal appears on p. 338.] In the coming days I hope to co-sponsor such legislation with several of my colleagues. I have had a draft proposal prepared which, with a section-by-section analysis, I ask to be placed in the Record. I am not wedded to every detail of this draft. It will have served its purpose if it can help this committee in these deliberations.

In addition, the commendable oversight hearings which this committee is currently conducting may produce some other good ideas which may well strengthen the Resolution. Certainly, the *Mayaguez* crisis and the Cambodian and Vietnam evacuations carried out in 1975 under the terms of the existing War Powers Resolution show clearly there is room for improvement.

In those crises of 1973 the Executive Branch did not feel bound by the existing statute. The consultation process was inadequate and incomplete; many months after the *Mayaguez* rescue, for example, a House subcommittee oversight investigation was faced with delays and procedural obstacles in simply obtaining factual information on how the crisis had been managed.

The Administration's report to the Congress of May 15, 1975, merely took note of section 4(a)(1) of the Resolution, which calls for information on the introduction of U.S. forces into hostilities. Section 4(a)(3), which calls for a report on the enlargement of U.S. forces in another foreign nation, in this case Thailand, was ignored. Even more important, the President felt free to engage in retaliatory bombing of targets on the Cambodian mainland apparently unconnected with the rescue operation—which appears to run against the grain of our constitution.

In preparing these remarks I had the opportunity to review my closing remarks from April 12, 1973, the last time I was honored to participate with this committee in this discussion. I concluded that testimony with these words:

"It is unfortunate that we in Congress, and Americans in general, have a tendency to overlook serious situations until they erupt into crisis. There should be little doubt that the gradual erosion of congressional war powers has grown to crisis proportions. If we fail to act now after the horrors of Vietnam have so clearly exposed the danger of individual war-making, we may never again see the questions of war and peace being decided by the sobering and deliberative processes inherent in the concept of collective judgment."

I believe those words are still appropriate, and that this committee has performed a most praiseworthy service by again deliberating the most vital of questions—how do we go to war?

[Senator Eagleton's prepared statement follows:]

PREPARED STATEMENT OF SENATOR THOMAS F. EAGLETON

JULY 13, 1977.

War Powers

Mr. Chairman, I appreciate the opportunity to participate again in the important discussion of one of the most complex and sensitive issues Congress has had to address in the history of the Republic—war powers legislation. This is the fourth time I have been privileged to testify on this subject before this Committee. But it is the first opportunity, as the distinguished Chairman of this Committee, Senator Sparkman has said, "to reflect on normally heated questions in a period of peace and tranquility." In my judgment, the existing War Powers Resolution is tragically flawed. If we take this opportunity to amend the legislation in order to restore to Congress its rightful and constitutional-role in the process by which we go to war, at some near or distant occasion, when our nation's will is again being tested in the international arena, we will be glad we took this quiet time to strengthen our constitutional system.

The effort to write war powers legislation in the late 1960's and early 1970's resulted from the excessive claim of Presidents of both parties of unilateral, inherent powers to commit the nation to war to the exclusion of any congressional role in the decision-making process.

With respect to Southeast Asia, our nation has suffered a series of frustrating deceptions—from the Tonkin Gulf to the illegal secret bombing of Cambodia. A phrase coined by Anthony Austin, in his prize-winning chronicle of our official entry into the Vietnam War, *The President's War*, seemed to sum up our fears: "the war-bred tyranny of kinds." After the 1970 Cambodia invasion had driven home with a vengeance the congressional erosion of war powers, a number of bills were introduced to restore the balance.

The bill that emerged from this Committee in 1971 was premised on the central principle that the decision to go to war, under our Constitution, is a decision for Congress alone to make. It sought to fulfill the intent of the framers of our Constitution, expressed so well by Alexander Hamilton, who said the war-making power "is the peculiar and exclusive province of Congress." Our founding fathers had had good reason—direct experience with the tyranny of a monarch with ultimate powers at his disposal—to assign matters of war and peace to the most representative branch of government.

The Senate bill was faithful to the original intent of the framers of our Constitution. The framers' central premise on war-making authority was clear: the decision to go to war, under our Constitution, is a decision for Congress alone to make.

Under our Constitution it is the Congress vested with numerous war-related powers: "to declare War," "to provide for the common Defense," "to define and punish . . . offenses against the Law of Nations," "to raise and support Armies . . . ," "to provide and maintain a Navy," "to make Rules for the Government and Regulation of the land and naval forces," "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repeal Invasions," "to provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States." Congress also has the exclusive power to apapropriate funds from the Treasury, and "to make all Laws which shall be necessary and proper for carrying into Execution . . . all

powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The President, under our Constitution, is vested, not with independent authority as sovereign, but with "executive power" of the United States. He has the duty to "take care that the Laws be faithfully executed." And the President is the commander-in-chief of our armed forces. James Maidson has these words to say about who would decide questions of war and peace under our system:

> "Every just view that can be taken of this subject, administers the public of the necessity of a rigid adherence to the simple, the received, and the fundamental doctrine of the constitution, that the power to declare war, including the power of judging of the causes of war, is *fully* and *exclusively* vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war; that the right of convening and informing Congress, whenever such a question seems to call for a decision, is all the right which the constitution has deemed requisite or proper . . ."

I fail to see how our Constitution could have made it clearer that Congress would provide *prior* authorization when American forces were committed to battle.

The legislation endorsed by the Senate in 1973 was consistent with our Constitution. We recognized that in certain emergency situations requiring immediate response—fast-moving crises where events would certainly overtake the deliberative nature of legislative response—the President had a limited unilateral power to respond. These exceptions were carefully circumscribed to avoid Presidential misuse. They were enumerated as follows:

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I believe the question of prior constitutional restraints is so essential to our system of government that the original legislation which twice passed the Senate should be passed again. In the coming days I hope to cosponsor such legislation with several of my colleagues. I have had a draft proposal prepared which, with a section by section analysis, I ask to be placed in the Record. I am not wedded to every detail of this draft. It will have served its purpose it if can help this Committee in these deliberations.

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In preparing these remarks I had the opportunity to review my closing remarks from April 12, 1973, the last time I was honored to participate with this Committee in this discussion. I concluded that testimony with these words:

> It is unfortunate that we in Congress, and Americans in general, have a tendency to overlook serious situations until they erupt into crisis. There should be little doubt that the gradual erosion of congressional war powers has grown to crisis proportions. If we fail to act now after the horrors of Vietnam have so clearly exposed the danger of individual war-making, we may never again see the questions of war and peace being decided by the sobering and deliberative processes inherent in the concept of collective judgment.

I believe those words are still appropriate, and that this Committee has performed a most praiseworthy service by again deliberating the most vital of questions—how do we go to war?

IMPORT OF RESOLUTION

Senator EAGLETON. In my prepared testimony I discussed some aspects of the bill we might have. There are other items in my prepared text, but I will have those printed as though read and close with one point. I guess I am bringing it home or seeking to bring it home, by repetition. My hang-up with respect to the War Powers Act, the one finally signed, where the veto was overridden, is the question of giving the President, as I view it, 60 to 90 days to decide on his own, wherever he wants, under whatever conditions, to commit American troops.

I don't think that the ex post facto situation leaves Congress with any viable power. After the troops are committed, after the flag is there, wherever "there" may be, it is too late. Ninety days later for Congress to say, "Oops, we wish those troops weren't there; we hereby now order they be brought back," the practical and pragmatic realities of the commitments of American troops make that an unlikely and nonpragmatic remedy as I view it. Thank you, Mr. Chairman.

Senator JAVITS. May I have a word? We have a major difference of opinion and in essence it is this. It is my view, and I believe the Senate followed that view in overriding the Nixon veto, that the constitutional situation remains the same and what actions the President had the power to take are not changed by the War Powers Resolution. It establishes a procedure by which the Congress can effectively participate and bring to bear the war powers which the Constitution gave us. Those powers had seemed to have atrophied in practice. It does not give the President new constitutional power. It cannot. It does not take away congressional authority under the Constitution. It cannot.

I assure Senator Eagleton I will not only consider with the greatest respect and seriousness his proposed legislation—and Senator Cranston—but indeed I will join it most likely because I was the original proponent of its major provisions—the delineation of

the President's emergency power to act and the power of Congress still to have its say.

I have not had consultations with Senator Stennis and Congressman Zablocki and others interested as I am. But I do wish the record to show this difference. It was debated when we overrode the veto of President Nixon. Senator Eagleton at that time made essentially the same argument. It is an argument which I respect but do not agree with. But nonetheless, on the grounds of true assertion of the congressional power I believe then and I believe now that the Senate version was much superior.

So with that framework—and I wanted to have that in the same context that Senator Eagleton testified to—I assure the Senator as I have already done personally that we will go ahead along the lines we have discussed.

Senator EAGLETON. I think Senator Javits summarizes it right on the mark. I think he has done it beautifully. There is this disagreement between us as between what that 60–90 day thing means and I think he summed it up adroitly and I am grateful to him and to you.

CONSTITUTIONALITY QUESTION

The CHAIRMAN. Senator Eagleton, I remember the discussions in the committee and before the Senate on the War Powers Resolution. There is one thing I always think of in connection with this. At that time John Sherman Cooper was a member of the Foreign Relations Committee and took an active part in the deliberations of the committee and the Senate the War Powers Act.

I was sitting next to him in the committee when he said to me, "I am not at all sure that it is constitutional." I never heard his reasoning for anything like that but I am sure it was on the question of whether or not we were seeking to take away from the President powers which the Constitution gave him.

Senator JAVITS. Mr. Chairman, I think it should be noted Senator Cooper whom I loved as a friend as well as a colleague was a cosponsor and active supporter of the War Powers bill. He voted to override the President's veto of the conference report as he had for the Senate bill each time. Apparently he was convinced that what I argued was a fact; that is, that I was not trying to redirect the Constitution but simply to establish a methodology by which the powers of the Congress and the President under it may effectively be joined.

The CHAIRMAN. I just thought it was interesting to find out there was a doubt in his mind as to whether or not it was an effort to limit powers which the Constitution gave to the President.

Senator EAGLETON. Others share that view. Among others, Senator Goldwater has that lingering, agonizing thought as well. I disagree. I think the war powers bill is unconstitutional for other reasons. That is, it grants an unconstitutional delegation for 90 days of authority that the President does not inherently have either under the Commander-in-Chief clause or any other clause in the Constitution to commit troops to battle without prior approval of Congress.

Great constitutional lawyers have these great constitutional debates. Thank you.

The CHAIRMAN. Thank you, Senator Eagleton. We appreciate your presentation.

WITNESS

Our next witness is to be the Honorable Stephen J. Solarz, Congressman from New York. I believe he has not arrived yet and I think the same is true of Honorable Barry M. Goldwater of Arizona.

[A recess was taken.]

The CHAIRMAN. Congressman Solarz, we are very glad to have you here. We will be glad to hear from you. Let me say that we have just had testimony from Senator Eagleton in which he discussed quite fully the War Powers Act. We will make a copy available to you. I regret that we do not have better attendance but the Senate is in session on this very important matter of the neutron bomb. Following the debate there will be a vote in the Senate. A copy of your statement will be printed in the record and also will be made available to the other members of the committee who could not be here today.

I will be very glad to hear from you.

STATEMENT OF HON. STEPHEN J. SOLARZ, U.S. REPRESENTATIVE FROM THE STATE OF NEW YORK

Mr. SOLARZ. Thank you very much, Mr. Chairman.

I very much appreciate the opportunity to testify this morning and with your permission I would like to submit my prepared statement for the record and then briefly summarize the points that I want to make.

The CHAIRMAN. Proceed any way you wish.

Mr. SOLARZ. Thank you. Let me say first I think these hearings come at a very timely moment. The enactment of the War Powers Resolution several years ago I think was a very significant step forward in the direction of reestablishing some meaningful congressional controls over the war-making powers. But the experience we had with the Vietnamese and Cambodian evacuations as well as the *Mayaguez* incident off the coast of Cambodia I think highlighted several loopholes in the law which would in my judgment be appropriate to correct and plug in a relatively calm and relaxed atmosphere rather than in the kind of crisis situation which might be produced by similar situations in the future.

I have two limited but I think significant suggestions to make for your consideration which I think would go a long way toward strengthening the War Powers Resolution.

PRESIDENT'S LEGAL OBLIGATIONS PURSUANT TO CONCURRENT RESOLUTION

The first recommendation I have comes from a rather remarkable colloquy which I was privileged to hold with Monroe Leigh, who was the chief legal adviser to the State Department, during the course of the hearing which was held by the House Committee on International Relations concerning the *Mayaguez* incident and its implications for the War Powers Resolution. During the course of this hearing I asked Mr. Leigh whether in his judgment if the Congress, pursuant to the War Powers Resolution, had affirmative-

ly enacted a concurrent resolution terminating the involvement of American forces in a combat situation abroad, or, if the Congress pursuant to the War Powers Resolution, had failed to enact specific statutory justification within the prescribed period of time to legitimize the continued use of American forces in a combat situation abroad, the President would be obligated to remove them.

And in response to that question, Mr. Leigh gave me the following answer, and I would like to quote now because I think this is important:

"If he,"—the President—"has used up all the money appropriated and then Congress refuses to provide any more, I think the Congress has effectively stopped the President from continuing the military action. I don't know how he can go on. If, on the other hand, he still had moneys that were unexpended, he could continue to spend those until such time as there was a court challenge and the court found that he was acting illegally."

I then asked Mr. Leigh a hypothetical question. I said, assume there were an invasion by North Koreans of South Korea and American forces in South Korea were fired upon and the President sent troops in to defend the original American troops that were under fire. If the Congress at that point pursuant to the War Powers Resolution adopted a concurrent resolution requiring the withdrawal of American forces from South Korea, would the President legitimately be entitled to disregard that resolution and keep the troops there anyway?

His answer—once again I quote—was, "I believe that the answer to that question is yes."

In fact, what Mr. Leigh did was to offer a rather novel interpretation of the War Powers Resolution which if accepted would render it functionally meaningless. It was his contention that from a legal point of view, so long as the President sent troops into a combat situation pursuant to this constitutional authority and responsibility, the Congress could not, by statute, require the President to refrain from doing something which he had the constitutional authority to do.

Of course I think it is quite clear that the whole purpose of the War Powers Resolution was specifically to give Congress the right either through the enactment of a concurrent resolution to require the withdrawal of American forces or through the failure to enact statutory justification for the continued use of American forces in a combat situation, to bring an American military involvement in hostilities abroad to an end.

In effect what Mr. Leigh was saying was that that is not the case, and that the only way the Congress can constitutionally prevent the President from sending troops into a situation where he has sent them pursuant to his constitutional authority is to cut off the funding for such purpose. Whatever the facts may be with respect to whether or not the Congress in fact has the constitutional right by statute to prevent the President from sending troops or keeping troops in a combat situation, no one denies the fact that the Congress, which has the power of the purse, can cut the funds off for such a purpose. If the funds are not there, then obviously the President lacks the ability to use troops in a combat situation.

SECTION 5 LOOPHOLE

The loophole in the War Powers Resolution which I think ought to be cleared up in order to deal with this problem is in section 5 of the bill. I understand that an amendment along these lines is contained in draft legislation before the committee. Basically it would provide whenever Congress, pursuant to the War Powers Resolution, enacts a concurrent resolution designed to terminate the involvement of American forces in combat situation abroad, or where the Congress pursuant to the War Powers Resolution, fails to enact a resolution to permit the continued use of American forces in a combat situation abroad within the 60-day period—or if it is extended by the President for another 30 days, within a 90-day period—that at that point the President would be denied the right to use any previously appropriated funds for that purpose. It was Mr. Leigh's contention that without such an amendment in effect, the President would be entitled to use previously appropriated funds from the Defense budget or from other budgets for the purpose of funding the use of American forces in a combat situation abroad.

This is, I might say, not an entirely hypothetical situation. I understand that in the next fiscal year there will be somewhere in the vicinity of $60 billion appropriated but unexpended monies in the account of the Defense Department of which $19.6 billion have not even been obligated. The adoption of such an amendment automatically prohibits the President from using previously appropriated funds for such a purpose.

Once Congress moves to cut off American military involvement abroad pursuant to the War Powers Resolution, we would end up in a situation where the War Power Resolution was a functional nullity because we would have voted to bring the troops out and the President would continue to fund them there in spite of our resolution.

Of course, at that point, in the absence of the kind of amendment I am suggesting, the matter would undoubtedly end up in the courts, but I don't think anybody could predict with certainty what the judicial outcome would be, particularly in an international crisis involving vital interests of the nation.

It is entirely conceivable that the courts might decline to rule on the matter on the grounds that this was a political question. So I think if we are going to make the War Powers Resolution meaningful, we have to add language to it which makes it clear that once Congress moves to terminate our involvement in hostilities abroad pursuant to the War Powers Resolution, no funds will be available from any previously-appropriated amounts for that purpose.

SECTION 8 LOOPHOLE

The second recommendation I have deals with section 8 of the bill which now provides that the President cannot draw the inference from any treaty or "provision of law" passed by Congress of presidential authority to introduce armed forces into hostilities, unless the provision of treaty states that it is "intended to constitute specific statutory authorization within the meaning" of the War Powers Resolution.

Unfortunately the War Powers Resolution makes no reference to the right of the President to infer authority to send American troops into a combat situation abroad from either executive agreements or from concurrent resolutions. I think this is an unfortunate oversight and a rather significant loophole because right now well over half of all of the agreements between the United States and other countries are in fact executive agreements. In fact, as a result of this unfortunate loophole we now have a rather anomalous situation. We have a situation in which the President is specifically prohibited from inferring authority to send American troops into a combat situation abroad from either a treaty or from a law. But he is not denied the right to infer such authority from either an executive agreement or from a concurrent resolution which under ordinary circumstances obviously don't have the same weight as a treaty or as a specifically enacted statute.

So I am suggesting an additional amendment to the War Powers Resolution which once again I understand is included in the draft bill before you which would specifically prohibit the President from inferring authority to send troops into a combat situation abroad from either an executive agreement or from a concurrent resolution in precisely the same sense that the President is now specifically prohibited by the existing language in the War Powers Resolution from inferring such authority from either treaty or from a law of the lands.

So I would say in conclusion, Mr. Chairman, if your committee in its wisdom should decide to approve these amendments, I think we would have gone a long way toward tightening up some of the loopholes in the War Powers Resolution which came to light during the course of the Vietnamese and Cambodian evacuations and *Mayaguez* incident which provided us with an opportunity to see how the War Powers Resolution was working in practice.

[Representative Solarz' prepared statement follows:]

PREPARED STATEMENT OF REPRESENTATIVE SOLARZ

Mr. Chairman, the conflicts and frustrations that arose out of this country's involvement in the long war in Indochina, together with the trend toward Executive Branch usurpation of power from the Congress during several successive administrations, led Congress to attempt, as explained in the purpose of the War Powers Resolution, "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" during times of hostilities abroad.

The most concrete achievement of this renewed determination and spirit within the Congress was the passage in 1973 of the War Powers Resolution. The Resolution, drawing upon the experience of America's surreptitious escalation of the Vietnam war, tried to establish clear limits on the President's authority to wage war. The Resolution provided for a limited period of time in which a President could engage in hostilities without Congressional consent while at the same time requiring the President to consult with the Congress even before introducing U.S. armed forces into such hostilities. Furthermore, the Resolution provided that Congress could remove American forces from conflicts by passing a concurrent resolution.

The War Powers Resolution was clearly a landmark in the evolving Congressional-Presidential relationship. It was a noble effort that passed despite a veto by President Nixon. The Chairman of my Committee, the Honorable Clement Zablocki, deserves major credit for this momentous legislation.

Unfortunately, a number of ambiguities have cropped up since passage of the Resolution, which were highlighted by the emergency evacuations of Americans and foreign nationals from Vietnam and Cambodia when the Communists took power in those countries, and the Mayaquez incident off the shores of Cambodia which took place shortly thereafter. These actions clearly confirm the need for some modifica-

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tion in the War Powers Resolution in order to further clarify the war making power in this country.

The most important change that I think is needed in the War Powers Resolution is the adoption of a provision to automatically cut off any expenditure of funds for the use of U.S. armed forces in hostilities after Congress adopts a concurrent resolution disapproving the use of American forces or after the 60-day period (which can be extended to 90 days) of combat sanctioned by the War Powers Resolution without any Congressional action.

I believe that this change is necessary because at least one important Executive Branch representative has contended that, despite the limitations of the War Powers Resolution, the President could continue military action as long as he wanted simply by using any leftover money previously appropriated by Congress.

During the Vietnam and Cambodia evacuations, President Ford took the opportunity to evacuate tens of thousands of Indochinese cilvilian and military personnel who wanted to escape with their American protectors. This humanitarian gesture raised a serious question as to whether the evacuation violated a variety of statutes which specifically prohibited U.S. military operations in, over, or off the shores of Indochina.

A short while after the evacuation, and shortly before the Mayaquez incident, Monroe Leigh, then the State Department's Legal Adviser, testified before the House International Relations Subcommittee on International Security and Scientific Affairs in a hearing on the effectiveness of the War Powers Resolution. In response to questions, Mr. Leigh contended that even though the Congress might pass a concurrent resolution requiring the withdrawal of American forces from the hostilities abroad, or even if Congress failed to approve the deployment of forces within the proscribed period of time, the President could use whatever previously funded appropriations he had to continue the fighting. This could mean residual appropriations designed to finance the specific military action or it could mean funds from the entire defense budget or it could conceivably mean anything the President wanted it to mean.

Specifically, I asked Mr. Leigh whether Congress, pursuant to the War Powers Resolution, could force the withdrawal of U.S. forces from combat situations into which they had been introduced by the President, pursuant to his constitutional authority as Commander-in-Chief. Mr. Leigh replied:

> If he (the President) has used up all the money appropriated and then Congress refuses to provide any more, I think the Congress has effectively stoppped the President from continuing the military action. I don't know how he can go on. If, on the other hand, he still had moneys that were unexpended, he could continue to spend those until such time as there was a court challenge and the court found that he was acting illegally.

I then asked Mr. Leigh a hypothetical question: if Congress, after American troops had been sent in by the President to defend U.S. forces that had been fired upon in Korea, passed a concurrent resolution requiring the withdrawal of U.S. forces, could the President disregard it and keep the troops there anyway. "I believe," Mr. Leigh replied, "that the answer to that is yes," although he did add that the Administration did not necessarily share this view. I think this colloquy has significant implications for the future effectiveness of the War Powers Resolution.

It was clearly Congress' intent, in enacting the War Powers Resolution, to prohibit the President from commiting the United States forces into combat situations abroad for prolonged periods of time without the approval of the Congress. From Mr. Leigh's testimony, it appears to be the legal interpretation of the State Department that the War Powers Resolution notwithstanding, the President retains the right to draw upon previously apppropriated funds to keep U.S. forces involved in overseas combat as long as such funds are available, even if Congres has specifically voted to terminate the use of American troops in such a situation.

The legal basis for this contention is that Congress cannot by statute deprive the President of the right to exercise authorities conveyed upon him by the Constitution. And to the extent the President has sent troops into combat in the discharge of his constitutional responsibilities, the Congress cannot statutorily deprive him of that right. As a result, Mr. Leigh argues, the President would be entitled, even in the face of a congressional decision under the War Powers Resolution to terminate the use of American forces in combat situtations abroad, to utilize previously appropriated funds for such purposes.

Indeed, the funds that the President might draw upon are immense. At the end of fiscal 1978, it is expected that the Pentagon will have an appropriated but unexpended balance of $80.3 billion, of which $19.6 billion will not have been obligated. Fortunately, there are many clear precedents establishing Congress' authority to

terminate the use of previously appropriated funds, including the 1973 amendment that blocked, as of August 15, 1973, the obligation of funds "herein or heretofore appropriated" for combat activities in, over or off the shores of Indochina.

To the extent that the Ford Administration—or any Administration—shares Leigh's point of view, the law is functionally meaningless; at a minimum, it is badly in need of clarification. As Mr. Leigh pointed out, a legal tangle resulting from differing interpretations of the Resolution could go to the courts for a decision. But with the United States enmeshed in what potentially could be a major constitutional crisis, the courts may well refuse to rule on such a case.

It would avail the Congress little if, pursuant to the War Powers Resolution, we terminated the use of American forces in combat situations abroad, only to find out that the President, pursuant to what he believed was his constitutional authority, decided to keep them there by utilizing previously appropriated funds for that purpose. Whether or not Congress has the constitutional right to require the President by statute or resolution to withdraw American forces from situations into which he has sent them pursuant to his authority as Commander-in-Chief, it clearly has the right to deny him the use of federal funds for such purposes. Consequently, by adopting an amendment to the War Powers Resolution making it clear that any Congressional action under the terms of the Resolution designed to bring an American involvement in a combat situation abroad to an end will automatically trigger a prohibition on the use of government monies for such purposes, Congress would put real teeth into the law and eliminate one of the largest loopholes in it.

A second area in which I would like to see some modification is Section 8(a) of the Resolution. Section 8(a) now states that a President cannot draw the inference from any treaty or "provision of law" passed by Congress of presidential authority to introduce armed forces into hostilities, unless the provision or treaty states that it is "intended to constitute specific statutory authorization within the meaning" of the War Powers Resolution.

However, the War Powers Resolution does not mention executive agreements and concurrent resolutions despite the fact that well over half of all agreements between the U.S. and other countries are executive agreements. Thus we have the rather anomalous situation whereby a President cannot use the treaties or laws as a justification for engaging in military action without the approval of Congress, but he could conceivably cite an executive agreement or concurrent resolution for the same purpose.

It seems to me that the Resolution should be broadened to prohibit the President from inferring war-making authority from concurrent resolutions and executive agreements in the same way it now prohibits him from claiming such authority from either laws or treaties.

If this change were made, it would be clear that any executive agreement between President Nixon and President Thieu of Vietnam regarding the U.S. response to North Vietnamese violations of the 1973 Paris accords—or some of the early 1970 base agreements with Spain and Portugal which were also executive agreements—could not be used by a President as the basis for a unilateral determination to introduce U.S. forces into hostilities.

It is vital that Congress act now to protect the War Powers Resolution, of which Chairman Zablocki and the Senate Foreign Relations Committee are so justly proud, from the constitutional challenges that have been raised against it. I believe that now is the time to act, when we are not in the midst of any major international crisis, and can consider the implications and consequences of what we are doing without the political and military pressures generated by crisis situations.

The War Powers Resolution was a significant and historic step forward in Congress' reestablishment of its historic role. But the very importance of that step requires us to remove the loopholes and ambiguities in the law which came to light during the course of the Vietnam, Cambodia and *Mayaquez* situations.

The CHAIRMAN. Thank you very much. Were you here when Senator Eagleton testified?

Mr. SOLARZ. You mean when he testified here?

The CHAIRMAN. A few minutes ago.

Mr. SOLARZ. No, unfortuately I missed his testimony.

CONSTITUTIONAL QUESTIONS

The CHAIRMAN. I remarked to him something that former Senator John Sherman Cooper said during deliberation of the War Powers Resolution. As a member of this committee he was one of

the prime movers of that Resolution. He whispered to me, "I am not at all certain that it is constitutional." Are there any such doubts in your mind as to whether or not the War Powers Resolution is constitutional?

Mr. SOLARZ. Let me say I lasted 3 months in law school and I only got up to "offer and acceptance" in contracts so I hesitate to push myself off as a constitutional scholar. But I will say this. I think there is a question about the constitutionality of some of the provisions in the War Powers Resolution. I think that at least in theory, the observation which was made by Mr. Leigh, the chief legal advisor of the State Department, may have some merit to the effect that if in fact the President has the constitutional authority to send troops into a particular situation, it is highly questionable whether the Congress by statute can deprive him of authority conveyed upon him by the Constitution. But I think the virtue of the amendment which I suggested is that in effect it puts that question aside and it says, whether or not Congress——

REPRESENTATIVE SOLARZ' AMENDMENT TO RESOLUTION

The CHAIRMAN. You referred to the amendment you recommend. Is that an amendment to the Constitution or an amendment to the proposed resolution?

Mr. SOLARZ. It is an amendment to the War Powers Resolution. I think the virtue of it is that it takes the position that whether or not the Congress has the right by statute to deprive the President of authority conveyed upon him by the Constitution, it clearly has the right to deprive the President of Federal funds for whatever purpose he wants to use them. What I am suggesting is in order to put teeth into the War Powers Resolution, we provide that if Congress decides to terminate an American involvement in hostilities abroad we make it clear no money is going to be made available to use the troops in hostilities abroad.

Then the President is put in a position where even though the courts may recognize he had the right to send the troops there, he would have to concede that if he does not have the money to send them there is nothing he can do about it. Our real power over the President in this kind of situation lies primarily in the power of the purse.

Now I don't want to say that we don't have the constitutional right to prohibit him from sending troops into a situation by statute. That is a matter that has not been litigated yet. All I am saying is, I think you can make arguments on both sides. But, nobody can argue with the proposition that if we decide to withhold the funds, there is no way he can continue sending troops into hostilities because he won't have the money to pay them unless they want to go as volunteers—which I doubt they will want to do.

WAR-MAKING POWERS UNDER CONSTITUTION

The CHAIRMAN. Concerning the Congressional/Presidential power structure relating to making war, from a practical standpoint is there conflict between those two?

Mr. SOLARZ. I think you have in a sense the same kind of inherent conflict in that situation that you have written into the Constitution as a whole. We have a system of checks and balances

in which powers are shared between different institutions—which I think the framers wisely recognized was the best way to keep people honest.

So while the President has authority as Commander-in-Chief, the Congress has the constitutional authority to declare war. I think the beauty of the War Powers Resolution is that it is responsive to the emerging climate of the 20th century in which as a practical proposition it is unlikely the Congress is ever going to be called upon again to adopt a formal declaration of war.

If we are involved in hostilities abroad, it is more likely to be pursuant to the President's authority as Commander-in-Chief. The War Powers Resolution recognizes that Congress has to have some ability to exercise its own independent judgment with respect to whether or not American forces should be engaged in hostilities abroad.

I think without the War Powers Resolution, we would end up in a situtation where the President had a kind of carte blanche to involve American forces in hostilities even though the Congress might not approve of it.

CONGRESSIONAL WITHHOLDING OF FUNDS

The CHAIRMAN. Suppose the President in case of an emergency called up the Armed Forces for whatever the objective might be. Could Congress negate that by withholding funds?

Mr. SOLARZ. I think Congress would have the right if it so chose to prohibit a particular deployment by the President through the mechanism of withholding funds for that purpose. I might point out, Mr. Chairman, that there is ample precedent for that. Several bills were enacted into law at the end of the Vietnam period specifically prohibiting the use of any funds in the defense appropriations for military operations on, over, or off the shores of Vietnam or Cambodia.

I think it is clearly recognized that we have the right to do so. Whether it would be wise to do so under the particular circumstances is another question. But we do control the power of the purse. If we chose to specify the particular activities that will not be funded, then there is no way that the President can fund them.

WAR-MAKING POWERS OF PRESIDENT, CONGRESS

The CHAIRMAN. Of course the purpose of the War Powers Resolution was to try to make definite the powers for Congress and the President, with reference to making war and with reference to, I presume, unmaking war.

Mr. SOLARZ. I think, Mr. Chairman, your last point is very well taken. As I look at the War Powers Act, it seems to me what it does first and foremost is to establish a mechanism whereby the Congress, if it should so decide, can terminate an American involvement in hostilities abroad. And the reason I think we need to update the War Powers Act is that it now turns out that prominent members of the previous Administration representing the Department of State have advanced novel constitutional doctrines which, if accepted, make the War Powers Resolution functionally meaningless. If the President takes the position that he sent troops into combat pursuant to his constitutional authority and that even

if the Congress votes to terminate their involvement pursuant to the War Powers Resolution, all he has to do is to draw on previously appropriated funds from the Defense budget and keep them there anyway, then we have accomplished nothing.

So if we amend the War Powers Resolution to cut off the use of funds, once Congress acts to terminate our involvement, then we in effect obligate the President to defer to the judgment of the Congress on this matter.

The CHAIRMAN. I believe you referred to that in your statement and did you not say it was a pool of $80 billion?

Mr. SOLARZ. To be exact, Mr. Chairman, we will have an appropriated but unexpended balance of $80.3 billion in the Defense budget of which $19.6 billion will not have been obligated.

The CHAIRMAN. How much?

Mr. SOLARZ. $19.6 billion will have been appropriated at the end of fiscal 1978 but unobligated. In other words, about $60 billion will have been appropriated and obligated but unexpended, and about $19 billion will have been appropriated but unobligated.

So what this means in effect is that if Monroe Leigh's interpretation is correct and we did not amend the War Powers Resolution, if a situation developed tomorrow where the President sent troops into combat and the Congress voted pursuant to the War Powers Resolution to pull them out, the President could keep them there and draw on these $80 billion of unexpended funds in the Defense budget to keep them there. That would mean in effect we would have accomplished very little.

The CHAIRMAN. Do you think that gives, as some have claimed, a 60-day blank check to the President?

Mr. SOLARZ. I think you can make that argument and I have no doubt that in some of the Talmud classes and Yeshivas in my district the proposition might be advanced. I think this is a very practical proposition that merely reflects reality.

I think the President will do what the President thinks he has to do under these circumstances, whether or not the War Powers Resolution is there. But what the War Powers Resolution does is not give the President the right to use troops he would not otherwise have but it does give the Congress a right by which it can terminate the involvement of forces abroad which without the War Powers Resolution it would not have. So I think it gives nothing to the President but it gives a lot to the Congress.

In other words, I don't accept that argument. I think it is incorrect.

The CHAIRMAN. Thank you very much, Mr. Solarz. This has been an interesting discussion and one I am sure will be helpful. We appreciate your coming over and being with us.

Mr. SOLARZ. Thank you very much. We appreciate it.

WITNESS

The CHAIRMAN. Senator Goldwater has come in. Senator Goldwater, if you will, we would appreciate your coming to the table and presenting your views. I apologize that no other members are here but the Senate is in session and you know something of the debate that is going on over there. They felt they had to go over to

participate. We are glad to hear from you. Your statement will be available to all the members of the committee.

STATEMENT OF HON. BARRY M. GOLDWATER, U.S. SENATOR FROM THE STATE OF ARIZONA, ACCOMPANIED BY: J. TERRY EMERSON, COUNSEL

Senator GOLDWATER. Thank you, Mr. Chairman.

I certainly understand. This is the third meeting I have been to this morning and I have another one to go to this afternoon.

The CHAIRMAN. I am sitting on the hot seat. To tell you the truth I have asked Senator Sarbanes to relieve me as Chairman because I have received a call requesting that I attend a meeting with reference to the neutron bomb, and I feel rather impelled to go. I will take with me a copy of your statement and read it carefully, and we will meet sometime on this question of the War Powers Act.

I was a member of the Foreign Relations Committee when the War Powers Act was passed. The discussion we had in the committee was not an easy matter to work out. Senator John Sherman Cooper who was at that time a member of the committee and who had been one of the leaders in propounding the the War Powers Act. During the discussion, he whispered to me, "I am not at all sure it is constitutional." That statement has remained a live question ever since and we are very glad to have you here and to get your views.

Senator GOLDWATER. Thank you for that comment, Mr. Chairman. Before you leave, I might say that the last time I saw John Cooper Sherman he said that had he had to do it over again he would not have voted for this measure because he still believes it is unconstitutional and I will expound on it—in fact if I am able to put the money together, which I have not been able to do, I intend to test the constitutionality of this, but at the present time that does not look too possible.

The CHAIRMAN. Of course, as you know, John Cooper Sherman is a good lawyer.

Senator GOLDWATER. But he is employed.

The CHAIRMAN. I don't mean by that I necessarily share his view but we do recognize there are good lawyers who do question its constitutionality.

Senator GOLDWATER. Thank you.

The CHAIRMAN. Thank you very much.

Senator GOLDWATER. Mr. Chairman, I am pleased to join you at your hearings to review the War Powers Resolution.

MANDATORY PROVISIONS REPLACEMENT RECOMMENDATION

Now, Mr. Chairman, I believe the Resolution is a very dangerous tampering by Congress with the ability of the Nation to protect its people and its freedoms. Far from seeing any need for strenthening the present law, I would prefer to see it stripped of all its mandatory provisions and replaced with a "Sense of the Congress" declaration.

As the law now stands, it is certain to initiate a crisis between some future President and a Congress who will have different beliefs as to the necessity for certain military action. The survival

of our nation, or of the way of life as our people now know it, may depend upon the outcome of that conflict.

For example, if the the War Powers Resolution had been in effect in 1941, it likely would have blocked defensive initiatives by President Roosevelt, whose vision of the national self-interest was broad enough to recognize that America's own defense against totalitarian aggressors was linked to helping Britain survive the assault from Nazi Germany.

Now, I can remember that in mid-1941, public opinion polls revealed a decrease in support for aid to Britain. A vast majority of Americans thought sending war material to Britain was pouring it down the sink. Europe seemed lost.

That same summer of 1941, the House of Representatives passed an 18-month extension of the Selective Service Act by the closest margin possible—203–202. One vote had saved the Army.

Yet, President Roosevelt sent the U.S. Army to occupy Greenland and Iceland without consulting Congress in advance. In fact, he acted in violation of an express restriction that Congress had enacted only a year before prohibiting the use of troops outside the Western Hemisphere.

In July, he ordered U.S. warships to convoy supplies sent to Europe to protect military aid going to Britain and the Soviet Union. By September, our ships were attacking German submarines. There was no authorization from Congress.

Now, I would like to ask: Would the same Congress that extended the draft by only one vote have acted under the War Powers Resolution to approve the use of warships against German submarines? Would Congress, in the summer of 1941, have granted specific authority, as required under the War Powers Resolution, for U.S. troops to remain in Iceland, some 2,300 miles away from the United States, in the face of imminent hostilities that could erupt at any moment?

Or, rather, would Congress have allowed the 60-day grace period of the War Powers Resolution to elapse, after which President Roosevelt would have been required to bring back our troops from Iceland and Greenland and to end the convoys which were protecting the British lifeline in the Atlantic?

Or, even before allowing the 60-day period to go by, would it not have been likely that Congress would have passed a Concurrent Resolution under Section 5(c) of the War Powers Resolution directing President Roosevelt to halt those uses of the Armed Forces immediately?

Testing the War Powers Resolution by this actual historical scenario, we can see that it probably would have led to disaster in the face of the Nazi onslaught against the civilized world. How can we have any confidence that a similar situation will not recur in the future where an isolationist Congress is pitted against a far-sighted President whose personal initiatives are the only thing standing between the Nation and disaster.

UNCONSTITUTIONAL, DANGEROUS OBSTACLE TO NATIONAL SECURITY

Mr. Chairman, I not only believe the War Powers Resolution is a potentially dangerous obstacle to the national security, I believe it is unconstitutional.

Now it is bewildering to me how anyone can read into the Constitution something that isn't there, nor appears in any interpretation given to it by the Supreme Court, but that is what Congress is doing when it attempts to demark the boundaries between its War Powers and those allotted to the President.

There are voluminous authorities that I could array in support of the independent war powers of the President, but we would be here from now until tomorrow if I made all of these a part of my statement. Instead, let me just summarize for you the major areas of disagreement between myself and those who assert for Congress the authority to define the President's or the Congress' war powers.

MAJOR AREAS OF DISAGREEMENT

First, spokesmen for congressional supremacy read into the Constitution something that is not written there. They act as if the Constitution itself contains a provision specifically reading that "the President shall at all times be subject to whatever rules and regulations the Congress may enact, and the Congress shall have power, notwithstanding any other provision of this Constitution, to define the war powers of the President." This, however, is nowhere in the Constitution.

Second, they assume the power "to declare war" means the same thing as the power "to commence, control and direct the use of the Armed Forces in any and all kinds of situations." Again, this is not what the Constitution says.

Actually, the Framers did not put too much importance upon declarations of war. The contemporary understanding of the declaration in the 18th century was that it was never required for defensive military actions.

The Framers made a distinction between "defensive" and "offensive" war, intending to restrain the President from wars of conquest and aggression, but allowing him to attend to the Nation's defense, when he believed it necessary.

Third, it is assumed that Congress can use its power of the purse to legislate policy restrictions over the President's use of the armed forces whenever it wishes. However, this is a bootstrap argument.

Congress is lifting itself up by the boot straps by making the assumption that it has authority to limit the President's powers. If it does not have the power to control the President's ability to defend the country, then Congress cannot acquire that power by using a rider in an Appropriation Act.

In other words, Congress cannot do what would be otherwise unconstitutional for it to do, simply by writing a limitation into an appropriations statute. For example, the Supreme Court held that a provision of the Appropriation Act of November 15, 1943, was unconstitutional which provided that none of the funds contained in that Act should be paid to certain named Federal employees. This was in *U.S.* v. *Lovett,* 328 U.S. 303(1946).

Thus, the Supreme Court has held that Congress' use of appropriations riders is limited by the Constitution. To assume that Congress can use an appropriation law to prohibit the President from spending monies for the use of the armed Forces in a particular way or place is to argue in a circle by assuming in the first

place that Congress does have the power to curb the President's defensive use of the Armed Forces.

Fourth, those who uphold the pre-eminence of Congress in the war powers field ignore the legal significance of more than 200 incidents in which American Presidents have used the Armed Forces for defensive purposes in hostilities or imminent hostilities without the prior, specific approval of both Houses of Congress.

Ever since George Washington threatened Spain with armed force if it did not open the Mississippi River to American navigation, Presidents have taken or planned military action in defense of vital American interests without coming to Congress for its prior approval or in the face of known opposition by Congress.

Even Thomas Jefferson, who is often quoted as being against unilateral military action, himself unilaterally sent a naval squadron into the Mediterranean with orders to protect our merchant ships against attack from the Barbary Powers. His orders direct the U.S. commander on the scene to protect our commerce "by sinking, burning, or destroying their ships and vessels wherever you shall find them."

These military operations took place all over the world, not just in the Western Hemisphere, and represent a consistent pattern by U.S. Presidents of responding to foreign threats against our citizens and vital interests by using whatever degree of force was necessary, and technologically available, at any given moment in history.

It is true that many of the early precedents took place against pirates or stateless natives, rather than organized governments, but there were many exceptions to this rule, and as the number of nation-states increased, the number of Presidential military actions involving formal States increased along with the historical development of the nations themselves.

According to the Supreme Court, a long practice such as this one can fix the construction of the Constitution by the courts. Thus, the historical record does have legal significance as a source of interpreting the Constitution and cannot be dismissed out of hand.

While repeated violation of the Constitution cannot make constitutional what was unconstitutional to start with, the Supreme Court has looked to "usage" as the decisive reason for upholding the validity of the very practices under question in at least four important cases. These include: *Stuart* v. *Laird,* 5 U.S. 298, 308 (1803): *McPherson* v. *Blacker,* 146 U.S. 1, 27, 35–36 (1892); *United States* v. *Midwest Oil Co.,* 236 U.S. 459, 472–73 (1915); *Myers* v. *United States,* 272 U.S. 52, 152 175 (1926).

Fifth, spokesmen of Congressional supremacy neglect substantial historical evidence that the framers knew of and blamed the Articles of Confederation for the system which allowed the Continental Congress to dangerously interfere with the conduct and planning of military affairs during the American revolution. They also overlook the fact that the obvious remedy for this defect was augmentation of executive power.

Most of the framers had witnessed at firsthand the incompetency of congressional meddling into military policy which had almost destroyed the success of General Washington's war efforts. In contrast, they knew that prompt and firm military steps which had

been taken by the Chief Executives of the States of Massachusetts and New Hampshire, just before the Constitutional Convention met, had successfully crushed rebellions in those States after reluctant and divided legislatures had failed to act. This certainly influenced their view of the value and need for an executive officer with independent defense powers.

Sixth, the exponents of Congress' powers fail to consider the fact that there was a strong shift in the 1780's toward giving the Executive Office greater powers of independent action for the public defense than was true in the 1770's. It is striking that each of the two State charters revised in the 1780's alloted strong defense powers to the Chief Executive.

Seventh, those who argue for congressional dominance in the field of war powers forget that delegates to the Constitutional Convention were very concerned with restraining exactly this kind of superior position for the legislative branch. In a passage quoted in the Federalist Papers, Thomas Jefferson explained: "One hundred and seventy three despots would surely be as oppressive as one." He added: "an elective despotism was not the government we fought for . . ."

Eights, proponents of congressional war powers fail to explain—if the framers meant to provide Congress with the power to choose when to employ the Armed Forces, the power to halt any military activity at any time, the power to restrict the geographical areas where the Armed Forces shall be deployed and to set numerical limits upon deployments in specific places—why then did the framers not say so in clear words of the kind they had available for use in the existing Articles of Confederation and some State constitutions, which specifically reserved the war powers to the legislature?

The men who wrote constitutions in the 1770's and 1780's knew how to give the legislature extensive powers if they wanted to and the fact that they did not spell this intent out in plain language in the Constitution is an indication that they did not mean for Congress to have supremacy over the defensive war powers.

Ninth, those who claim for Congress the ultimate war powers totally overlook and fail to discuss interpretations of the Constitution by at least six sitting members of the Supreme Court who have written that it is the President who holds "primary" responsibility for the conduct of foreign policy.

For example, Justice Steward, joined by Justice White, has written that the Constitution endows the President with "a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense . . ." Similarly, Justice Blacknum has written that Article II of the Constitution placed in the executive branch "the responsibility for the Nation's safety." These several statements appear in: *New York Times Co.,* v. *United States,* 403 U.S. 713 (1971); 729 (Stewart and White); 741 (Marshall); 761 (Blacknum): First National City Banco Nacional De Cuba, 406 U.S. 759, 767 (Burger and Rehnquist) (1972).

Now, when several of the present Supreme Court Justices write that the President has the lead role in foreign policy and the responsibility for the Nation's safety, this should at least require an answer from people, who claim that Congress has the primary responsibility for these things, to say why they think their inter-

pretation of the Constitution would prevail with Justices who appear to be taking the opposite position.

VALIDITY OF TESTING STATUTE PROVISION

Mr. Chairman, in concluding, I would suggest making one amendment to the War Powers Resolution. I ask that you add a provision in the law making it easier for the validity of the statute to be tested on constitutional grounds. In this way, we may settle these legal questions and remove doubts about exactly what is this Nation's ability to defend itself.

I want to thank the Chairman very much for his being here and also Senator Javits and to ask that an article written by my assistant, J. Terry Emerson, for the *Notre Dame Lawyer* be printed at this point in my remarks.

Senator SARBANES. Without objection it is so ordered.

[The information referred to follows:]

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THE WAR POWERS RESOLUTION TESTED: THE PRESIDENT'S INDEPENDENT DEFENSE POWER

*J. Terry Emerson**

I. Introduction

The final months of direct United States military involvement in this nation's longest war were marked by military operations which raised many fundamental questions about the arrangement of the war powers between the executive and legislative branches. These armed actions are particularly interesting to a student of the constitutional allotment of warmaking and public defense powers, since they represent the first major test of recent enactments of Congress in which the legislative branch has sought to impose binding rules on the use of American force abroad. One of these laws, the War Powers Resolution, seems to represent a congressional will that the President not commit American military forces, even in defense of American lives, liberty, and property, without first consulting Congress. The President did, in fact, comply with the resolution and consult with Congress during the recent operations, but what if he had not? Could Congress lawfully prevent the President from acting unilaterally to defend American interests abroad?

Numerous historical precedents since the Constitution was adopted suggest that the President has power independent of Congress to commit American forces for defensive purposes. The Founding Fathers, although fearful of a too powerful Executive, were also well aware of the hazards of placing military operations under the control of a legislative body; they drafted a Constitution that reflected these concerns. While Congress cannot constitutionally legislate restrictions to these independent defensive war powers, sufficient guarantees of accountability are inherent in the constitutional system.

II. The War Powers Resolution and Its First Tests

A. *Provisions of the War Powers Resolution*

A history-making law, the War Powers Resolution[1] was enacted by Congress on November 7, 1973, over President Nixon's veto. Never before had Congress undertaken to codify or define rules applicable to the introduction of United States armed forces into war or threatened war.

The announced purpose of the resolution, set forth in § 2(a), is 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 in situations where imminent involvement in hostilities is clearly indicated

* Counsel to United States Senator Barry M. Goldwater; former Assistant Counsel, Office of Legislative Council, United States Senate; former Richardson Foundation Congressional Fellow; J.D., Duke University, 1959; A.B., Elon College, 1956.

1 Pub. L. No. 93-148; H.J. Res. 542, 93d Cong., 2d Sess. (1973).

by the circumstances, and to the continued use of such forces in hostilities or in such situations.

Section 2(c), described further herein, expresses a congressional understanding that the "constitutional powers of the President as Commander-in-Chief" to commit military forces exist only when: (1) Congress has declared war, (2) legislated specific authority, or (3) the United States is under attack.[2]

Section 3 provides that the President will consult with Congress "in every possible instance" before each use of armed forces in hostilities or threatened hostilities and regularly thereafter, until United States forces are disengaged or removed from such situations. The applicability of the resolution is initiated by § 4, which requires that, absent a declaration of war, whenever United States armed forces are introduced (1) into hostilities or imminent hostilities; (2) into the territory, air space, or waters of a foreign nation, when equipped for combat (other than solely for the supply, replacement, repair or training of forces); or (3) in numbers which substantially enlarge United States forces equipped for combat already located in a foreign nation, the President must report it in writing to Congress within 48 hours and periodically afterwards. It is significant that situations (2) and (3) are *not* tied to the actual outbreak of or imminent involvement in hostilities, but require the mere deployment of combat forces into another country, whether or not hostilities might be anticipated. Even the strengthening of units already located in foreign countries is similarly covered.

Once the reporting provision has been triggered, § 5 takes effect. This section mandates that no later than 60 days after a report is required under § 4(a)(1), "the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted)," unless Congress grants specific authority for the operation to continue or "is physically unable to meet as a result of an armed attack upon the United States." The 60-day period can be extended for an additional 30 days if the President determines and certifies to Congress that the safety of United States troops demands their continued use in the course of bringing about their prompt removal. Next, § 5(c), an important and often overlooked part of the war powers legislation, provides that at any time United States 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." This means that at any time before the 60- to 90-day period is up, Congress can unilaterally order United States forces to pull out. The law provides that the President must obey such a congressional directive.

Sections 6 and 7 of the resolution establish congressional priority procedures for consideration of, and final action upon, legislation introduced either to author-

2 Section 2(c) does not answer what the understanding of Congress is as to any assertions of power which the President may make by virtue of his possession of the executive power of the nation, his authorities over the conduct of foreign policy, or his right to enforce the duties and obligations "growing out of the Constitution, our international relations, and all the protection implied by the nature of the Government under the Constitution." *See* text accompanying notes 69-80 *infra*.

ize continued engagement of our forces or to compel their removal. Another major policy provision is included in § 8, which states that no authority for the use of troops shall be inferred from any provision of law, including defense appropriations, unless the law spells out a specific intent to confer such authority within the meaning of the resolution.[3] Nor can any authority for troop deployment be inferred from any existing or future treaty, unless it is implemented by separate legislation specifically conferring such authority. In somewhat of an anticlimactic manner, Congress then declares in § 8(d) that nothing in the law "is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties," or "shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces . . . which he would not have had in the absence of this joint resolution."[4]

The War Powers Resolution received its first tests during the closing months of America's involvement in Indochina.

B. *A Chronology of Presidential Military Initiatives in 1975*

Four military operations which came under the purview of the War Powers Resolution occurred in 1975. Three were rescue and evacuation efforts: (1) the evacuation of Americans and others from Danang and other South Vietnamese seaports imperiled by enemy forces; (2) the rescue of Americans and others caught in Phnom Penh before the capture of the Cambodian capital by the Communists; and (3) the evacuation of United States citizens and numerous South Vietnamese during the dying hours of the Thieu government in Saigon. Finally, there occurred the well-publicized *Mayaguez* incident, in which an American ship and crewmen were rescued, and freedom of the seas for United States vessels was upheld.

The first independent Presidential military activity of the year occurred on March 29, 1975, when President Ford directed United States naval vessels to assist in an international humanitarian relief effort to transport thousands of refugees and some United States nationals to safety from Danang and elsewhere in South Vietnam. American forces abroad were equipped for combat.[5] One week later, United States Marines in 36 helicopters flew into the Cambodian capital of Phnom Penh, where they evacuated some 100 Americans, 160 Cambodians, and 35 third-country nationals. A contingent of 350 Marines, in full combat gear, participated in the operation, standing guard in the area where the helicopters landed. Twenty United States warplanes patrolled the skies and two helicopter gunships escorted the fleet. No casualties were incurred, but a

3 Implicit in this provision is the concept that because Congress funds a war does not mean it wants to share responsibility for that war.

4 In this section, Congress appears to be admitting uncertainty about what it has done elsewhere in the resolution and where the boundaries of the Constitution actually fall between the President and Congress. On the one hand, Congress says the President can do whatever the Constitution allows, regardless of what it may have mistakenly provided to the contrary. On the other hand, it does not mean to authorize him to do anything he cannot now do, whatever that is. If nothing more, this provision invites competing interpretations of the war powers allotment of the Constitution by the President and Congress.

5 121 CONG. REC. S 5279-80 (daily ed. Apr. 7, 1975).

75 mm. recoilless rifle round and at least four rockets hit the landing field.[6]

By mid-April, President Ford had ordered the reduction of American personnel in the United States mission in Saigon to levels that could be quickly evacuated during an emergency. On April 29, 1975, Tan Son Nhut Airfield in Saigon came under rocket and artillery fire. Believing that the airfield was "unusable" by fixed wing aircraft and that "the collapse of the Government forces within Saigon appeared imminent," the President decided that the "situation presented a direct and imminent threat to the remaining United States citizens and their dependents in and around Saigon." Accordingly, he ordered United States military forces to proceed with "an emergency final evacuation out of consideration for the safety of U.S. citizens."[7] In the final removal, approximately 5,600 Vietnamese and 1,375 Americans were evacuated from the embassy by a fleet of 70 helicopters. In addition, over 30,000 Vietnamese refugees were picked up on the open sea by Navy ships. American fighter aircraft provided protective aircover and in at least one instance suppressed North Vietnamese antiaircraft artillery firing upon evacuation helicopters. About 865 Marines were involved in the operation. Two Marines and two pilots were killed in the final withdrawal.[8]

Two weeks later, President Ford directed American forces to free the unarmed American merchant vessel *Mayaguez* and its 39 American crew members. The ship was seized May 12, 1975, by Cambodian Communist troops 60 miles from the Cambodian coast and seven miles from the disputed island of Poulo Wai, claimed by both Cambodia and Vietnam. In a report to Congress on the event, the President charged that the seizure of the ship was "in clear violation of international law," and an "illegal and dangerous act."[9] The United States had not recognized the claim of the Cambodians to the Wai Islands, nor their claim to a territorial sea of more than three miles.[10]

The American rescue effort involved the destruction or immobilization of seven Cambodian patrol boats by United States aircraft on May 13; the mobilization by the United States of eight ships, 11 helicopters, 25 planes, and 300 Marines; the assault on the island of Koh Tang by United States Marines on May 14; and the successful recapture of the abandoned *Mayaguez* late that day. One American plane dropped the biggest nonnuclear bomb in our arsenal on Koh Tang. Other air attacks struck the military airfield at Ream and a mainland Cambodian oil storage depot shortly after the crew had been released. These missions were explained as necessary to protect Marines still left on Tang Island. Fifteen United States servicemen are listed as dead and three missing in action on and around that island.[11]

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6 11 WEEKLY COMP. OF PRES. DOC., Apr. 21, 1975, at 378; Wash. Post, Apr. 13, 1975, at A1, A19; Wash. Post, Apr. 12, 1975, at A1, A-12.

7 H.R. DOC. No. 94-124, 94th Cong., 1st Sess. (1975); 121 CONG. REC. 3609 (1975) (remarks of Senator Eagleton).

8 *Id.*; Phila. Inquirer, June 8, 1975, at A-1, A-5; Wash. Star, May 2, 1975 at A-1, A-6.

9 11 WEEKLY COMP. OF PRES. DOC., May 19, 1975, at 514-15.

10 *See* letter of Assistant Secretary of State Robert McCloskey to Senator Edward Brooke, printed in 121 CONG. REC. S 11572-74 (daily ed. June 25, 1975).

11 *See* text of President Ford's letter on the *Mayaguez* affair, *supra* note 9; letter of Assistant Secretary of State Robert McCloskey, *supra* note 10.

C. *Application of the War Powers Resolution*

Did the President violate the law by any of these operations? In applying the provisions of the War Powers Resolution to the facts of the 1975 Indochina military actions, the first issue to be considered is the effect that should be given to § 2(c). This provision spells out the congressional understanding that the constitutional power of the President as Commander in Chief to introduce combat forces into hostilities, or situations where hostilities are imminent, exists "only" when Congress has declared war or granted specific statutory authority, or when there is "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."

Is § 2(c) meant as a "legally" binding" definition? If it is binding, did the facts of each evacuation and rescue mission fit the congressional understanding of a situation where troops were introduced "into hostilities" or where their "imminent involvement in hostilities" was clearly indicated? Notwithstanding the restrictive language of § 2(c), does the provision allow for an implied exception in order to evacuate American citizens? Does any such exception extend far enough to encompass the humanitarian withdrawal of foreign nationals in connection with the evacuation of Americans?

Certain portions of the legislative history of the War Powers Resolution can be read to indicate that Congress intended § 2(c) to be a binding rule, codifying the President's power as Commander in Chief in all situations involving hostilities.[12] The weight of the evidence on congressional intent, however, points to the conclusion that § 2(c) does not carry binding force. The State Department claims the subsection is "at most a declaratory statement of policy," that it "does not contain language which requires or prohibits any particular action, which is characteristic of mandatory and binding provisions." An additional point made by the State Department is that the conference report on the War Powers Resolution expressly provides that "[s]ubsequent sections of the Joint Resolution are not dependent upon the language of this subsection . . . ."[13]

To the considerations posed by the State Department may be added the fact that the primary object of the War Powers Resolution was to "insure that the collective judgment of both the Congress and the President" will apply to certain crisis situations involving armed action or its grave threat.[14] The provisions of the resolution which implement congressional participation in decision-making relating to employing the Armed Forces are not found in § 2(c), but rather in other sections of the resolution which establish a process of consultation, reporting, and prompt congressional action on these matters.[15] Since it is not necessary for § 2(c) to have a binding effect in order to carry out Congress' role in the "collective judgment" process, it can be concluded that the section is not an effort at legislating a legally binding limitation on Presidential authority.

Even if § 2(c) were assumed to be an operative rule for the use of the Armed Forces in grave situations, the omission of any specific language regarding

12 119 CONG. REC. 33550 (1973) (remarks of Senator Javits).
13 119 CONG. REC. 40022-23 (1973) (remarks of Senator Eagleton).
14 H.J. Res. 542, 93d Cong., 2d Sess., § 2(a) (1973).
15 *Id.* §§ 4-7.

the protection of United States citizens overseas does not mean that emergency rescue operations are prohibited. The War Powers Resolution was passed over the President's veto in an atmosphere of concern that United States forces might be reintroduced into the Vietnam war to enforce the Paris Cease Fire Agreement of January 24, 1973,[16] or that on other pretexts the President might resume bombing missions or active American fighting in support of the South Vietnamese regime.[17] In this setting, the term "hostilities" or "imminent involvement in hostilities," for purposes of the presumed limitations of § 2(c), would include only actions where a principal aim is to destroy enemy troops or resources, or otherwise strengthen the lasting ability of an ally. Without specific and convincing evidence of Congress' deliberate purpose to bar such an activity, it cannot be presumed that Congress intended to prohibit a humanitarian action reasonably related to protecting the safety of endangered Americans.[18]

Moreover, there is specific legislative history to the effect that Congress did recognize that the President possesses an inherent constitutional power to employ the Armed Forces to protect United States citizens. During Senate debate over the final version of the War Powers Resolution that had been agreed to in joint conference between the House and Senate, Senator Javits, an initial author of the legislation and then manager of the proposal, discussed exactly this point in a colloquy with Senator Eagleton of Missouri. "[T]he Senator has laid great emphasis on the word 'only,'" noted Senator Eagleton. "I take it that the Senator's current position is that under the Constitution the President has no emergency authority with respect to American nationals endangered abroad."[19] "I said no such thing," replied the Senator from New York. "I would tell the Senator this," he added: "There was a very long argument about including the concept of rescuing nationals. It was felt that whatever was specified on that score, in order to be conservative in respect of the President's power, would have to be so hedged and qualified that we were better off just not saying it . . . ."[20]

Senator Javits' answer makes it clear the conferees did recognize the existence of a rescue power in the President. But to avoid the difficult and perhaps impossible task of nailing down a definition of executive authority, they left the

16 The text of the Vietnam Ceasefire Agreement and Protocols is printed in 31 CONG. Q. WEEKLY REP. 151-64 (1973).

17 See brief summary of the congressional attitude regarding the Indochina war in 33 CONG. Q. WEEKLY REP. 842-46 (1975).

18 The same analysis would apply to seven other laws which seek to prohibit the use of appropriated funds to finance certain military activities in, over, or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia. Four of these prohibitions bar the use of funds to finance "directly or indirectly combat activities" by the Armed Forces. (Section 839 of Pub. L. No. 93-437; section 741 of Pub. L. No. 93-238; section 108 of Pub. L. No. 93-52; and section 307 of Pub. L. No. 93-50). One prohibits the use of money to "finance military or para-military operations." (Section 30 of Pub. L. No. 93-189). Two laws prohibit the use of funds to finance "the involvement of United States military forces in hostilities." (Section 806 of Pub. L. No. 93-115 and section 13 of Pub. L. No. 93-126.) These seven restrictions were enacted because of concern with the possible use of the armed forces to support the Government of South Vietnam or Cambodia. The employment of the military in the Cambodian and Vietnam evacuations and the recapture of the *Mayaguez* have little or no bearing on the matter of aid to the Cambodian or South Vietnam regimes and were initiated for the primary purposes of protecting U.S. citizens and assisting in international humanitarian relief. Thus, the operations were not restricted by any of the above appropriations riders.

19 119 CONG. REC. 33558 (1973) (remarks of Senator Eagleton).

20 *Id.*

matter open for interpretation by the President and Congress as future practice might require. If instead of relying on his sole judgment of what may be warranted by particular circumstances, the President wishes to obtain a clarification or support of his power to act, Senator Javits explained: "He can always come to us for authority if he is in any doubt."[21]

Having concluded first that § 2(c) of the War Powers Resolution does not contain a legally binding definition of the President's powers as Commander in Chief, and, second, that in any event humanitarian relief missions involving in part the rescue of Americans are excepted from any limitations intended by such section, it is clear the President did not violate the War Powers Resolution in the course of the Indochina operations. All that was required was the consultation and reporting required by §§ 3 and 4 of the resolution, and this the President did.

President Ford not only consulted with Congress by bringing before both Houses in joint session on April 10, 1975, the need for the possible evacuation of Americans and Vietnamese, but he requested support from Congress in the form of related legislation which would demonstrate unity among the two political branches of government on this important matter of national policy.[22] He also mentioned the urgency of the situation in Cambodia.[23] On April 14, President Ford, with Secretary of State Kissinger, Secretary of Defense Schlesinger, and Army Chief of Staff Weyand, met personally with the full Senate Foreign Relations Committee for consultation on the situation in Southeast Asia. Top administration officials also testified before several congressional committees to discuss the evacuation issue.[24]

The same spirit of collaboration, to the degree possible, marked the *Mayaguez* incident. Monroe Leigh, Legal Adviser to the State Department, informed a House subcommittee investigating the application of the War Powers Resolution to the event "that although the Mayaguez incident was a rapidly unfolding emergency situation, four separate sets of communications took place between the Executive Branch and the Congressional leadership."[25] He summarized these consultations as follows: "First, the Congressional leadership was informed of the principal military operations prior to the actual commencement of those operations; second, the Congressional leadership did have an opportunity to express its views concerning the impending military operations; . . . and third all views which were expressed by the Congressional leadership . . . were communicated directly to the President."[26]

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21 *Id.*

22 121 CONG. REC. H 2684 (daily ed. Apr. 10, 1975). It is interesting that the President commenced and completed the Indochina evacuations even though Congress did not provide him with the supporting legislation he had requested. In fact, on May 1, 1975, after the last evacuation, the House of Representatives rejected the conference report on this measure, H.R. 6096, the Vietnam Humanitarian Assistance and Evacuation Act of 1975, which would have provided statutory authority for the President to do exactly what he had already done. 121 CONG. REC. 3540-51 (daily ed. May 1, 1975).

23 121 CONG. REC. H 2684 (daily ed. Apr. 10, 1975).

24 33 CONG. Q. WEEKLY REP. 776-78 (1975).

25 *Hearings on War Powers: A Test of Compliance Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 1st Sess. 78 (1975) [hereinafter cited as *War Powers Hearings*].

26 *Id.* at 77-78.

Dissenting voices were heard. Senator Eagleton complained that "[a]t most a number of Senators and Congressmen were notified or informed of action already planned or underway."[27] He introduced an amendment that would replace the phrase "consult with Congress" in § 3 of the War Powers Resolution with the words "seek the advice and counsel of Congress."[28] This he would define to mean that the President "shall in every possible instance discuss fully the proposed decision for using [the] Armed Forces with Members of Congress . . . and shall fully consider their advice and counsel before committing the United States Armed Forces to any such proposed decision."[29]

Senator Javits took a similar view. He informed the same House panel that the State Department Legal Adviser appeared before that "[t]o a disturbing extent, consultations with the Congress prior to the Mayaguez incident resembled the old, discredited practice of informing selected members of Congress a few hours in advance of the implementation of decisions already taken within the Executive Branch." He proposed that "prior consultations required under the law should be conducted with the committees having legislative jurisdiction—meeting in their formal capacities as committees of the Senate and House of Representatives."[30] By this description, Senator Javits meant the 17-member Senate Foreign Relations Committee and the 37-member House International Affairs Committee, sitting in full session.[31]

Pressed as to his view of the form consultation should have taken, Mike Mansfield, the Majority Leader of the Senate, stated that the consultative process should be applied to "at least the leadership and the chairmen and the ranking Republican Members."[32] Although he professed not to have been consulted, referring to "briefings" rather than "consultation," Senator Mansfield did not agree with a reporter's description that the law had been "to a slight extent, bent or violated," explaining that "maybe he didn't have the time."[33] This point was forcefully used by Monroe Leigh, who testified that "one must consider the other things that the Chief Executive had to do to discharge his obligations under the Constitution."[34]

How the President could have cooperated more fully with Congress than he did in the circumstances of rapidly changing and developing events, each of which could be seen as a new reason for consulting with Congress, is unexplained by his critics. The answer to this practical problem surely lies in a common sense approach based on Congress' own phrase, "in every possible instance,"

27 121 CONG. REC. S 8826 (daily ed. May 21, 1975). Earlier, Senator Eagleton had complained that Congress had not been informed in any way about an incident which he believes was the first test case for the War Powers Resolution, the evacuation of more than 500 Americans from Cyprus in two military helicopter operations on July 22 and 23, 1974. 120 CONG. REC. S 13851-53 (daily ed. July 31, 1974). The executive branch denied there had been a failure of reporting since our forces "were unarmed." 120 CONG. REC. S 14180 (daily ed. Aug. 2, 1974).

28 The amendment is proposed in S. 1790, 94th Cong., 1st Sess., § 2(1) (1974).

29 S. 1790, 94th Cong., 1st Sess., § 2(3) (1974).

30 *War Powers Hearings*, *supra* note 25, at 79.

31 *Id.* at 68.

32 Senator Mansfield's remarks were made during an interview on "Face the Nation," the pertinent part of which is printed in 121 CONG. REC. S 8819 (daily ed. May 21, 1975).

33 *Id.*

34 *War Powers Hearings*, *supra* note 25, at 79.

which admits of circumstances where lengthy dialogues between the President and some 50 to 60 members of two congressional committees simply cannot take place.[35]

III. The Independent War Powers of the Executive

Given that President Ford did not violate any provision of the War Powers Resolution in the course of the four Indochina military actions of 1975, the question arises of what constitutional validity the resolution would have in the case of Presidential noncompliance. Does Congress possess constitutional authority to prohibit the President from using the Armed Forces in defense of American lives, liberty, and property without first obtaining the collective judgment of both Houses of Congress? Should an incident arise where the President and Congress differ over the need for an armed response, will the Executive be able as a matter of constitutional law to carry on a defense mission which Congress has ordered him to call off? For example, if Congress fears that a contemplated rescue mission involves a risk to the public in general that outweighs the safety of those Americans immediately involved, is the President constitutionally bound to abandon those Americans when so directed by a concurrent resolution agreed to under § 5(c) of the War Powers Resolution? Or may he undertake the operation by virtue of distinct and independent authorities vested in the President by the Constitution?

A. *Historical Incidents of Defensive Presidential War-Making*

History throws considerable light on these questions. Our past is replete with incidents involving threats to American lives, property, or important American overseas interests in which Presidents have used force or the threat of force for defensive purposes without a declaration of war and without policy restriction by Congress.

It is not surprising that force was not used abroad during the terms of our first President. With no Navy and a regular Army which never exceeded 4,100 men,[36] President Washington could not have mounted an overseas war under any circumstances. With the influence arising from the nation's potential greatness, based on an immense land area and a growing population, he could and did, however, threaten the use of force as an arm of diplomacy when an opportune moment arose. Such an occasion presented itself in 1790, when Spain

35 *E.g.*, as explained by the State Department Legal Adviser:

> To comply with the 48-hour requirement in the last report which concerned the Mayaguez affair, the President had to be awakened at 2 o'clock in the morning in order to read and sign his report so that it could be delivered to the Speaker and the President Pro Tempore of the Senate. These deliveries were made to the offices of the Speaker and President Pro Tempore at approximately 2:30 A.M. on May 15 about four hours before the expiration of the 48-hour period.

Id. at 72.

36 Letter from U.S. Center of Military History, Dep't. of Army, to Barry M. Goldwater, Sept. 19, 1975. *See* C. PAULLIN, HISTORY OF NAVAL ADMINISTRATION 1775-1911, at 53, 89 (1968). The Navy under the Constitution began with the Act of March 27, 1794, which authorized construction of four ships of 44 guns each and two of 36 guns each. Only three of the ships were completed, and even these were not launched until *after* Washington's second term had expired. *Id.* at 91, 97.

and England appeared to be on the verge of war. The Spanish Colony of New Orleans, and other Spanish posts to the north, were vulnerable to attack by a British operation from Detroit, a danger known by both Washington and the Spanish. Acting on Spanish fear of the British, Washington unilaterally pressured Spain to open the Mississippi to American navigation, an important foreign policy goal of his administration. Thomas Jefferson, as Secretary of State, implemented Washington's plan by instructing the American envoy in Spain to threaten that if the United States could not secure navigation down the Mississippi by negotiation, it would acquire it by force, perhaps in alliance with Britain.[37] The threatened hostilities did not erupt, but Washington had shown his readiness to take action independent of Congress when a vital interest of the nation was at stake.

Washington's successor, John Adams, moved a step further toward the actual commencement of hostilities for reasons of national defense. On March 19, 1798, he issued an order, without the authority of Congress, allowing American merchant vessels to arm for defense against attacks by French warships.[38] The consensus of congressional debate on arming our merchantmen, which had occurred only three days preceding Adams' order, was that "any new measures ought [not] to be gone into, or measures which, in their tendency, must lead to war."[39] His action was promptly questioned by Congress on the ground that if the President could take the measures which he had taken, "[h]e, and not

37 3 J. FLEXNER, GEORGE WASHINGTON 256-58 (1970); D. MALONE, JEFERSON AND THE RIGHTS OF MAN 311 (1951); 5 J. MARSHALL, THE LIFE OF GEORGE WASHINGTON 238-39 (AMS Press ed. 1969).

There is at least one other example when the first President was willing to use armed force at his own discretion. In fact, he was prepared to use it against the apparent contrary judgment of Congress. Leading up to Washington's action was the scheming of "Citizen" Genet, who "deliberately planned two expeditions, to be carried on from the territories of the United States against the dominions of Spain, and had, as minister of the French republic, granted commissions to citizens of the United States, who were privately recruiting troops for the proposed service." MARSHALL at 468. These regiments were being recruited in Georgia, South Carolina, and Kentucky to attack the Spanish possessions at the mouth of the Mississippi and in Florida. 4 J. FLEXNER, GEORGE WASHINGTON 50-53 (1972).

The Federalists reacted by introducing and passing a bill in the Senate forbidding filibustering expeditions against persons at peace with the United States. The House refused to follow the Senate's lead. "To achieve, despite Congress's unwillingness to act, what he considered essential for peace, he issued his executive proclamation." *Id.* at 127. This was the Proclamation of March 24, 1794, warning against enlisting citizens for the purpose of invading the territories of a nation at peace with the United States and requiring all citizens to refrain from engaging in such unlawful purposes, sometimes called Washington's Second Neutrality Proclamation. "He went, indeed, further," directing General Wayne "to post troops where they could intercept any filibustering expedition that tried to float down the Ohio." *Id.* Not only was Washington ready to enforce his decision of neutrality as between Spain and France on his own authority after he could not persuade Congress to act, but he used Wayne's army for a purpose totally different than the one Congress had intended, a campaign against Indian war parties in the North. *Id.* at 49.

38 8 ANNALS OF CONGRESS 1271 (Gales & Seaton ed. 1851). On May 22, 1798, Adams' Secretary of War, James McHenry, moved the nation closer to war by instructing Navy Captain Richard Dale to convoy our merchantmen in coming in or going off the coast between the Capes of Virginia and Long Island and, if attacked while on the high seas, "to defend Yourself to the Utmost." NAVAL DOCUMENTS RELATED TO THE QUASI-WAR BETWEEN THE UNITED STATES AND FRANCE 77 (U.S. Office of Naval Records & Library 1935). Dale's orders were limited to repelling force by force primarily for political reasons. McHenry, and Alexander Hamilton, whose advice he had solicited, correctly foresaw that Congress would be induced to respond with its approval of even stronger measures than Adams had taken, thereby sharing responsibility for the military actions likely to ensue.

39 *Id.* at 1254-63.

Congress, had the power of making war."[40] The matter was debated fully, but Congress rejected any legislation that would have regulated the President's action. The House also defeated amendments which proposed to limit the manner in which the President could employ our small naval force.[41]

From the published debates, it is clear that this early Congress distinguished between offensive and defensive military measures, recognizing that the President can take proper actions for the defense of the country, without direction from Congress.[42] During a continuation of this debate, Representative Jonathan Dayton, then the Speaker of the House and a signer of the Constitution, argued that the President, as Commander in Chief, was the official "whom the Constitution has made exclusively the judge" of employing the Army and Navy of the United States wherever he "thought the common defense and general welfare required them to be stationed."[43] The President was also supported by Representative Sewall, who ridiculed the idea that "[o]ur citizens going without the territory of the United States are to be no longer objects of our attention" and "were to be abandoned to the elements or to the hostility of mankind, wherever they went."[44]

This view of the President's responsibility for the public safety as primary has since been followed by nearly every President. Only three years later, Thomas Jefferson sent into the Mediterranean on his own authority a squadron of four ships, with instructions that should hostilities be commenced by the Barbary pirates upon American shipping before the squadron's arrival, "this force will be immediately employed in the defense and protection of our commerce . . . ."[45] His orders provided that pirate attacks against American shipping will be "repelled and punished." It was only after actual fighting broke out that Jefferson came to Congress for support.[46] Even President Buchanan, who is cited in a

40 *Id.* at 1324.
41 *Id.* at 1459, 1462, 1521.
42 *Id.* at 1325, 1330.
43 *Id.* at 1410, 1454-55.
44 *Id.* at 1457-58.
45 2 AM. STATE PAPERS, CLASS I, FOREIGN RELATIONS 347-48 (1930); Sofaer, Book Review, 88 HARV. L. REV. 286 (1974).

Early in 1802, Jefferson again acted on his own authority without notifying Congress in a military matter of serious consequence. Having learned of the scheduled cession of Louisiana by Spain to France and the closure of the deposit at New Orleans, Jefferson threatened the French chargé in America with an Anglo-American military alliance if France took possession of Louisiana. Also, he warned that the French could remain in the territory "only so long as the Americans would permit." He then confirmed this threat by writing a private letter to Robert Livingston, the U.S. minister in France, explicitly referring to *war* as a means of rejecting France from the New World. When the House of Representatives called upon him for all the official papers bearing on developments in New Orleans, Jefferson kept this letter a secret from Congress. D. MALONE, JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805, at 240, 253-56, 264 (1970).

46 Jefferson's idea of the way "to protect our commerce & chastise their insolence," in case the Barbary Powers have declared war or committed hostilities, as stated in his orders to Captain Dale, was "by sinking, burning or destroying their ships & vessels wherever you shall find them." 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WAR WITH THE BARBARY POWERS 467 (1939).

During a discussion between Jefferson and his Cabinet on sending the squadron to cruise in the Mediterranean, Jefferson records that his Secretary of the Treasury, Alexander Gallatin, a strict constructionist, advised: "The exve can not put us in a state of war, but if we be put into that state either by the decree of Congress *or of the other nation*, the command and direction of the public force then belongs to the exve." 1 THE WRITINGS OF THOMAS JEFFERSON 293 (P. Ford ed. 1892) (emphasis added).

recent report by the Senate Committee on Foreign Relations as acknowledging the war power of Congress,[47] risked a confrontation with Great Britain by ordering, upon his own authority, a naval force "to protect all vessels of the United States on the high seas from search or detention by the vessels of war of any other nation."[48] A conflict was avoided at the last moment when Great Britain, because of this pressure, abandoned its claim to the right of boarding and searching American merchant vessels.[49]

President Grant, who is described by a prominent historian as having "politely deferred" to Congress after being rebuffed by the Senate in his attempt to annex Santo Domingo,[50] nevertheless put the Navy on a warfooting, upon his sole authority, in a confrontation with Spain concerning the seizure, court-martial, and execution of 53 crew members and passengers of the American steamer *Virginius*. According to contemporary reports, every available ship was commissioned or recalled from foreign stations, and war appeared imminent. Grant's use of force succeeded: Spain yielded, returned the *Virginius* with her surviving crew and passengers, and paid an indemnity to the United States.[51]

During the early 1800's, American gunboats thus protected American shipping in the Atlantic and Mediterranean, and made several landings on foreign soil to protect American lives and property. By the 1850's these protective actions extended to the Pacific, culminating in President McKinley sending 5,000 troops in 1900 to defend the American Legation in Peking. In the early 1900's, American forces repeatedly protected American property in Panama and other Caribbean areas, and made several landings in China. By 1927, this country had 5,670 troops stationed in China. Prior to our official entry into World War II, President Roosevelt, without consulting Congress, sent troops to occupy Greenland and Iceland and ordered United States warships to protect the British lifeline in the Atlantic. Since World War II, the United States has been involved in major land wars in Korea and Indochina, has risked a nuclear holocaust in order to remove offensive missiles from Cuba, and has placed the Armed Forces on a worldwide military alert to prevent the Soviet Union from intervening in the Middle East.[52]

Presidents have deployed troops into crisis areas and used force or the threat of force for defensive purposes without a declaration of war or other specific authorization by Congress on approximately 200 occasions since the founding of the Republic.[53] The import and "quality" of these precedents, however, are challenged by a distinguished historian, Arthur M. Schlesinger, Jr., on the ground

47 S. Rep. No. 93-220, 93d Cong., 1st Sess. 12 (1973).

48 7 J. Richardson, A Compilation of the Messages and Papers of the Presidents 3038 (1897).

49 C. Berdahl, War Powers of the Executive in the United States 51 (1921).

50 A. Schlesinger, Jr., The Imperial Presidency 86 (Popular Library ed. 1974).

51 F. Chadwick, The Relations of the United States and Spain 314-51 (1909).

52 *See generally* the chronological list in Emerson, *War Powers Legislation*, 74 W. Va. L. Rev. 53, 88-110, 367 (1972), as reprinted with supplementary data in *Hearings on S. 440, Before the Senate Comm. on Foreign Relations*, 93d Cong., 1st Sess. 126-48 (1973). *See also* M. Kalb & B. Kalb, Kissinger 488-99 (1974), regarding the 1973 Middle East crisis.

53 Emerson, *supra* note 52, at 155-56. Up to 81 military operations may be supported by legislation other than declarations of war, if authority to use force can be inferred from treaties. But such action by the Senate alone would not constitute any precedent for requiring the consent of both the Senate and House in other circumstances.

that "the operations were mostly directed against nongovernmental groups, mostly concerned with the protection of American citizens and mostly trivial." Such "police actions, not directed at sovereign states," can be explained as not rising "to the dignity of formal congressional concern."[54] Moreover, Schlesinger indicates: "A substantial number took place . . . without presidential authorization, very often the consequence of the individual initiative or short temper of lieutenants along the southern border or commodores on the high seas."[55]

This analysis misses the practical answer that Presidents have consistently responded to foreign threats to the United States with the force necessary, and physically and technologically available, at a given moment in history. "When little force was needed . . . little was used; when larger commitments were necessary, they too were forthcoming."[56] President Washington did not hesitate to threaten Spain with hostilities. President Adams risked a deeper war with France by withdrawing his previous order that had forbidden the arming of merchant vessels. President Buchanan accepted the chance of a conflict with Great Britain in upholding the right of United States vessels to be free from search or detention by foreign warships.

Furthermore, precedents of Presidential military activity cannot be uniformly categorized as actions against "stateless and lawless people"; there are too many exceptions. Even if accurate, this categorization is not of any major import. The flow of blood is the same whether from combat with pirates and unruly natives, or with regular forces. Any commitment of American forces into troubled areas involves a serious risk of armed fighting. Nothing in the 18th century materials regarding the war powers indicates that the framers made a distinction between hostilities with organized states and nongovernment groups in the allotment of those powers; nor is there a history of practice by Presidents showing they have made such an interpretation of their powers. It is true that Presidential initiatives with respect to formal states have increased notably in the 20th century, but this is surely the result of the increase in the number of nation-states and the persistent development of ways in which the United States can be affected by events abroad. One must assume the Constitution never accommodates changes in history or technology for the difference to become significant. Under such an assumption, the United States Air Force would have no constitutional basis, for the Constitution provides for raising "Armies" and maintaining a "Navy," but nowhere refers to an Air Force.

The inference that most precedents of Presidential war powers are the result of hotheaded military officers on the scene is not supported by close examination of the incidents. In fact, only a fraction of all the incidents have been subsequently disavowed or repudiated by the Executive.[57] Where actions may have been commenced by individual commanders, they were carried out according to what was believed to be a clear Presidential directive or policy.[58] In any event, it

54 SCHLESINGER, *supra* note 50, at 61-62.
55 *Id.* at 62.
56 Monaghan, *Presidential War-Making*, 50 B.U.L. REV. 27 (1970).
57 Emerson, *supra* note 52, at 110.
58 Goldwater, *The President's Ability to Protect America's Freedoms—The Warmaking Power*, 1971 LAW & THE SOCIAL ORDER 444 n.141.

is the President as Commander in Chief who is responsible for the command of forces and the conduct of military operations. In practice, the President acts through the executive departments and subordinate officers, and unless disavowed,[59] their acts are in legal contemplation the acts of the President.

B. *Constitutional Significance of Precedents*

Accepting the existence of a nearly uniform practice of Presidents to use armed force or the threat of it in furtherance of important defense interests, without the specific approval of Congress, the question arises of what bearing historical practice has upon current constitutional construction.

In the words of Justice Story, "the most unexceptionable source of collateral interpretation is from the practical exposition of the government itself, in its various departments, upon particular questions discussed, and settled upon its own intrinsic merits."[60] A leading present-day authority on the legal aspects of foreign affairs writes that:

> [T]he emphasis upon usage, as a test of constitutionality . . . was based upon the notions that a people's genuine "constitution" is in how they live and cooperate under a basic charter and that the most important authority in a democratic community is in the expectations that people create in each other by such living and cooperation. The most important principle of interpretation in any legal system I have studied is that which requires examination of "subsequent conduct" as an index of contemporary expectation.[61]

Usage was decisive in resolving an early separation of powers issue between two branches of government. In 1802 the Congress enacted the Judiciary Act, which continued the former practice of the Supreme Court Justices riding circuit. Chief Justice Marshall promptly wrote letters to the Associate Justices stating that he doubted the constitutionality of this provision, upon the ground that the Constitution required separate appointments for holding circuit court. He suggested the possibility that his colleagues refuse to carry out the law.[62] Even with such a serious cloud of doubt over Congress' authority to require additional judicial duties of the Justices, especially without specific commissions to do so, the Marshall Court abided by the principle of usage:

> To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.[63]

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59 United States v. Eliason, 41 U.S. (16 Pet.) 291, 301 (1842); Wilcox v. Jackson, 38 U.S. (13 Pet.) 496, 512 (1839); BERDAHL, *supra* note 49, at 21; D. WATSON, THE CONSTITUTION OF THE UNITED STATES 914 (1910).

60 1 J. STORY, COMMENTARIES ON THE CONSTITUTION § 409, at 392 (1833).

61 Letter from Professor Myers McDougal to Barry M. Goldwater, Jan. 12, 1973.

62 L. BAKER, JOHN MARSHALL 378-81 (1974).

63 Stuart v. Laird, 5 U.S. (1 Cranch) 298, 308 (1803). Marshall did not participate in the decision. Practice also served as the decisive evidence of interpreting the Constitution in McPherson v. Blacker, 146 U.S. 1, 27, 35-36 (1892).

Usage has also been accepted by the Supreme Court on at least two occasions as a basis for rejecting congressional attempts to reverse its earlier ideas of executive authority. In *United States v. Midwest Oil Co.*,[64] the Court approved the validity of a long-continued practice of the President to withdraw public land from private acquisition even though this conflicted with a federal statute which made such lands free and open to occupation and purchase. That practice fixed the construction, the Court explained, "is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or *the existence of a power*, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation."[65] A decade later the Court again relied on usage as a basis for rejecting congressional control over the Presidency. In holding that Congress could not alter 73 years of prior practice to begin setting conditions on the removal of executive officers by the President, even though such practice had often been the subject of bitter controversy in the past, the Court ruled:

> Nor can we concur . . . that when Congress, after full consideration and with the acquiescence and long practice of all the branches of the Government, has established the construction of the Constitution, it may by its mere subsequent legislation reverse such construction. It is not given power by itself thus to amend the Constitution.[66]

The facts of these two cases closely parallel debate over the military command powers. Here there are over 185 years of practice in which Presidents have reacted on their own initiative to any crisis which they believed might present an unacceptable threat to the national safety. Many Presidents have been criticized by both Houses for taking these strong military actions.[67] But Congress had never once before the 1970's passed a law prohibiting, or ordering a halt to, any of these conflicts.[68] If the rule of the above cases is applicable, Congress cannot now, after full consideration and acquiescence for almost two centuries, reverse the construction of the Constitution which has become so firmly set.

C. *Constitutional Source of President's Powers*

The President need not rely solely upon practice to establish his authority to use armed forces in certain instances. The basic source of his power is the Constitution itself. First, article II of the Constitution states that "[t]he Executive power shall be vested in a President of the United States of America." There is authority for the proposition that this is not a passive grant, but includes the traditional power of protecting the national safety as historically recognized by the law of nations.[69] For example, an edition of Vattel, circulated among leaders

64 236 U.S. 459, 473 (1915).
65 *Id.* at 472-73 (emphasis added).
66 Myers v. United States, 272 U.S. 52, 152, 175 (1926).
67 Goldwater, *supra* note 58, at 426-28.
68 Emerson, *War Powers: An Invasion of Presidential Prerogative*, 58 A.B.A.J. 809, 813-14 (1972).
69 *See* address of then Solicitor General Erwin N. Griswold, printed in 117 CONG. REC. 28976-78 (1971) (remarks of Senator [redacted]).

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of the American Revolution by Benjamin Franklin,[70] states the rule that the Executive ought "to watch for the nation, and take care to preserve it . . . and to secure it, as far as possible, against everything that threatens its safety or its happiness. Hence all the rights which a nation derives from its obligation to preserve and protect itself . . . reside in the [Executive.]"[71]

Second, the President is "the sole organ of the nation in its external relations, and its sole representative with foreign nations."[72] At least six of the present members of the Supreme Court have accepted Chief Justice Marshall's description of executive power to mean that the President has "primary responsibility for the conduct of foreign affairs." For example, Justice Stewart, joined by Justice White, stated the Constitution endows the President with "a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense . . . ."[73] Marshall's quote also is cited with approval in *United States v. Curtiss-Wright Export Corp.*,[74] where it is stated that the power of the President in the field of international relations is "delicate, plenary and exclusive" and "does not require as a basis for its exercise an act of Congress."[75]

70 2 B. FRANKLIN, THE LIFE OF BENJAMIN FRANKLIN 349 (J. Bigelow ed. 1874).

71 E. VATTEL, THE LAW OF NATIONS 14, 15 (1863). *See also* 2 C. WOLFF, THE LAW OF NATIONS TREATED ACCORDING TO A SCIENTIFIC METHOD § 39, at 26 (1934 reprint of ed. 1764). The framers also had before them the instruction of Thomas Rutherforth, who, while he dissented from an opinion that "the external executive power" is "from its own nature" independent of control by the legislature, nevertheless concluded that in those societies "where the legislative and the executive power are lodged in different hands," and especially where the legislative power resides "in a considerable number of representatives," the *usual* practice "is to allow some degree of discretionary power in respect of war or peace" to the executive. 2 T. RUTHERFORTH, INSTITUTES OF NATURAL LAW 54-56, 59 (Cambridge ed. 1756).

72 So said John Marshall, on March 7, 1800, while a member of the House of Representatives. 10 ANNALS OF CONGRESS 613 (Gales & Seaton ed. 1851).

73 New York Times Co. v. United States, 403 U.S. 713, 729 (1971) (Stewart & White, JJ., concurring). Justice Thurgood Marshall, in his concurring opinion in the same case, said that "it is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander-in-Chief." *Id.* at 741. Justice Blackmun, dissenting in that case, stated: "Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety." *Id.* at 761. Justice Rehnquist, joined by Chief Justice Berger and Justice White, writes of the "primacy of the Executive in the conduct of foreign relations" and "the lead role of the Executive in foreign policy," in First Nat'l City Bank v. Banco Nacional De Cuba, 406 U.S. 759, 767 (1972).

74 299 U.S. 304, 319-20 (1936).

75 *Id.* The well-known Neutrality Proclamation of 1793 by President Washington is commonly cited as the first major action which set the doctrine of Presidential responsibility for determining on foreign policy. *E.g.*, C. ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 84-85 (1964). The actual facts of the matter bear out its significance. Washington's policy arose out of the French Revolution and the declaration of war made by France against Great Britain, Holland, and Russia. As American vessels were being designated by French representatives in the United States as privateers against British merchant shipping, we were in "the most extreme danger of being drawn into the war." 4 A. FLEXNER, GEORGE WASHINGTON 26 (1970).

Even before word of these declarations reached him, Washington had decided upon and often avowed a fixed purpose of maintaining "the neutrality of the United States, however general the war might be in Europe." On the 12th of April, 1793, he reasserted this policy in similar letters to Jefferson and Hamilton: "War having actually commenced between France and Great Britain, it behoves the government of this country to use all the means in its power to prevent the citizens thereof from embroiling us with either of those powers, by endeavouring to maintain a strict neutrality." MARSHALL, *supra* note 37, at 326-28. Six days later, he addressed a circular letter to all his Cabinet members, enclosing for their consideration "a series of questions, the answers to which would form a complete system" by which to implement his policy. *Id.* at 328-29. Among other things, the meeting of the heads of departments led to the issuance of a proclamation "forbidding the citizens of the United States to take part in any hostilities on the seas, with or against any of the belligerent powers . . . and enjoining

Third, § 2 of article II designates the President as "Commander in Chief." This title has been defined as encompassing "the conduct of all military operations in time of peace and of war, thus embracing control of the disposition of troops, the direction of vessels of war and the planning and execution of campaigns . . . ."[76] Nor has the Commander in Chief power been discovered only recently as a functional base for the President's authority. His right to use force "in such manner as, in his judgment, the public good . . . might require," was specifically made the subject of congressional debate, and was ultimately accepted by the Congress, as early as 1798.[77]

Fourth, § 3 of article II vests in the President the duty and right to "take care that the laws be faithfully executed." The Supreme Court has construed this power to include enforcement not only of statutes and treaties, but also of "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."[78]

Fifth, the President could view his oath of office, to "preserve, protect and defend the Constitution of the United States,"[79] as both reinforcing executive powers found elsewhere in the Constitution and possibly standing alone as a source of power. "A Constitution which does not permit the Commander in Chief to order belligerent acts whenever they are deemed necessary to defend the interests of the nation, would be less an instrument intended to endure through the ages, than a suicide pact."[80]

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them from all acts inconsistent with the duties of a friendly nation towards those at war." *Id.* at 330-31.

Although it was decided upon not to use the word "neutrality," the proclamation declared what was in effect neutrality and was but one means of reaffirming the policy of neutrality that Washington had previously made. "Being at variance with the prejudices, the feelings, and the passions of a large portion of the society, and being predicated on no previous proceedings of the legislature," it is a powerful example of a President making foreign policy for the nation, in conflict with the passions of the moment, in order to protect the safety of the nation. *Id.* at 334.

Washington's proclamation was signed on April 22, 1793. It is important to distinguish the policy of neutrality and the proclamation from the separate rules regarding the arming of vessels of belligerents in American ports and other obligations of neutrality, which rules and instructions were approved by Washington's Cabinet on August 3, more than three months after the Proclamation. *Id.* at 365-67. It is these obligations on the part of private citizens to which Washington referred when he said it "rests with the wisdom of Congress to correct, improve or enforce this plan of procedure." It was not his policy of neutrality or his personal interpretation of the treaties with France that he offered for Congress' judgment, but only so much of his system as required legislation to fulfill, such as rules of prizes or revisions of the criminal code. He himself had established policy as a prerogative of the Executive. 33 THE WRITINGS OF GEORGE WASHINGTON 164-65 (J. Fitzpatrick ed. 1940).

76 The quotation is from one of the foremost authorities of this century on the law of nations. Wright, *Validity of the Proposed Reservations to the Peace Treaty*, 20 COLUM. L. REV. 121, 134 (1920). *See also* holding by Court of Claims that: "In time of war, the Commander in Chief has the same powers as other civilized governments, and the exercise of them need no ratification to give them effective force." The court was speaking of the *undeclared* war in the Philippines. Warner, Barnes & Co. v. United States, 40 Ct. Cl. 1, 32 (1904).

77 8 ANNALS OF CONGRESS 1269, 1410, 1445-46, 1451, 1454-55, 1457-59, 1462, 1477, 1521 (Gales & Seaton ed. 1851).

78 *In re* Neagle, 135 U.S. 1, 64 (1889).

79 U.S. Const. art. II, § 1, cl. 7.

80 SCHLESINGER, *supra* note 50, at 70; 2 B. SCHWARTZ, THE POWERS OF GOVERNMENT 205 (1963).

D. *The Intent of the Founding Fathers*

The contemporary setting in which the Constitution was drafted points to a general understanding among most of the framers that the President would possess and exercise an independent role as required by the national defense.[81] Although it is almost forgotten today, at the time of the Constitutional Convention the country faced overwhelming foreign dangers. To the north, Britain was illegally holding onto frontier military posts it had agreed to cede, and was supporting Indian raiding attacks across our northern frontier. To the south, Spain possessed New Orleans and posts at the mouth of the Mississippi and in the Floridas. In the years immediately preceding the Convention, Spain had ended the free navigation of American boats on the Mississippi, imposed special tariffs for the deposit of goods in New Orleans, and plotted creation of an Indian buffer state between Spanish possessions and the American border. Even our erstwhile ally, France, was suspected by Jefferson of attempting to make the United States a dependent client embroiled in French foreign conflicts. Added to these threats was an awareness by the framers that the "extension of our own commerce in our own vessels," as distant as "the trade to China and India," would invite hostility against our fleets and require our defense of "that commerce."[82]

Admitting this existing state of things, W. Taylor Reveley contends that the framers remedied this situation "by loosening the hold of individual states on

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81 A recent major contribution to the law of foreign affairs arrives at exactly the opposite conclusion. Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527 (1974). Professor Arthur Bestor builds a painstaking case for the proposition that the framers of the Constitution "validated a transfer" of the powers of war and peace from executive to legislative hands "that had taken place a dozen years earlier and which they sought to modify in only a very limited way." *Id.* at 563. His view is that the Constitutional Convention essentially borrowed the principles of the Articles of Confederation by which every crucial decision of foreign policy was to be arrived at through legislative deliberation. *Id.* at 568. Developing his premise beyond the concept of mere joint participation of the two branches in the making and carrying out of critical decisions, he argues that the majority and minority at the Constitutional Convention "were in agreement on one point—that foreign policy should be determined by legislative deliberation and that the executor of that policy should be the agent of the legislature, bound by the instructions it formulated." *Id.* at 619.

Professor Bestor's impressively documented work deserves close attention, but an awareness of basic differences in treatment may explain the divergent conclusions of that paper and this one. Bestor (1) gives absolutely no weight to subsequent usage as a source of collateral interpretation of the Constitution, *id.* at 663, (2) gives no notice to interpretations of the foreign-affairs provisions of the Constitution by at least six members of the present Supreme Court who have put forward the view that the President holds *primary* responsibility for foreign affairs, *see* note 73 *supra*, (3) fails to consider evidence that the framers equated "war" in the declaration clause with "Offensive" war, thus overlooking a meaning to that clause beyond that of simply "communicating a warning or a notice to the enemy," which Bestor rules out as "absurd," *id.* at 608-09, (4) neglects substantial contemporary evidence that the framers knew of and blamed the Articles of Confederation for the system which allowed Congress to dangerously interfere with the conduct and planning of military affairs during the Revolution and the fact that the obvious remedy for this defect was augmentation of executive power, *id.* at 570-71, (5) ignores the significance of the shift in direction of state charters towards giving the executive office greater powers of independent action for the public safety, (6) fails to consider the implications of evidence the framers held strong fears of delegating too much power to the Congress, and (7) is concerned with the entire field of foreign relations decisions, whereas this article is addressed solely to the power of determining on the use and deployment of military force in defense of important national interests.

82 L. KAPLAN, COLONIES INTO NATIONS 163-70, 179-80 (1972); *cf.* THE FEDERALIST NOS. 4, 34 (A. Hamilton).

congressional action and by restructuring Congress to make *it* a more viable executive force."[83] Certainly the framers meant to correct the delays and derangements in government that resulted from the neglect and inaction of the 13 independent sovereignties, each State exercising its own discretion over matters of foreign affairs and national defense. But to stop here is to ignore the totality of the problem and the obvious remedy.

The times called for swift and unified decisions on matters of foreign affairs, as free as possible of transistory emotions. The framers recognized that the very nature of deliberative legislative bodies would on occasion render Congress unequal to the vigorous action required. It is inconceivable that the framers planned to meet the ominous foreign problems of the day by allowing a reluctant or divided Legislature to block steps necessary for the public safety. Instead, they understood that the Executive must in some instances take action on his own initiative without awaiting specific authority from Congress.

It must be remembered that the framers had witnessed firsthand the inefficiency of the Continental Congress in the management of military affairs during the War of Independence. Of the 55 framers who attended the Constitutional Convention, no less than 30 had performed military duty in the Revolution.[84] These men knew that at the time of the American Revolution, Congress had jointly possessed the powers of the executive and legislature.[85] They knew that the directives of Congress had interfered with General Washington's operations and had nearly caused disaster.[86]

It was the Continental Congress, for example, which twice decided on absolutely impractical plans for attacking Canada, without consulting a single military expert,[87] and which by its resolution of October 11, 1776, influenced General Washington to defend a fort at Harlem Heights by "every art and whatever expense," resulting in the loss of over 2,600 men.[88] It was the Continental Congress' order in the fall of 1777 which made it difficult for Washington to obtain reinforcements from the Northern Army, thereby preventing him from saving American forts on the Delaware River and allowing the British to open navi-

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83 Reveley, *Constitutional Allocation of the War Powers Between the President and Congress: 1787-1788*, 15 U. VA. J. INT. LAW 73, 83 (1974) (emphasis added).

84 *See generally* the sketches of each framer set forth in C. ROSSITER, 1787 THE GRAND CONVENTION 79-137 (1966). At least six signers of the Constitution, in addition to Washington, were intimately familiar with the General's problems. Gouverneur Morris had defended the Commander in Chief in Congress and had come to Valley Forge to see things for himself; Thomas Mifflin had been quartermaster general of Washington's army; Robert Morris had managed to finance Washington's campaign; Hamilton had served on Washington's staff and stormed Yorktown; James McHenry had frozen at Valley Forge and become a secretary to Washington; and General C. C. Pinckney had been an aide to Washington in the battles of Germantown and Brandywine.

85 D. HIGGINBOTHAM, THE WAR OF AMERICAN INDEPENDENCE 91-92 (1971); M. JENSEN, THE ARTICLES OF CONFEDERATION 266-69 (1940).

86 John Marshall, himself a contemporary observer, remarks: "Congress were disposed to be regulated in their plans, rather by their wishes, than by the means placed in the hands of their military commanders for the execution of them. . . ." 3 J. MARSHALL, THE LIFE OF GEORGE WASHINGTON 5 (AMS Press ed. 1969).

87 4 J. MARSHALL, THE LIFE OF GEORGE WASHINGTON 30-41 (AMS Press ed. 1969).

88 2 J. MARSHALL, THE LIFE OF GEORGE WASHINGTON 485-502 (AMS Press ed. 1969). Washington wrote that the decision not to abandon the fort was "repugnant to my own judgment." 2 J. FLEXNER, GEORGE WASHINGTON 138, 145, 149 (1968).

gation of the river for the supply of its army.[89] That Congress is also accountable for the tragedy of Valley Forge.[90] In August of 1777, the Continental Congress threw out a military commissary-general chosen by Washington and assumed charge of the commissariat for itself, erecting a system "in direct opposition to the opinion of the commander in chief."[91] John Marshall, who served with General Washington throughout the winter of 1777, observed in his authoritative biography of Washington that "Congress persisted in their system, and the effects of deranging, in the midst of a campaign, so important a department as that must be which feeds the troops, were not long in unfolding themselves."[92] Not only was Washington's army prevented from making attacks on Howe's lines about Philadelphia, but the lack of clothing, food, and blankets had tragic results as cold weather came on. As summarized by one military historian: "The amount of harm, caused by the unwise military control usurped by Congress, can only be measured in terms of the appalling sufferings of the American soldiers at Valley Forge . . . ."[93]

The framers also held fresh memories of Shays' Rebellion of 1786-87, in which Governor Bowdoin of Massachusetts had been required to singlehandedly call out the militia and raise an army to restore order before the reluctant and divided legislature could be moved to action.[94] "Finding that the lenient measures which had been taken by the legislature, to subdue the resentments of the insurgents, only enlarged their demands," Marshall relates, Governor Bowdoin determined "on a vigorous exertion of all the powers he possessed, for the protection and defense of the commonwealth. Upwards of 4,000 militia were ordered into service . . . ."[95] Since "the public treasury did not afford the means of keeping this force in the field a single week," the Governor again took affairs in his own hands, heading a number of citizens who financed the proposed expedition entirely with private money.[96]

A similar outbreak against a state government took place in New Hampshire, when an armed mob surrounded the legislature and intimidated the legislators.[97] The rebellion "was crushed by the instant and vigorous exertions of General [John] Sullivan, who was at the head of the executive of that state."[98] Sullivan personally ordered out the nearest companies of cavalry and infantry

89 T. Frothingham, Washington, Commander-in-Chief 228-30 (1930).
90 Watson, *supra* note 59, at 912.
91 Marshall, *supra* note 86, at 276.
92 *Id.* at 277.
93 Frothingham, *supra* note 89, at 234.
94 News of the Governor's strong claim to and use of executive defense powers was quickly spread in the public press. *E.g.*, Boston Gazette, Jan. 29, Feb. 5, Feb. 12, 1787. Massachusetts Gazette (Boston), Jan. 30, Feb. 6, Feb. 9, Feb. 20, 1787. Governor Bowdoin's speech to the legislature explaining the necessity for "speedy and vigorous measures" pursuant to the independent powers vested in him by the Constitution of the Commonwealth is reprinted in the Boston Gazette, Feb. 5, 1787. Also see the reply of the legislature, in which "the Senate and House of Representatives, in General Court assembled . . . take this earliest opportunity to express their entire satisfaction in the measures you have been pleased to take, *pursuant to the powers vested in you by the Constitution*, for the subduing a turbulent spirit . . . ." Massachusetts Gazette, Feb. 6, 1787, at 1 (emphasis added).
95 Marshall, *supra* note 37, at 103. *See also* M. Starkey, A Little Rebellion 49, 186 (1955).
96 Marshall, *supra* note 37, at 104.
97 2 E. Stackpole, History of New Hampshire 243 (1916).
98 Marshall, *supra* note 37, at 95.

and took command of the loyal troops.[99] These disorders, and the way in which they were handled by firm action of the executives, were known throughout the American States. They certainly influenced the view of the framers as to the nature of executive responsibility for the public safety and the necessity for having at the head of government an officer who could have adequate independent power to protect against armed threats to our lives, property, and government itself.[100]

The Founding Fathers also had before them the example of recently established state constitutions, such as those of Massachusetts (1780)[101] and New Hampshire (1784),[102] which conferred far broader defense powers upon the state executives than had earlier charters adopted in the immediate period of the Revolution.[103] Eight constitutions and two royal charters had been completed in the year of independence. The following year was marked by the adoption of three more constitutions. These charters generally provided for a weak executive and reflected the animosity then prevailing towards King George.[104] It is striking that each of the two state charters revised in the 1780's, when the drafters worked in a less prejudicial atmosphere and had the advantage of wartime experience under the weak laws, allotted strong military defense powers to the executive. A comparison of these two later charters with the original 13 reveals the same dramatic shift of powers to the executive as is manifest in the transition from the Articles of Confederation to the Federal Constitution.[105]

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99 STACKPOLE, *supra* note 97, at 244.

100 Reveley would deny the significance of these executive initiatives by compartmentalizing the concerns of the Framers into two independent categories, one involving their concern with "purely domestic tranquility," and the other their considerations of foreign affairs. REVELEY, *supra* note 83, at 94. The framers themselves made no such narrow distinctions. General Henry Knox, then Secretary at War, wrote Washington that as a result of these disorders: "Men of reflection and principle are determined to endeavour and to establish a government . . . which will be efficient in cases of internal commotions or foreign invasions." Liberty was at stake; whether the threat be from domestic or external sources made no difference. MARSHALL, *supra* note 37, at 98. Also see the references to "dangers from foreign arms and influence," "hostilities from abroad," "dangers from foreign force," "dangers from abroad," and dangers . . . from the arms and arts of foreign nations," warned against in THE FEDERALIST Nos. 3-6 (A. Hamilton).

101 B. POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES, Pt. I, 965-66 (1972).

102 *Id.*, Pt. II, at 1288.

103 Although Hamilton states, in THE FEDERALIST No. 69, that "it may well be a question," whether the Constitutions of New Hampshire and Massachusetts, "do not, in this instance, confer larger powers upon their respective governors, than could be claimed by a President of the United States," it must be remembered he was trying to "sell" the Federal Constitution to the public. Hamilton does not flatly say the President is given less powers. He merely observes that "it may well be a question." He does not mention how serious a question it is or indicate how it shall be answered. Nor does he catalogue the powers of the governors so we can know which aspects of those powers may be in question. For example, the Executives may have possessed powers regarding martial law or the raising of armies which the President does not have.

104 H. CUSHING, HISTORY OF THE TRANSITION FROM PROVINCIAL TO COMMONWEALTH GOVERNMENT IN MASSACHUSETTS 10-12 (AMS Press ed. 1969); 2 H. PILLSBURY, NEW HAMPSHIRE 329 (1927).

105 Raoul Berger points out that the constitutions of Massachusetts and New Hampshire provided that the Executive shall exercise the powers of commander in chief "agreeably to the rules and regulations of the constitution and the laws of the land and not otherwise." He argues from this that the Executive was "subject to governance by the legislature." Berger, *War-Making by the President*, 121 HARV. L. REV. 31, 37 n.67 (1972). Berger makes an assumption that is unsupported. He offers no legislative history regarding adoption of these Constitutions and no court decision of either of the two States so interpreting the above phrase.

The trend toward a strong executive was reflected in ways other than the new constitutions of Massachusetts and New Hampshire. In 1780, the Continental Congress requested the several state legislatures to invest the executive authority "with powers sufficiently ample" to comply with such applications as might be made to them by a committee of Congress from camp with General Washington.[106] Marshall reports that: "Under the impressions produced by these representations, some of the state legislatures vested extensive powers in the executive. . . ."[107] The following year Congress reformed the organization of its executive functions, consolidating power into fewer hands.

> From an ill-judged prejudice against institutions which had been sanctioned by experience, all the great executive duties had heretofore devolved, either on committees of Congress, or on boards consisting of several members. . . . But the scantiness of the national means at length surmounted the prejudices which had so long prevailed; the several committees and boards yielded to a secretary for foreign affairs, a superintendent of finance, a secretary of war, and a secretary of marine.[108]

Thus, an impartial review of the history of this early period reveals that the attitudes of the majority of persons who wrote the state constitutions had undergone a change from an initial dread of the royalty in the 1770's to a perception of the need for a strong executive by the 1780's. Experience had by then established the validity of the position that nothing short of conferring upon the Executive an independent power for defense of the nation's safety would ensure the preservation of its freedoms.

Those who would dwell upon the concern of the Founders with a monarchial Presidency would do well to study the fear our forefathers had of an unregulated Congress. James Wilson instructed his law class in 1790 that "[t]o control the power and conduct of the legislature by an over-ruling constitution, was an improvement in the science and practice of government reserved to the American States."[109] Jefferson, in language quoted in the *Federalist*, depicted congressional government as being the equivalent of "despotic government."[110]

Nor has a study of available materials by the author turned up any support for Berger's premise. On the other hand, contemporary interpretations of the Constitutions by the Executives, and accepted by the Legislatures of each State during the two emergencies which arose in 1786 show that they construed their powers broadly. *See* text at notes 94-100 *supra*. All that the provision on its face conveys is the statement that the Executive shall act agreeably to the rules and regulations of the Constitution and laws of the land, whatever they may be. It does not define or describe those rules and regulations. If the Constitution confers independent and exclusive defense powers on the Commander in Chief, as applied in the crises of 1786-87, then that is the law of the land. Berger would rewrite the provision to read that the Executive "shall at all times be subject to whatever rules and regulations the legislature may enact, and the legislature shall have power, notwithstanding any other provision of this constitution, to define the powers of the Executive as Commander-in-Chief." This, however, is not what the language reads.

106 MARSHALL, *supra* note 87, at 248.

107 *Id.* at 250-51.

108 *Id.* at 404-05.

109 THE WORKS OF JAMES WILSON 770 (R. McCloskey ed. 1967).

110 THE FEDERALIST No. 48 (A. Hamilton), quoting from Jefferson's *Notes on Virginia*, printed in Paris in 1784 for distribution among his friends in Europe and America and printed in England in 1787. The pertinent text is in 2 THE WRITINGS OF THOMAS JEFFERSON 162-165 (B. Lipscomb-Bergh ed. 1903).

He said: "It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one."[111] Consistent with this theme is the history published by John Adams in 1787, which was much circulated at the Constitutional Convention and undoubtedly contributed to the opinions of the members.[112] This work concludes:

> If there is one certain truth to be collected from the history of all ages, it it this; that the people's rights and liberties, and the democratical mixture in a constitution, can never be preserved without a strong executive, or, in other words, without separating the executive from the legislative power.[113]

If the framers, contrary to this concern with vesting excessive power in the Legislature and contrary to their recognition of the inadequacies of the Legislature in deliberating upon and conducting defensive war, meant to provide Congress with the entire panoply of war powers—the sole power to decide when to employ the Armed Forces, the power to compel a halt to any military activity already begun, the power to define or limit the geographical areas where the forces shall be deployed and even to set numerical limits upon deployments in specified areas—they certainly had a perfect model before them in the Articles of Confederation. Article IX of the Confederation conferred upon the Continental Congress the "sole and exclusive right and power of determining on peace and war." The fact that the Constitutional Convention turned away from this clear-cut language, voting to remove from Congress the power to make "peace"[114] and changing the power of "determining on" war to the sole power "to declare" war,[115] is persuasive evidence that the framers intended the legislative branch to have less authority over military matters than it possessed under the Articles.

Another contemporary model the framers could have followed, but did not, was article 26 of the South Carolina constitution of 1776, which specifically restrained the executive by prescribing that the "governor and commander-in-chief shall have no power to commence war, or conclude peace, or enter into any final treaty without the consent of the Senate and house of representatives."[116] Again, one might ask why, if the framers meant to make the Executive no more than the "agent" of the Legislature in matters of military affairs, did they not say so in clear words of the kind they had available for use?

IV. Limits to Presidential War Power

A. *The Powers of Congress Distinguished*

In the famous book which first formulated the war powers of this nation, William Whiting wrote:

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111 *Id.* at 163.
112 1 J. Adams, A Defense of the Constitutions of Government of the United States of America (1787), *reprinted* in 4 The Works of John Adams (C. Adams ed. 1851).
113 *Id.* at 290.
114 2 Records of the Federal Convention of 1787, at 319 (M. Farrand ed. 1937) [hereinafter cited as 1787 Records].
115 *Id.* at 318-19.
116 Poore, *supra* note 101, Pt. II, at 1625-26.

> Congress may effectually control the military power by refusing to vote supplies, or to raise troops, and by impeachment of the President; but for the military movements and measures essential to overcome the enemy—for the general conduct of the war—the President is responsible to, and controlled, by no other department of government . . . .[117]

He added that the Constitution "does not prescribe any territorial limits, within the United States, to which his military operations shall be restricted."[118]

Dr. John Pomeroy, Dean of the New York University Law School in the 1860's, similarly rejected the idea that "the disposition and management of the land and naval forces would be in the hands of Congress . . . ."[119] "The policy of the Constitution is very different," Pomeroy instructed. The Legislature may "furnish the requisite supplies of money and materials" and "authorize the raising of men," but "all direct management of warlike operations . . . are as much beyond the jurisdiction of the legislature, as they are beyond that of any assemblage of private citizens."[120]

Congress has great powers over military matters. It controls the size and the strength of the Armed Forces and the amounts and kinds of materials with which war is waged.[121] Congress can provide or refuse to provide a multitude of emergency powers involving foreign trade and strategic materials.[122] Congress can

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117 W. Whiting, The War Powers of the President 163-64 (Rio Grande Press ed. 1971).

118 *Id.* at 166.

119 J. Pomeroy, An Introduction to the Constitutional Law of the United States 288-89 (1870).

120 *Id.* at 289.

121 To the framers the power of the purse was an extremely effective check on going to war. In the early years of the Republic, it was possible to conceive of no navy and almost no army. In fact, Washington had a regular army of only 672 in 1789, 1,216 in 1790, and 2,128 in 1791. 6 Annals of Congress 2073 (Gales & Seaton ed. 1849); R. Weigley, History of the United States Army 89 (1967). Congress could put an entire clamp on the means of making war by the simple and then practical method of not raising forces. That this is exactly how the first Congresses viewed the power is shown in the Act of March 27, 1794, which authorized a small naval force for protection of trade of the United States against Algerine cruisers. Section nine of this law provided that "if a peace shall take place between the United States and the Regency of Algiers, that no farther [*sic*] proceeding be had under this act." 4 Annals of Congress 1428 (Gales & Seaton ed. 1849). Thus, there was no navy, except for this one emergency.

Similarly an amendment proposed in 1794 by Congressman Sedgwick to a bill providing for the raising of auxiliary troops would have required that the force shall be completely disbanded if no war shall break out with any European power within two years and six months after the time for their enlistment begins. Although the amendment did not pass, it reflects the understanding of our forefathers as to how war was to be controlled. *Id.* at 500-04. Congress did not pass policy rules seeking to restrict the President's discretion as to why or where the military forces were to be employed. Congress reduced the size of those forces, if it wanted to restrain the President. When an effort was made to control the first President's discretion, it was defeated as has been every similar attempt in Congress up to the 1970's. *Id.* at 1221.

Also, it is instructive to consider Gouverneur Morris' argument at the Constitutional Convention that "if a majority of the Senate be for peace, and are not allowed to make it, they will be apt to effect their purpose in the more disagreeable mode, of negativing the supplies for the war." Records, *supra* note 114, at 548. If the option of reducing the size of the forces or curtailing supplies is no longer adequate, in the opinion of those who want stronger control over Presidential discretion, the way to change the situation is by a constitutional amendment, not by reading into the Constitution powers for Congress which the framers never comprehended.

122 *See generally, e.g.*, Office of Emergency Preparedness, Exec. Office of the President, Guide to Emergency Powers Conferred by Laws in Effect on January 1, 1969 (1969). This book compiles 284 national emergency laws in effect on January 1, 1969. The House of Representatives acted to greatly reduce the President's authorities with respect to

approve or reject treaties or area-resolutions having defense implications.[123] Ultimately, the impeachment power is available if a President should commit an irresponsible abuse of a constitutional discretion.[124] But once Congress has decided how many men should be drafted, or what arms should be constructed, history indicates that the President may station those men and send out those arms to such parts of the world as he determines appropriate in the national defense, without any geographical or time limitations imposed by Congress.

One constitutional provision which is claimed to vest the final decision of going to war with Congress is the declaration of war clause.[125] But the idea that a declaration of war is a necessary condition for the waging of war is a myth. Actually, the power to declare was viewed as one of the least important war powers by political figures of the 18th century. According to the contemporary meaning and usage given to declaration of war, it served as an official proclamation of solemn, public war or as an initial step of commencing "offensive" war. By comparison, the power of the purse and the power of limiting the supplies

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national emergencies by passing H.R. 3884 of the 94th Congress. 121 CONG. REC. H. 8341 (daily ed. Sept. 4, 1975).

123 Approximately 52 hostilities arguably have been authorized by treaties. Emerson, *supra* note 52, app. G., at 117-19.

124 It is important to remember that the original language of the "high crimes and Misdemeanors" phrase, accepted by the Constitutional Convention, included the descriptive words "against the United States." The Committee on Style and Arrangement dropped the latter words, but without any authority or intent of changing the substance of the provision. 1787 RECORDS, *supra* note 114, at 550. Thus, impeachment was seen as a category of offenses against the state—political crimes.

During an earlier discussion in the Convention regarding impeachment, Edmund Randolph stated that the "propriety of impeachments was a favorite principle with him" because the "Executive will have great opportunities of abusing his power, particularly in time of war when the military force and in some respects the public money will be in his hands." *Id.* at 67. This indicates a recognition both that the President would possess broad war powers and that his exercise of discretion would still remain a subject of possible check by the process of impeachment.

Alexander Hamilton wrote in THE FEDERALIST No. 65 that the jurisdiction of the Senate in cases of impeachment "are those offenses which proceed from the misconduct of public men, or in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL as they relate chiefly to injuries done immediately to the society itself." *See also* Bestor, *Reviews: Impeachment*, 49 WASH. L. REV. 255 (1973); Broderick, *What Are Impeachable Offenses?*, 60 A.B.A.J. 415 (1974); Broderick, *The Politics of Impeachment*, 60 A.B.A.J. 554 (1974).

125 U.S. CONST. art. I, § 8, cl. 11.

James Wilson, one of six men who signed both the Declaration of Independence and the Constitution and one of the original Justices of the Supreme Court, instructed his law students in 1792 that the Constitution of the United States renews the principles of government known in England before the Norman conquest by which "the power of making peace and war was invariably possessed by the [legislative body]." WILSON, *supra* note 109, at 433.

Earlier in the same lectures Wilson had pointed out that it is a part of the law of nations that a "state ought to attend to the preservation of its own existence." *Id.* at 151, 154. Further he declared: "The same principles, which evince the right of a nation to do every thing, which it lawfully may, for the preservation of its members, evince its right, also, to avoid and prevent, as much as it lawfully may, every thing which would load it with injuries or threaten it with danger." *Id.* at 156.

Would the framers violate one of the cardinal duties of a nation, which Wilson believes is obligatory upon it by the law of nature? If Wilson's reference to the war-making power of Congress is considered an all-encompassing statement, the nation would be helpless to preserve itself whenever a threat exists that the legislature, for one reason or another, is reluctant "to avoid and prevent." Considering the enormous problems which the Framers faced, including serious dangers of internal disorders and foreign pressures, both military and economic, and believing the framers were practicable men who strived for a workable charter that would endure, it is believed that Wilson did not mean to deny an independent power in the executive of reaction against serious foreign menace.

and size of the Armed Forces were by far the major means of controlling the occurrence of hostilities. To read the declaration clause to mean that no defensive war or other reaction can be commenced without a specific authorization by Congress is to confer a meaning upon that clause which nowhere appears in the Constitution and to give it a purpose which the framers never intended.

The vast majority of wars are begun without any declaration. This was as true in the Founding Fathers' day as it is today. In the 87 years preceding the Constitutional Convention, 38 wars were waged in the Western World; only one was preceded by a declaration.[126] That the Founders knew of this condition is proven by Hamilton's statement in the *Federalist No. 25* that declarations of war were already in disuse in the 18th century. When the Constitutional Convention narrowed the scope of Congress' war power by substituting "declare" for "make" in the declaration of war clause,[127] the framers must have understood that there had been and would continue to be many instances in which hostilities would occur without declaration.

The framers did give a meaning to the declaration clause, but it was essentially concerned with "offensive" war,[128] the distinction between offensive and defensive wars being well known by the framers.[129] For example, Hamilton, in the second of eight papers written under the pseudonym "Pacificus," explained that had the United States assisted France in 1793 instead of remaining neutral, we would have engaged in offensive war, since France was then a belligerent nation in Europe.[130] By the law of nations, as compiled by authorities known to the framers, a declaration of war was not required for defensive war.[131] Of course, the framers meant to check Presidents from engaging in wars of aggression and conquest, but they also knew from experience that a nation must attend to its own survival, and that as a consequence there was needed an ultimate authority who could act in defense of the country.

Another power relied upon by spokesmen for congressional supremacy in the field of war powers is the "necessary and proper" clause of article I. It is not believed Congress can restrain Presidential defensive operations under the guise of this provision. To the contrary, William Whiting counseled President Lincoln that Congress is "bound to pass such laws as will *aid* him" in carrying into

126 L. Maurice, Hostilities Without A Declaration of War 12-27 (1883).

127 1787 Records, *supra*, note 114, at 319.

128 The "usual contests of Empire and Ambition," with which the framers were familiar, were "waged by a ruling prince to extend his dominions, or settle a dynastic squabble, or secure a commercial advantage." Higginbotham, *supra* note 85, at 103, quoting and interpreting a writing of George Washington's. These are the aims of warfare that characterized "offensive" war, and that the Framers meant to prevent absent legislative collaboration.

The declaration also serves the purpose of making it known to our citizens and the world that our nation is in the condition of war. Whiting, *supra* note 117, at 39-40; Wolff, *supra* note 71, at 364-66.

129 *E.g.*, the letter addressed by President Washington to his Cabinet on April 18, 1793, regarding the means of maintaining a neutrality in the war commenced between France and Great Britain, included two questions specifically addressed to the distinctions of "offensive" from "defensive" war. Marshall, *supra* note 37, at 329.

130 7 Works of Hamilton 86-87 (J. C. Hamilton ed. 1851).

131 Vattel, *supra* note 71, at 316; Wolff, *supra* note 71, at 368. *See* N. Grothus, On the Law of War and Peace 57, 184 (1925 reprint of 1646 ed.).

execution his military powers.[132] Congressional measures under the necessary and proper clause must be in aid of the functions of the President as Commander in Chief; they cannot restrict his exercise of those functions.[133] This interpretation of the Constitution is supported by *Myers v. United States*[134] in which the Supreme Court held that Congress could not limit the President's discretion of removal of Executive Officers even though Congress itself created those offices. Chief Justice Taft, writing for the Court, emphasized that Congress cannot vary the exercise of the President's distinctive powers. This, he said, "would be a delegation by the [Constitutional] Convention to Congress of the function of defining the primary boundaries of another of the three great divisions of government."[135] The Court also took a restrictive view of the necessary and proper clause in *Kinsella v. Singleton*.[136] There it held the clause "is not a grant of power," but merely removes the uncertainty that Congress may implement the powers otherwise vested by the Constitution.[137]

In the same vein, neither can Congress use its power of appropriation to legislate policy restrictions over the conduct of the President's defense powers. This would be placing "the keys of the Treasury and the command of the army into the same hands," something that Madison rejected in *Federalist No. 37* as being "particularly dangerous" and therefore unintended by the Constitutional Convention. If the Constitution does give the President authority to protect American rights and interests abroad, Congress cannot by a mere appropriation rider redefine the allotment of powers made by the framers.[138]

B. *Accountability of the War Power: The Constitution and the Media*

Referring to the concept of allowing the President to wage defensive war on his own decision, Abraham Lincoln, when a first-term Congressman, asked, "Study to see if you can *fix any limit* to his power in this respect." He added, *"no one man"* should hold the power of bringing the oppression of war upon us.[139] Lincoln withdrew his opinion in part 15 years later by writing, "When rebellion or invasion comes, the decision is to be made," and the man whom the people have made the Commander in Chief "is the man who holds the power and bears the responsibility of making it."[140] But his original question requires an answer.

One reply is that the concept put forward does not give an unrestrained power to the President to do anything he wants. He cannot conduct a war of aggression. He cannot bully another country with threats of armed action simply

132 WHITING, *supra* note 117, at 33 (emphasis added).
133 POMEROY, *supra* note 119, at 289.
134 272 U.S. 52 (1926).
135 *Id.* at 127.
136 361 U.S. 234 (1960).
137 *Id.* at 247.
138 There is little case law pertinent to the military defense powers discussed in this article. The fundamental fact is the Supreme Court has never ordered any ongoing military action to stop. The author adopts by reference his analysis of the few possibly relevant cases set forth in Emerson, *supra* note 52, at 61-69; Emerson, *supra* note 68, at 812-13.
139 *See* SCHLESINGER, *supra* note 50, at 54 (emphasis added).
140 *Id.* at 72.

because he does not like its tariff policies or the way it governs its internal affairs. His constitutional power of independent action is limited to the defense of the nation, its citizens, and its freedoms. One principle that is clear in every writing or speech of the Founding Fathers is that they meant to curb the self-destructive wars of aggression that marked the rule of the European nations. This explains why the President's independent use of force can be invoked only for purposes of defense.

The President's actions are checked by the constitutional system of accountability. He must, under current practice, come to Congress at least once a year, and usually more often, for funds to maintain and equip the Armed Forces. In this connection, Congress has the right and resources to conduct extensive investigations into the state of the nation's defense arsenal, the strategy and assumptions that underlie American foreign policy and defense, and the general role of the United States in the world.[141] If Congressmen and Senators disagree with the basic assumptions that support the nation's defense policies or the kinds of commitments the Government makes and guarantees, they can slash funds for the programs and weapons systems which implement these policies.[142]

Congress' opportunity to bring a different viewpoint to the electorate through the news media should not be underestimated as a means of control over the Executive. The chambers of each House contain attentive press galleries; sound and television studios are located in the Capitol. If members are not solicited to give their opinions, each invariably has a full-time assistant on his or her personal staff who is responsible for the preparation and issuance of press releases to the newspaper, wire service, periodical, and television rooms situated in the Capitol, heralding the legislator's position. A news desk is an ever-present sight at all open committee hearings, which offers members another means of making public their own alternative policies. With the news media's preference for controversy, the legislator critical of the Executive or possessed with a contrary plan of action is reasonably assured of coverage.

Nor should the importance of the press as an institution in its own right be slighted. The power of the press to influence decisions is also visible in the many unofficial gatherings held in Washington, where the roles of bureaucrat and newsman are reversed; reporters and journalists become the briefers and the speakers, who dispense information and opinions to audiences of high level executive branch officials and congressional aides. Investigative reporting, too, has taken on a scope and significance that rival or surpass the fact-finding efforts of Congress itself.

What does this mean? In the words of a critic of a rampant Presidency: "Through history the media of mass opinion—newspapers and, in more recent years, radio and television—had provided an unwritten check on Caesarism."[143]

141 *E.g.*, the Senate reserved two days for exactly such a "great debate" regarding U.S. commitments overseas and the nation's defense needs on June 2 and 3, 1975. 121 CONG. REC. S 9177-254 (daily ed. June 2, 1975), S 9404-92 (daily ed. June 3, 1975).

142 Congress is already applying a greater axe to the defense budget than is generally understood. Defense is now receiving its smallest share of the federal budget since 1940, about 27 per cent, and the smallest proportion of the gross national product since 1950, about 6 per cent. 121 CONG. REC. S 14747 (daily ed. Aug. 1, 1975).

143 SCHLESINGER, *supra* note 50, at 219.

Indeed, the Vietnam war is an example of how the force of public opinion worked to end the spiral of escalation of the American fighting role in Indochina. When the majority of the American people and their elected representatives in Congress stopped backing the war, it was ended.

Our forefathers knew that the 40 some newspapers published between 1775 and 1783 helped to unify the patriots during the American Revolution and to stiffen their resolve to last the war out to its successful conclusion.[144] They realized that the media deserved much of the credit for the remarkable fact that 11 states approved the Constitution within 10 months after the end of the Convention of 1787.[145] In the nationwide debate preceding the adoption of the Constitution, 90 of the 100 newspapers then published supported ratification.[146] The early magazines of America also helped to mold public opinion for the Federal Charter.[147]

The point that must not be missed in all the criticism of the supposed lack of accountability on the part of the Executive is the enormous influence the press has had in affecting the course of history. We should not discount the opinion of George Washington, who credited the wide circulation of the printed word as being "the security of a free Constitution."[148] And when all else fails, there remains the check of impeachment, which is meant to be a viable safeguard against political offenses, such as an irresponsible abuse by a Chief Executive of a constitutional discretion.[149]

V. Conclusion

With time, public opinion or Congress will curtail or remove from office a President who oversteps the bounds of his emergency war powers. It is the people who have the last word. They can either reject the President as a candidate in the next election or act through their Congressmen to impeach and remove him from office. So long as he holds office, however, the Constitution, as designed by the framers and interpreted in the course of history, does not permit Congress to prescribe the situations, length of time, or places when or where the President can use the Armed Forces in defense of the nation and the constitutional guarantees of liberty and safety for the American people.

In summary, President Ford acted in conformity to the War Powers Resolution and consistently with a long line of precedents set by his predecessors when

144 2 THE CAMBRIDGE HISTORY OF AMERICAN LITERATURE 176-178 (1933). Dr. David Ramsay, a contemporary historian of the period, believed the "press had a merit equal to that of the sword" in winning the War of Independence. 2 D. RAMSAY, THE HISTORY OF THE AMERICAN REVOLUTION 319 (1968 reprint of London ed. of 1793). *See generally* A. SCHLESINGER, JR., PRELUDE TO INDEPENDENCE (1957) (detailed study of the role newspapers as engines of opinion pushing the colonists along the road to independence from the Sugar Act of 1764 onward).

145 C. BOWEN, MIRACLE AT PHILADELPHIA 306 (1966).

146 R. RUTLAND, THE NEWSMONGERS 58-59 (1973).

147 L. RICHARDSON, A HISTORY OF EARLY AMERICAN MAGAZINES 1741-1789, at 3-4, 238, 250-52, 260-62, 317-19 (1931).

148 The quote is from Washington's first annual address to Congress, 1 ANNALS OF CONGRESS 970 (Gales & Seaton ed. 1834).

149 *See* note 124 *supra*.

he committed United States military forces in defense of American evacuees and related foreign nationals from the war zones of Indochina, and when he upheld the safety of American citizens and the freedom of the seas for American vessels by rescuing the *Mayaguez* and its crew. But even if his actions had been in open conflict with the War Powers Resolution, it would have made no legal difference; and although some future Presidential undertaking may involve far more than a short-lived action to rescue citizens, or may run afoul of a specific concurrent resolution of the Congress aimed at halting the President's use of the armed forces, the President can legally continue whatever defensive measure he believes is justified. To the extent it limits the President's independent defense powers, then, the War Powers Resolution is unconstitutional.

DECLARATION OF WAR CLAUSE OF CONSTITUTION

Mr. SARBANES. Before I yield to Senator Javits, I have a couple of questions. One is, given your statement, what do you understand the constitutional provision that "the Congress shall have the power to declare war" to mean?

Senator GOLDWATER. Well, the declaration of war in the writing of the Constitution was never intended as an offensive measure to commence war. In the 200—I believe 201 times the President has called the militia out for various purposes—and these range all the way from maintaining order in the Nation's Capital to international war—war has been declared only five times. And in two of these cases, it was in the same war. So I feel while the Congress can declare war any time it wants to, only the President can call the troops into action.

Now I must say that this is not specifically provided but it has never been contested although I think on four occasions in the Nation's history the Supreme Court has been asked to give an interpretation of the Commander-in-Chief reference in the Constitution to the President.

My assumption is that he as Commander-in-Chief is the only one in power with the power to go to war.

CONGRESSIONAL APPROPRIATIONS REQUIREMENT

Senator SARBANES. If the President uses American Armed Forces in a manner in which you suggested, is the Congress then required to appropriate the funds for those forces to substantiate the President's use?

Senator GOLDWATER. In my opinion that is about the only power that it has other than trying to make it perfectly obvious to the President that to continue in war would be politically wrong both for him, his country and his party.

Senator SARBANES. You mean it has the power not to provide the appropriation?

Senator GOLDWATER. Congress always has the power to appropriate or not appropriate.

Senator SARBANES. Then I did not understand the statement: "To assume that Congress can use an appropriation law to prohibit the President from spending moneys for the use of the Armed Forces in a particular way or place is to argue in a circle. . ." I don't understand that if the Congress has the power as it has just been conceded to appropriate or not appropriate.

Senator GOLDWATER. Let's go back to the Vietnam War. Had we refused to appropriate funds for the operation of the Vietnam War in my opinion that would not have been provided by the Constitution. Now he could conduct the war on for the period of time that he had funds left.

Senator SARBANES. You mean we can refuse to have an Army altogether but if we have one we cannot place any limitations on how it is used?

Senator GOLDWATER. That is not the correct interpretation of the Constitution as I understand it. It is the responsibility of Congress to provide and maintain an Army. Now if we refuse to appropriate funds—I would not suspect that we would refuse to appropriate the funds to maintain the Army. We would refuse to appropriate the

excess billions of dollars requested by the President as needed to conduct that particular war without any particular policy reference to that war.

I remember this was discussed at some length during different times in debate on the Senate floor, whether we would use that power. But we cannot absolve ourselves of the responsibility of raising and maintaining an Army or Navy.

CONSTITUTIONAL RESTRICTIONS

Senator SARBANES. I find it difficult to understand how, if you have the power not to do that, you don't have the lesser power to limit or restrict what is done.

Senator GOLDWATER. It was never written into the Constitution. That is the main reason. I think the major reason that the framers of the Constitution——

Senator SARBANES. Where do you find in the Constitution the power that you are talking about that precludes the limitation?

Senator GOLDWATER. The second article, they have the power to defer under the Constitution. The war powers of Presidents are not based on a claim to inherent powers. They are based on specific provisions in the Constitution.

First, article II states that the executive power shall be vested in the President. Unlike Congress which has enumerated powers, the President has a broad general grant of all the executive power.

Second, the Supreme Court has found the President possesses broad power in the foreign affairs field.

Third, section 2 of article II designates that the President is Commander-in-Chief—and this to me is the important three words that we have never had a Supreme Court decision on and they have not rendered a decision because they said to do so would be political—not political in a Democratic-Republican sense but it would enter into the field of politics.

Fourth, section 3 of article II gives the President authority to take care that the laws be faithfully executed. The Supreme Court has construed this power to include enforcement of the rights and duties and obligations growing out of the Constitution itself, our international relations and the protection implied by the nature of Government under the Constitution.

Fifth, the President takes an oath of office to preserve, protect, and defend the Constitution as we all do.

CONGRESSIONAL POWER TO RAISE AND SUPPORT ARMY, NAVY

Senator SARBANES. Hamilton in the *Federalist Papers* said the purpose of the "Commander-in-Chief" was to make it clear that the President was to be first general among generals, the first admiral among admirals, and therefore eliminate any questions in that regard in terms of military command. But how you take that and set it off against the specifically enumerated congressional powers—(1), to declare war; (2), to raise and support armies; and (3), to provide and maintain a Navy—let me ask you this question. Do you think the Congress has the power to decree that the United States should not have an Army and Navy just as a constitutional question?

Senator GOLDWATER. I think you have to have a constitutional convention to determine that. You would have to use the provisions of the Constitution to repeal that section of the Constitution. I do not deny what you say. We do have a responsibility to raise an Army and Navy and support them.

Senator SARBANES. Could we decide not to do that without that power?

Senator GOLDWATER. Not without a constitutional convention which we can do through several avenues.

Senator SARBANES. Do you read: "Congress shall have the power to provide and maintain a Navy" as requiring us to provide and maintain a Navy or leaving the option as to whether we shall or shall not have a Navy?

Senator GOLDWATER. I would assume it meant that we should. Let me go back and try to answer the question I have not answered yet. The experience of the legislature before the Constitution was written, when they undertook to direct the generals of General Washington's army so much that we nearly lost the war with Great Britain, prompted the framers to be specific about the powers of Congress. They limited it. The power to declare war does not carry with it the power to send troops to war.

COMMANDER-IN-CHIEF INDEPENDENT DEFENSE POWER

Again, the unresolved question is, does the Commander-in-Chief who, believe it or not, has the power to put on four, five, six stars and carry a saber as Lincoln nearly did in the Civil War and actually become the Commander-in-Chief in the field of his armies, have independent defense power? That is a point that I want to test in the Supreme Court and I will as I said if I can ever raise the funds to do it. But to go on with your story, your remarks about Hamilton, Professor Abraham Sofaer will testify before this committee and he writes in his new book on the origins of war powers and I quote him: "Even the statements of the most important and influential leaders provide little definitive guidance. Most are offset by equally significant statements of opposing spokesmen."

He adds: "The actions of early leaders reflect their positions on issues more reliable than their constitutional rhetoric." And until we get a Supreme Court judgment on this whole general question I think it is a matter of wisdom not to legislate rules in the field.

Senator SARBANES. I have no further questions. I find very interesting the constitutional interpretation of article II—which enumerates the powers the Congress with respect to various matters—as in effect requiring the Congress to do the various things that are numerated rather than leaving to the Congress the choice to do so or not to do so as in its best judgemnt and wisdom it determine.

CONGRESSIONAL ENACTMENT OF POLICY RESTRICTIONS

Senator GOLDWATER. Let me add further that Congress cannot enact any policy restriction that conflicts with the President's independent powers. Now let me reiterate something I dwelled on and dwelled on. The expression "to declare war" does not prohibit us from declaring war every day if we want to. We do not have the power to send men to war and the only power that I know of whereby we can return them from war is by denying enough

money for the prosecution of that particular war, whatever that amount might be. That is why I think it is so necessary that we find what the Supreme Court judgment would be in this whole field.

Senator SARBANES. I was not focusing on the war-declaring power. I was focusing on the "raise and support Army and provide and maintain a Navy." As I indicated I find it interesting that it was always interpreted to mean that Congress had the power to do it if it chose to do it rather than being interpreted to require the Congress to do it.

Senator GOLDWATER. That is a judgment on my part. I think it is a general judgment held by most members of the Congress.

Senator JAVITS. Senator Goldwater has been a long-standing exponent of the ideas which are stated in his memorandum. He has made these arguments very eloquently several times in testimony before this committee when we were considering the bill and in the debate on the floor especially as it related to the overriding of a veto. I have great respect and a great affection for Senator Goldwater although we do not agree upon the concept which he has spelled out. One of the points, however, which he made then and makes now I very much take to heart. Therefore I am very grateful to him for appearing today and restating his classic arguments terribly important from such a senior Senator and statesman and great figure in our country to say, "How can we have any confidence that a similar situation will not recur in the future where an isolationist Congress is pitted against a far-sighted President whose personal initiatives are the only thing standing between the Nation and disaster?"

Of course that could be reckoned the other way—isolationist President standing against a far-sighted Congress. The important thing is that Senator Goldwater in all his views which are, as I say, different from mine on the Constitution, reiterates one thing, Mr. Chairman, the ultimate responsibility for life and death and the survival of our country and of the world. I am grateful to him and I hope he lives to be 120 to keep repeating it. Thank you, Mr. Chairman.

Senator SARBANES. Senator Goldwater, thank you very much.

Senator GOLDWATER. Let me conclude because Jack has brought something up. He and I have argued about this at great, great length. I would be most happy if the Supreme Court would decide this. If it decides against me I will become one of your allies. If it is the other way—I have always felt that I would rather rest the safety of my future and my country's future in the hands of one man who has to live with that decision right or wrong than with 535 members who can be influenced by politics along the way. I think a President who has the advantage of advising and consenting with a group like this, advising with the Joint Chiefs of Staff, with the National Security Council, with a broad knowledge of foreign affairs which is really his only big responsibility, would make a better decision than we would.

But I want to thank you for the opportunity to appear here. As I say, I am anxious to get this tested in the courts. All I need is some of that inflated money.

Senator JAVITS. Only one thing, Senator Goldwater. The court is very likely to send it back to us on the grounds it is a "political question" between the legislative and executive branches.

Senator GOLDWATER. I would make an even-money bet they would. They have done it four times before.

Senator SARBANES. We are adjourned.

[Whereupon, at 11:45 a.m., the committee adjourned, subject to call of the Chair.]

WAR POWERS RESOLUTION

THURSDAY, JULY 14, 1977

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, D.C.

The committee met, pursuant to notice, at 10:13 a.m., in Room 4221, Dirksen Senate Office Building, Hon. Frank Church, presiding.

Present: Senators Church, Case, and Javits.

OPENING STATEMENT

Senator CHURCH. The Committee on Foreign Relations today continues its series of hearings on the operation and effectiveness of the War Powers Resolution.

We are privileged to have with us today four distinguished legal scholars: Professor Thomas M. Franck of New York University Law School; Monroe Leigh, the former legal adviser of the Department of State, now with the Washington law firm of Steptoe and Johnson; Professor Abraham Sofaer of the Columbia University Law School; and Myron Curzan of the Washington law firm of Arnold and Porter.

Each witness will have 15 minutes for his initial presentation. Following the final statement we will have questions and general discussion.

I want to thank you gentlemen for coming here today.

We will proceed, Professor Franck, first with your statement.

STATEMENT OF PROFESSOR THOMAS M. FRANCK, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NEW YORK, AND DIRECTOR, INTERNATIONAL LAW PROGRAM, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE

Mr. FRANCK. Thank you, Mr. Chairman.

It is a privilege and a pleasure to be here. It is particularly a pleasure given the blackout in New York that we experienced when we left this morning. I can report to Senator Javits that to those of us from New York, Washington does indeed, for once, appear to be the city of light. [General laughter.]

It is the contention of my paper that the War Powers Resolution is a healthy redress of the adversary or balance-of-power system that informs our democracy, but that it has also in practice proven to have severe flaws. I personally welcome the attempt draft bills that I have seen, drafts No. 1 and No. 2, to rectify some of the flaws that have appeared in practice.

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PAST RESOLUTION USE

The War Powers Resolution contains an obligation on the part of the President to consult with members of Congress and to report to them under circumstances involving the use of the armed forces. There have been four, possibly five, instances in which force has been used after the passage of the War Powers Resolution, and the practice has shown that there are some unsatisfactory aspects of the present wording of the act.

For example, in the Danang evacuation on April 4, 1975, the President sent a naval task force involving 12 helicopters and some 700 Marines on a rescue mission into Danang at the time that part of Vietnam was falling to the North Vietnamese.

The State Department Legal Adviser, Mr. Leigh, in commenting on this afterwards—and correct me if my opinion is wrong—pointed out that since that mission did not involve hostilities within the meaning of section 4(a)(1) of the War Powers Resolution, technically the President was not required to consult prior to undertaking the operation.

The same essentially was true in the case of the Phnom Penh evacuation on April 12 and the Saigon evacuation of April 29, although in the case of Phnom Penh there was some fighting after the last helicopter left and in the case of Saigon there was some fighting while the evacuation was going on.

These cases illustrate the difficulty of drawing a line between situations in which forces are sent to engage in hostilities and situations in which forces are sent to effect a peaceful mission in a situation where hostile circumstances prevail—that is to say, where actual fighting is going on. The cases seem to me to suggest the wisdom of amendment to section 4(a)(1) to take into account the fact that when American Armed Forces are sent into a foreign theatre of operation, the question of whether those armed forces engage in hostilities is not a matter determined solely by the United States, but also, and perhaps even primarily, by the response of those who are doing the fighting in that area. Therefore, prior consultations are warranted where forces are sent with the intent that they fight; consultations are also warranted in situations where forces are being sent to an area where others are fighting and therefore where there is a reasonable possibility that the American forces will not be able to carry on peaceful operation without being drawn into the hostilities.

MAYAGUEZ INCIDENT

The next incident was the *Mayaguez* case, and here, as in the earlier cases, the consultation that occurred was essentially perfunctory, at least in the sense that even though in the *Mayaguez* case the forces were clearly being sent into a situation involving hostilities, the Members of Congress who were contacted by the President were contacted to be informed, not to participate meaningfully in the decision-making process at a time when that process was still in a state of formation or when that process was still fluid.

Here the Legal Adviser noted, and I will quote, that the "President was extremely apprehensive that there be no breach of security in advance of the time that the troops actually were landed, so

there were strong arguments for not revealing that information—even to a select group of Members—very much in advance of the time it was to occur."

In other words, the *Mayaguez* operation was one in which there was clearly an obligation to consult prior to the operation to the extent possible; but the concept of consultation was interpreted as having to fit within security guidelines set by the Executive, and these in practice meant that the Members of Congress were informed a few hours after the first use of force, but a few hours before the most important use of the force. This timetable is set out in the paper that I submitted to this committee and I will not belabor it here, except to say that if there is to be a meaningful system of prior consultation, it seems to me that two things are necessary. One of them is that the requirement to consult must be spelled out more clearly, as it is in the Eagleton Amendment that has also been introduced into the House by Representative Seiberling, and as I believe it now will be in the No. 2 draft before this committee. In addition, it also seems to me important to spell out who the President must consult and to provide both security and communications procedures by which Members will be readily on call and their security guaranteed during the consultative process. Here the committee may want to use the experience of the Intelligence Oversight Committee of the Senate to set up both security and communications systems that will permit the consultation process both to be effective and to be secure.

I would like finally to turn to the question of terminating hostilities once they have begun.

ORIGINAL JAVITS' VERSION

The original Javits' version of the War Powers Resolution provided for a strict enumeration of circumstances in which the President could exercise his Commander-in-Chief powers to dispatch armed forces abroad in hostilities, and it provided for a joint resolution procedure by which Congress could terminate ongoing hostilities. This seemed to me, at the time, and still seems to me now, to be a preferable procedure to the one that was arrived at in conference when the War Powers Resolution was being enacted.

SCOPE OF SECTION 2(c)

As I indicate at some length in my paper, there seem to me to be real difficulties about the existing enumeration in section 2(c) of the circumstances in which the President can exercise his authority. There is no provision for him to exercise his authority to rescue civilians, a power which, it seems to me, is clearly within the prerogative rights of the Presidency; and, there is no provision for him to use the armed forces in the event of an imminent threat to the United States or in the situation of a possible attack. The constitutional situation may not be quite as clear in that instance; but it seems to me that in the nuclear age there is no question that the President should have, and in a crunch would exercise, that power on his own since no country is going to sit still and wait for the first strike.

Until those two provisions are included in section 2(c), I do not think that section 2(c) would be considered either by the American

public or by a court to be a serious and therefore exhaustive enumeration of the President's powers. Unless the bill has a serious and exhaustive enumeration of the powers which Congress believes to be those of the President, this bill is neither an effective hortatory tool for curbing the President's powers and aligning American public opinion behind Congress in effecting that curb, nor is it a weighty instrument to introduce into a court of law because a judge would look at 2(c) and say, well, obviously Congress did not intend this to be an exhaustive enumeration of the President's powers because of the glaring omissions.

Given that tenuous state of 2(c), Congress, under the War Powers Act, as it now stands, is forced to rely on the termination power in section 5, to effect a cutoff of Presidential operations with which it disagrees. Section 5 contains seeds of problems of its own. I do to some extent get into this in my paper and we may get into this in the questioning afterwards. I do think that there are real problems about the constitutionality of the concurrent resolution process under article 5, and it seems to me that it would be much more effective if Congress were instead to rely upon its funding power and its legislative power to restrict both prospectively, and, if necessary, subsequently, Presidential exercises of force in violation of a comprehensive serious enumeration in section 2(c) to replace the present unsatisfactory enumeration.

ADJUDICATIVE PROCESS TO DISPOSE OF EXECUTIVE/CONGRESSIONAL DISPUTE

Finally, it does seem to me to be important, if Congress is to anticipate future situations in which it may have to enter into a dispute with the Presidency, to provide for an adjudicative process in which an orderly disposition of such a dispute could be had.

While it is true that the attempt to use the courts to end the Vietnam War have on the whole yielded little in the way of results, it does seem to me to be well within the power of Congress to write a law which would open the way for a possible adjudicative process, certainly at the instigation of Congress itself. The case of the Select Committee and Nixon seems to me to establish beyond any reasonable doubt that Congress, or a committee of Congress, would have the power to take the President to court if a dispute of this sort were to arise in the future, and Congress, relying on a comprehensive enumeration in section 2(c) and a prospective funding limitation, could certainly argue that there was a justiciable issue here, which it was the duty of the court to resolve.

However, that point, too, could be clarified in the War Powers Act itself, which, borrowing from other precedents, such as the Hickenlooper amendment No. 1, could stipulate that the courts should adjudicate this issue, and couple a legislative determination of justiciability with what I believe to be a clear line of precedent in favor of congressional standing. The problem of having the courts decide a case of this sort seems to me to be eminently tractable. The War Powers Resolution would be a good vehicle in which to insure that the route to the courts was open.

Finally, in that connection, the law, if it were to open a route to the courts, ought to modify or enlarge the range of remedies which a court could afford the Congress as plaintiff. Quite rightly the

Court of Appeals in the Holtzman case was unhappy about the prospect of ending the Vietnam War with an injunction, feeling that that was an unsatisfactory, guillotine method for effecting what ought to have been a phased extraction, with deliberate speed but not certainly by a date certain or at a moment certain set by a court.

However, as my paper indicates, there are ample legislative precedents for providing the court with other forms of remedy in which the judiciary could suspend the enforcement of an injunction pending negotiation between the parties to effect an agreed remedy with the approval of the court.

DRAFT NO. 2 SUPPORT

In sum, I would urge the committee to adopt the general directions for reform of the War Powers Resolution proposed in Draft Number 2, which is currently before the committee, and in addition to turn its attention to the possibility of clearing a path for judicial arbitration in situations where that might in the future prove to be the least harrowing remedy in a situation of conflict between President and Congress during ongoing hositilities.

[Professor Franck's prepared statement follows:]

PREPARED STATEMENT OF THOMAS M. FRANCK

The War Powers Resolution in Practice

It is the contention of this paper that the War Powers Resolution is a healthy redress of the adversary or balance-of-power system that informs our democracy, but that it has also proven a flawed instrument in practice, one which could benefit from reconsideration and reform. The search for perfecting the Resolution should not be interpreted as taking from it, or from its sponsors, the rightful credit due an historic restoration of the classical symmetry between Congress and the President, a largely successful and thoroughly commendable effort to strip away two centuries of embroidery applied to the pillars of the Constitution by Presidential initiative and Congressional acquiescence. Congress is to be congratulated for insisting on a return to something approximating strict construction of the War Powers clause of the Constitution, despite the opposition of a strict constructionist President.

(A) *The Duty to Consult and to Report: Has the President Complied So Far?*

The Resolution requires the President "in every possible instance" to "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 to "consult regularly with the Congress until [they] are no longer engaged. . . ." The Chief Executive is also required to "submit within forty-eight hours . . . a report, in writing . . ." to both Houses of Congress, whenever, in the absence of a declared war, armed forces "are introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" or "into the territory, airspace, or waters of a foreign nation, while equipped for combat . . ." Such a report is to set out the circumstances necessitating the intervention, its constitutional or legislative authority as well as the estimated scope and duration of the operation.

To date, the President's compliance, at best, is a very mixed record. There are four instances, and perhaps a fifth, that provides some guidance on how the law has been working in practice.

First as to the need to consult.

The first instance occurred on April 4, 1975, when President Ford sent U.S. naval vessels and an amphibious task group with twelve helicopters and some 700 Marines to the coast of Vietnam to transport refugees to areas further south.

Because this operation did not involve "hostilities" it was exempt from section 4(a)(1) of the Resolution and came, instead, under section 4(a)(2). The State Department Legal Adviser has taken the position—correctly, given the drafting of the Resolution—that "no . . . prior consultation is contemplated under section 3 when the action to be reported under section 4(a) fits within subparagraphs 2 and 3" as opposed to 4(a)(1), i.e., when U.S. forces are introduced into the "territory, airspace

or waters of a foreign nation, while equipped for combat" but not into actual or "imminent" hostilities. The President was not required, then, to consult because the Danang evacuation, technically, was a peaceful humanitarian rescue rather than an operation involving hostilities under section 4(a)(1).

But surely this is an unsatisfactory distinction in practice. The U.S. intervention at Danang was peaceful only because Hanoi chose not to make it otherwise. If Congress is to be consulted and kept informed on the introduction of forces into actual or imminent hostilities, why should it not also be consulted in the process leading to a decision to send U.S. troops into a combat zone for what may or may not turn out to be peaceful purposes? Such a rationalization, however, would require amendment of the Resolution to require the same consultation under section 3 in respect to any operations falling within the description in section 4(a)(2) and 4(a)(3).

However, it is not solely the scope but also the quality of consultation that may require rethinking in the light of recent practice. Although, in the Danang case, the President was not obliged to consult, he nevertheless did so as a voluntary gesture. Consultation was stated to have occurred on March 30, and to have involved "the members of the Senate and House leadership." According to the legal adviser, the leadership was notified and informed prior to the actual commencement of the introduction of armed forces although consultation was not technically called for. Yet in the view of Congressman Clement Zablocki, then chairman of the House International Relations Committee's Subcommittee on International Security, "there was a report" but "there was not consultation." He distinguished between "notification, which occurred, and consultation, which did not." Other congressional leaders agree.

The second case followed on April 12, 1975, when the President sent 350 ground troups, 36 helicopters and supporting tactical air and command elements, to assist in the evacuation of U.S. nationals as well as of a substantial number of Cambodians from Cambodia shortly before the fall of Phnom Penh. Although there was some firing after the last helicopter had left, the President nevertheless maintained that there were no hostilities involved and no duty to consult. On April 28, the President, in the words of the legal adviser, "directed that congressional leaders be notified"—not consulted—"that the final phase of the evacuation of Saigon would be carried out by means of military forces within the next few hours." Involved were a contingent of 70 helicopters and 865 Marines. These arrived in Saigon at 1 a.m. on April 29 and evacuated 1,373 U.S. citizens and 5,595 South Vietnamese. This time, however, some fighting was involved. Only at 11:30 a.m., well after the operation was underway, did the President meet with congressional leaders at the White House for what the legal adviser described as "a further briefing on the situation in Saigon."

If the test of the War Powers Resolution is its effectiveness in adding congressional voices to the counsils in which war-peace decisions are made, none of these three cases, marginal as they are, gives cause for great satisfaction.

At the same time, it should be noted that none of the three cases involved serious combat activity. The same could not be said of the *Mayaguez* incident. That U.S. merchant vessel was seized on May 12, 1975. In responding to the Cambodian provocation, the Presidential discretion as Commander-in-Chief was confronted by several congressional enactments, the War Powers Resolution, with its Section 3 requirement for prior consultation, and seven statutory provisions prohibiting the use of authorized or appropriated funds of any kind to finance military operations in, over, or off Indochina.

The first U.S. use of force occurred at 6:20 a.m., on May 13, and consisted of the firing of warning shots across the bow of the *Mayaguez* to prevent Cambodians moving the ship to their mainland. At 1 a.m. on May 14, U.S. war planes sank three Cambodian gun-boats said to be moving the U.S. crew to the mainland. Later, on the morning of the 14th, the destroyer escort *Holt* appeared on the scene and at 5:14 p.m. began the assault on Kho Tang Island where the crew were believed to be held. That occupation began at 7:20 p.m. and was followed, some three hours later, by extensive bombing of targets on the Cambodian mainland. Yet it was only at 6:40 p.m., half an hour before the Kho Tang landings, and long after the first shots has been fired, that the President began a series of meetings with congressional leaders.

The lack of consultation in the *Mayaguez* case underscores the need to revise the statutory requirements. It was nearly 7 o'clock on Tuesday evening, May 13, when William T. Kendall, a congressional liaison officer for the White House, began to telephone more than a dozen leaders in the Senate and House to inform them of the situation. These perfunctory calls, made over no more than an hour and one-half, amounted to a notification of the action rather than a consultation. Nor did they take place "prior" to hostilities since the first shots had been fired by U.S. forces more than twelve hours earlier, on Tuesday morning. Senator Mike Mansfield spoke

for others when he said "I was not consulted, I was notified after the fact about what the Administration had already decided to do." Even Kendall noted that "he had geen given a prepared statement to read to the Senators on what amounted to a fait accompli." Representative John B. Anderson of Illinois, the third ranking Republican in the House, expressed disappointment that the President had done no more than to call up and say "here's what we've decided. That doesn't really fit the new era of divided responsibility." The legal adviser, while defending the consultative process, noted that the "President was extremely apprehensive that there be no breach of security in advance of the time that [the troops] actually were landed, so there were strong arguments for not revealing that information—even to a select group of members—very much in advance of the time it was to occur."

President Ford has recently, in attacking the War Powers Resolution, averred to a possible fifth case: the landing of U.S. forces in war-torn Lebanon in 1976 to evacuate U.S. citizens. Ford has cited the Lebanon evacuation as a prime instance of the difficulties encountered in finding key members of Congress in time to permit meaningful consultation. Yet it is significant and, possibly, disturbing that the President did not seem to consider that particular use of force to require any report to Congress under Section 4(a) of the Resolution. In summary, none of the five incidents involving U.S. use of force since the enactment of War Powers Resolution could be said to encourage the belief that Congress, or congressional leaders, now have a meaningful role to play in the decision to use force abroad. By meaningful, I mean a role that is activated before an irrevocable commitment is made by the President.

As regards the War Powers Resolution's reporting requirement that the President "submit within forty-eight hours . . . a report, in writing . . ." to both Houses of Congress, whenever, in the absence of declared war, armed forces "are introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" or "into the territory, airspace or waters of a foreign nation, while equipped for combat . . .": with the exception of the Lebanese case, the President appears to have complied with the reporting requirement in general, although not with the obligation to set out the constitutional or legislative authority under which he is acting, except to the extent of stating that the actions occurred "pursuant to the President's constitutional executive power and his authority as Commander-in-Chief" and as "Chief Executive in the conduct of foreign relations. . . ." In other words, in each instance, the President asserted that his actions were based not on acceptance of the War Powers Resolution but on an assertion of the inherent powers of the Presidency under the Constitution. It follows that such reporting, and, for that matter, such consultation as occurred was undertaken *ex gratia* only. The President appeared to be safeguarding the position that he was reporting and consulting only out of political sensitivity, not because of any acceptance of the right of Congress to intervene in the exercise of these inherent Presidential powers.

In none of the four instances in which reports have been made, did the filing of the reports substantially add to Congress' ability to participate meaningfully in war-peace decisions, because the operations were of short duration and, since the requirement is to submit within forty-eight hours of the introduction of forces into hostilities or into the territory of a foreign nation, by the time the reports were received the actions had been completed. In the case of the *Mayaguez*, the report was received by Congress on May 15, after the operation's completion. The forty-eight hour deadline for reporting could be said to have been met only if the clock began to run with the actual use of force, rather than with the arrival, on the afternoon of May 12, of 1,000 Marines from Okinawa and the Philippines at Utapao airbase in Thailand.

The Power of Congress to Terminate Hostilities Under the War Powers Resolution

In none of the five cases to date, has Congress attempted to invoke Section 5 of the War Powers Resolution to compel a termination of hostilities. As noted, however, in his four reports to Congress, President Ford carefully protected his option, in future cases, to disregard Section 5 as an unconstitutional invasion of his executive powers. That stance was reinforced by his staff. Presidential Assistant Roderick Hills took the position, after the *Mayaguez*, that "Mr. Ford had acted under his constitutional war powers to protect the lives and property of Americans." Hills argued, "we should not assume that Congress would likely interfere with the true constitutional war powers of the President—and what could be more at the heart of the true power than assuring the free passage of vessels in international waters and the safety of American citizens? Congress has the power of the purse. But if it gives the President armies to command and a duty, he must exercise it." White House

Press Secretary Ron Nessen added that "the President has authority to protect the lives of Americans and the property of Americans under the Constitution."

While Section 5 was not invoked by Congress, an analogy can be drawn to the seven statutory prohibitions on the use of funds for operations in, over or around Vietnam, Laos, or Cambodia. All four operations were clearly in violation of the letter of this prohibition, a fact not unnoticed by the Administration. The legal adviser argued, however, that the seven laws meant to exempt humanitarian rescue operations and, in any event, that the President has inherent constitutional authority to effect rescue of Americans and even non-nationals—a power that cannot be affected by statutory prohibition.

If that is the position of the President in respect of a congressional statute terminating funding—an area in which congressional preeminence is particularly clear—the same argument would certainly apply with greater force in respect of Section 5(b) of the War Powers Resolution. Asked by Congressman Solarz for a list of situations in which the President has inherent powers that are immune to congressional action under Section 5, the legal adviser wrote: "Besides the three situations listed in subsection 2(c) of the War Powers Resolution, it appears that the President has the constitutional authority to use the Armed Forces to rescue American citizens abroad, to rescue foreign nationals where such action directly facilitates the rescue of U.S. citizens abroad, to protect U.S. Embassies and Legations abroad, to suppress civil insurrection, to implement and administer the terms of an armistice or cease-fire designed to terminate hostilities involving the United States, and to carry out the terms of security commitments contained in treaties. We do not, however, believe that any such list can be a complete one, just as we do not believe that any single definitional statement can clearly encompass every conceivable situation in which the President's Commander-in-Chief authority could be exercised."

It would be a President of impoverished imagination who could not fit every conceivable military contingency into one of these elastic categories. If the legal adviser's view is correct, Section 5 of the War Powers Resolution is, for all practical purposes, a dead letter.

The War Powers Resolution seems both to confirm and deny that the President has inherent war-making powers conferred by the Constitution. Section 2(c) apears to come close to conceding that the Commander-in-Chief has inherent constitutional power to introduce armed forces into hostilities on his own authority in "a national emergency created by attack upon the United States, its territories or possessions, or its Armed Forces." It should follow from this concession, whatever its wisdom, that the President has no inherent war powers in any other situation. Yet the effectiveness of this implied limitation is undermined in several ways. The Conference Committee Explanatory Statement on the War Powers Resolution went some way towards disavowing Congress' intent to make 2(c) exhaustive or binding as had been its counterpart in the Senate version of the bill. The seriousness of 2(c) as an exhaustive enumeration of inherent Presidential powers is further put in doubt by the failure to include the right to rescue U.S. citizens imperiled abroad. Finally, 2(c) is implicitly undermined by Section 5(c) which gives Congress, without Presidential assent, the power to terminate any hostilities, not excluding those pursued under color of Section 2(c). The State Department legal adviser has noted: "If the President had the power to put the men there in the first place, that power could not be taken away by concurrent resolution because the power is constitutional in nature." As a result, a cloud of legal uncertainties surrounds the hapless 2(c).

There are reasons to regret Congress' failure to use the vehicle of the War Powers Resolution to attempt a serious, definitive, exhaustive enumeration of instances in which the President may use force in international relations on his own authority. Such an enumeration—while not determinative—would carry considerable weight and be of significant assistance in any future political or judicial confrontation over an undeclared war. It would, at least, serve as evidence balancing the historical precedents—particularly those derived from the past fifth years of Congressional acquiescence—that support the virtually unfettered war-making power of the Commander-in-Chief.

If the enumeration in Section 2(c) is neither wholly convincing nor exhaustive, there can be no doubt as to the seriousness of the provision in Section 5 of the War Powers Resolution providing for the termination of Presidentially-initiated hostilities by concurrent resolution of the two Houses. Congress appears to have decided, in making certain compromises between the House and Senate versions of the Resolution, that it would trade a definitive statement of the limited inherent war-making powers of the President for a definitive process by which Presidential wars can be terminated unilaterally by the two Houses. This may not, however, have been a good bargain. For one thing, it is politically difficult to stop a war once it has

begun and the human and material resources of the nation have been committed. More important, it is far from clear that the concurrent resolution process, by which the Congressional cut-off is to be effected under Section 5, is constitutional. It is also not clear that the automatic cut-off envisaged in the resolution after sixty to ninety days, absent explicit Congressional authorization for the Presidentially-initiated use of force, would be constitutional where the President is engaged in the use of force pursuant to his inherent constitutional powers, some of which appeared to be conceded in Section 2(c).

The constitutionality of the Congressional veto in Section 5 probably varies with the circumstances in which Congress invokes it. where the President is engaged in the use of force under an inherently Presidential power, as opposed to an authority conferred on him by Congress, there are serious doubts about the constitutionality of a termination by legislation, let alone by concurrent resolution. Such a distinction between what is, and what is not, Congressionally subject to concurrent resolution has been recognized by early proponents of the device. The Attorney General, arguing in 1949 in favor of the congressional veto in the 1939 and 1945 Reorganization Acts, distinguished between its exercise in areas of authority delegated by Congress, as opposed to "matters which may be considered to be strictly within the purview of the Executive, such as those relating to foreign policy." In *Clark* v. *Valeo*, the court, once again, alluded to the President's "self-executing mandate to conduct foreign affairs." In a concurring opinion, Judge Leventhal speculatively advanced a distinction which, while theoretical, may also be the practical approach of the future. "One's view of the one-House veto may be affected," he said, for example, "if it should develop that Congress itself distinguished between regulations that are 'interpretative,' and therefore more aligned with the responsibility of the Executive Branch, and regulations which are 'legislative,' that implement or carry forward a statutory mandate in ways not specified by the statute, and with respect to which a more substantial congressional role might be proper." In this view, the constitutionality of the Congressional veto depends upon whether the Congress, in a given instance, is helping the Executive in the exercise of a delegated rule-making power, for example, by approving or rejecting a proposed general scheme of regulation or reorganization, or is using its veto ad a device to interfere in the case-by-case application of standards set by law. The latter function is the proper province of the Executive which is constitutionally endowed with responsibility to see that the laws are faithfully executed.

Only by the extradordinary remedy of denying funds, can Congress restrain those exercises of Executive power that originate in the Constitution or that constitute case-by-case implementation of powers delegated by statute.

Some Proposals for Reform

(a) Consultation

In none of the five instances (Danang, Saigon, Phnom Penh, *Mayaguez*, Lebanon) was there genuine consultation before introduction of U.S. forces into areas where fighting was underway.

To remedy this, consultation under Section 3 should be required at least 24 hours prior to any Presidential decision to commit U.S. forces under any of the circumstances contemplated by Section 4(a)(1). That section should also be amended by adding to the recital of situations requiring consultation those in which U.S. forces are introduced "into any situations in which there is armed conflict." There should be a narrowly-drafted exception to this requirement covering emergency situations that make an instant response essential to prevent irreparable injury to the United States, its Armed Forces, or its citizens. In such circumstances, consultation should be required at the earliest practicable time. Consultation should be defined, as by the amendment proposed by Senator Eagleton, to mean "discuss fully and seek the advice and counsel" of a defined group in Congress.

President Ford has recently argued that "when a crisis breaks, it is impossible to draw Congress into the decision-making process in an effective way" because lawmakers, especially during recesses, are often hard to locate quickly enough and because, even if they are in Washington and available for consultation, they cannot be as well versed as the President on fast-breaking developments. He concluded that "there is absolutely no way American foreign policy can be conducted or military operations commanded by 535 Members of congress even if they all happen to be on Capitol Hill when they are needed."

The problems to which the former President alludes are genuine ones. However the issue is surely overstated. The requirement to "consult with Congress" is not one compelling the President to talk personally with every Member. It would be responsive, however, to define the consultation requirement by an amendment, such

as the one proposed by Senator Eagleton and Representative Seiberling or one stipulating a somewhat broader constituency for consultation consisting of two designated Members, each, of the Senate and House committees dealing with foreign affairs, Armed Services and Intelligence, as well as the Foreign Affairs Appropriations Subcommittees and the two senior leaders of both parties in both Houses. These Members would have to undertake to be permanently on call, either in person or by electronic communications, much like the members of the Senate Committee on Intelligence which currently has a comparable consultative role in respect of proposed covert operations. Obviously, such consultation would have to be under strict Congressional security self-regulation.

(b) Reporting to Congress

If the procedures for consultation are tightened up, the reporting requirements' deficiencies become less important.

(c) Disapproval by Congress

The automatic 60/90-day termination provision and the concurrent resolution procedure (Section 5(b) and (c)) are probably unworkable and possibly unconstitutional for reasons suggested above. In their place, Congress should revert to the original Senate scheme, partly still embodied in Section 2(c)(3), which enumerates the circumstances in which Presidential use of force is authorized. Subject to procedural consulting and reporting requirements, the President should be authorized to use the armed forces in these limited circumstances. They should certainly include the use of force to repel an actual or impending attack on the territory of the U.S. or on its forces abroad and, perhaps, for the rescue and evacuation of U.S. civilians endangered abroad. The provision need not state whether the President's authority to act in these cases is derived from this act of Congressional delegation or from the constitution. Nor should an attempt be made to limit the exact period during which the armed forces may be used for these purposes.

The principal problem is not to confine Presidential wars to 60 days but to restrict them to situations of actual or imminent attack on U.S. territory, the armed forces and, perhaps, on civilians abroad. If the President, despite such statutory restrictions and strengthened provisions for consultation determines to use the armed forced in unauthorized circumstances or for purposes that are, arguably, not within the authorized categories, then a revised Resolution should make provision for employing the undisputable and constitutionally unlimited Congressional jurisdiction over funding. The War Powers Resolution should be amended to stipulate that no funds may be expended by the President for use by the armed forces in any case enumerated in Articles 4(a)(1), (2) or (3) except when that use is in response to actual or imminent attack on U.S. territory or its armed forces or for purpose of evacuating endangered U.S. civilians. This "prior restraint" would be more effective than the current termination provisions in Sec. 5 because: (a) it is a more securely constitutional remedy than the concurrent resolution procedure, (b) it does not challenge (or confirm) Presidential power to conduct an authorized operation as Commander in Chief but merely terminates funding if it is not an authorized operation, and (c) it takes effect immediately upon commencement of an unauthorized operation, not upon the subsequent exercise of Congressional discretion.

Nevertheless, the failure of a comparable funding limitation to prevent the President initiating military operations in the case of the *Mayaguez* leaves room for doubt as to the efficacy of this device when it stands alone. The revised Resolution could anticipate that contingency by establishing the justiciability of an action to test the constitutionality and *ultra vires* of a presidential use of force. To do this, the Resolution might also address itself to the questions of standing and remedies.

Justiciability and standing [1] could be provided by stipulating in the amended Resolution that no court in the United States shall decline, on ground that it is a non-justiciable or political question, to make a determination on the merits, giving effect to the Constitution of the United States and to this Resolution, in any case in which a claim of *ultra vires* is asserted against the President as Commander in Chief by Congress or appropriate Congressional committee, in an action arising out of the introduction by the President of the Armed Forces into hostilities. The Congress or any Committee of Congress seized of the matter, should specifically be accorded standing to pursue such a claim against the President. The courts should not, however, be put in the position of actually stopping a war: a politically-loaded task. Thus the Resolution should address itself to the question of judicial remedy. An amendment could provide that an interlocutory or permanent injunction restraining the President in the preparation or conduct of military operations not be granted by any court until after the exhaustion of all legal remedies and until the Supreme Court of the United States is satisfied that its judgment cannot be affected by agreement between the parties.[2]

The effect of such a provision would be to recognize the role of the court as impartial umpire in a kind of controversy which, by its nature and by the circumstances in which it is most likely to arise, can engender the most powerful and destructive passions. The Court would not be cast adrift on uncharted political seas, for there is ample textual and historic evidence to guide judges in making principled decisions in this area. Nor are there overriding policy reasons for judicial reticence since both lives and the integrity of the system of government by law are likely to be at stake. Neither is there danger of the courts preempting the role of the coordinate political branches, for adjudication would occur precisely at the request of one coordinate branch in conflict with another. In such conflict, only the courts could end the "potential of embarrassment from multifarious pronouncements by various departments on one question." [3]

Still, there is reason to hope that umpires will not be needed. If it is generally understood, as it now appears to be, that Presidents, in a nuclear age, must have the flexibility to respond instantly to a major threat to the United States but that, otherwise, no President should ever shoulder, alone, the burden of initiating a significant commitment of American lives and fortune, then the basis exists for civilized accommodations between Congress and the Executive.

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[1] Even under present law, there is little question that Congress, Committees and also Members of Congress have standing to object to the constitutionality of an undeclared war. *Mitchell* v. *Laird*, 476 F.2d 533 (1973). Standing, in that case, did not overcome the court's refusal to consider the issue justiciable.

[2] This proposal is informed by the language of the "Hickenlooper Amendment" to the Foreign Assistance Act of 1961 which requires the courts to apply international law in cases of foreign expropriation of U.S. assets rather than decline to decide on the merits by reference to the act of state doctrine. 22 U.S.C. § 2370(e)(2). The proposed amendment affecting justiciability and standing draws upon the reasoning in: *Mora* v. *McNamara*, 389 U.S. 934, 88 S. Ct. 282 (1967), *Massachusetts* v. *Laird*, 400 U.S. 886, 91 S. Ct. 128 (1970), *DaCosta* v. *Laird*, 471 F.2d 1146 (CA 2 1973), *Mitchell* v. *Laird*, F.2d 533 (1973), *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 94 S. Ct. 1 (1973), 414 U.S. 1316, 94 S. Ct. 8 (1973) and 414 U.S. 1321, 94 S. Ct. 11 (1973), and *Flast* v. *Cohen*, 392 U.S. 83. The proposition that judicial determination as to standing and justiciability will take into account the determination of Congress expressed in legislation is supported by *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). In a concurring opinion Justice White, joined by Justices Blackmun and Powell, said: "Absent the Civil Rights Act of 1968, I would have great difficulty in concluding that petitioners' complaint in this case presented a case or controversy within the jurisdiction of the District court under Art. III of the constitution. But with that statute purporting to give all those who are authorized to complain to the agency the right also to sue in court, I would sustain the statute insofar as it extends standing to those in the position of the petitioners in this case." To preclude a "sudden death" injunction by a court against the President as Commander in Chief that would preclude an orderly, phased termination of an *ultra vires* presidential war, the proposal draws upon the language of two former federal laws restraining the granting of district court injunctions against enforcement of state and federal statutes on grounds of their unconstitutionality. 28 U.S.C. § 2281, 2282. For the general proposition that Congress may make "consent" laws which require the courts to reassess their earlier interpretation of a separation-of-powers provision of the Constitution, see *In re Rahrer*, 140 U.S.545 (1891), *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946), *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 96 S. Ct. 2666 (1976), and compare *Edelman* v. *Jordan*, 415 U.S. 651, 94 S. Ct. 1347 (1974). The U.S. Court of Appeals has also held that subpoenas for White House tapes sought by the Senate Select Committee in an action against the President of the United States raised justiciable issues after Congress had enacted a specific statute conferring jurisdiction (*Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725 (1974)) even though the District Court had declined so to hold (*Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 366 F. Supp. 51 (D.D.C. 1973)) before the statute was enacted. (PL 93-190, 28 U.S.C. sec. 1364, approved Dec. 18, 1973)

[3] The Supreme Court has laid down the test of justifiability in *Baker* v. *Carr*, 369 U.S. 186 at 217: "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a policy decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Senator CHURCH. Thank you very much, Professor Franck. Next we will hear from Monroe Leigh. Please proceed, Mr. Leigh.

[Mr. Leigh's biography follows:]

BIOGRAPHY OF MONROE LEIGH

Name: Monroe Leigh, 5205 Westwood Drive, Washington, D.C. Born: July 15, 1919, Halifax County, Virginia.

Education: BA (magna cum laude), 1940, Hampden-Sydney College, Hampden-Sydney, Virginia. LLB, 1947, University of Virginia Law School, Charlottesville, Virginia.

Academic Societies, etc.: Order of the Coif, Decisions Editor, Virginia Law Review—1946, Editor-in-Chief, Virginia Law Review—1946–47.

Military service: Enlisted as Aviation Cadet 1942; Discharged as Captain in 1946, having served in United Kingdom and France in Ninth Air Force.

CAREER SUMMARY

Bar Admissions: Virginia—1947, District of Columbia—1948, United States Supreme Court—1950.

1947–1951—Associated with Washington, D.C. law firm of Covington, Burling, Rublee, Acheson & Shorb and successor firms. Engaged in general practice of law with emphasis on international problems.

1951–1953—Member of United States Mission to North Atlantic Council, first in London and later in Paris. In this capacity served as U.S. Member to North Atlantic Council Committee on Infrastructure, which was charged with negotiating the formula for financing the building of airbases and other military installations in Europe.

1953–1955—Deputy Assistant General Counsel for International Affairs, Office of Secretary of Defense, Washington, D.C.

1955–1959—Assistant General Counsel for International Affairs, Office of Secretary of Defense, Washington, D.C. Additional duty as counsel for St. Lawrence Seaway Development Corporation, 1954–1956.

1959 to January 1975—Private law practice with Steptoe & Johnson, Washington, D.C. (partner in 1961), specializing in international problems.

1964–1975—Lecturer on Legal Problems of International Trade at the University of Virginia Law School.

January 1975 to January 1977.—Presidential apointment as Legal Adviser, Department of State, Washington, D.C.

1975–1981—Member, Permanent Court of Arbitration, The Hague.

January 1977 to present.—Private law practice with Steptoe & Johnson, Washington, D.C. (partner), specializing in international problems.

Professional Memberships and Associations: American Bar Association (Section on International and Comparative Law). American Law Institute (Advisory Committee on Restatement of the Foreign Relations Law of the United States). American Society of International Law (Honorary Vice President). American Branch, International Law Association. Board of Editors, American Journal of International Law. Council on Foreign Relations. Washington Institute of Foreign Affairs. Advisory Committee, Parker School of Foreign Law, Columbia University. Advisory Committee, Procedural Aspects of International Law Institute. Advisory Board, International and Comparative Law Center, The Southwestern Legal Foundation. Board of Advisors, Journal of International Law and Economics, George Washington University National Law Center. Advisory Board, Virginia Journal of International Law, University of Virginia Law School.

Recent Publications: "Enforcement of Judgments and Awards," in Southwestern Legal Foundation Symposium on Rights and Duties of Private Investors Abroad (1965) at p. 439. "Due Process and the Foreign Relations Law of the United States," 21 Business Lawyer 853 (1966), with Timothy Atkeson. "The Supreme Court and the Sabbatino Watchers," 13 Va. J. of Int'l Law 33 (1972). "Expropriation of Foreign Owned Investment—Recent Trends," in Southwestern Legal Foundation Symposium on Private Investors Abroad (1972) at p. 197. "Sovereign Immunity—The Case of the 'Imias'," 68 Am. J. of Int'l. Law 280 (1974). "Dunhill: Toward a Reconsideration of Sabbatino," 16 Va. J. of Int'l. Law 685 (1976), with Michael David Sandler.

STATEMENT OF HON. MONROE LEIGH, STEPTOE AND JOHNSON, WASHINGTON, D.C.

Mr. LEIGH. Thank you very much, Mr. Chairman.

I have a statement which I would like to have inserted in full in the record, but I would like to speak from portions of it in order to stay within the time limit.

Senator CHURCH. Very well.

Mr. LEIGH. Needless to say, I am very grateful for the opportunity to appear before the committee to testify on the War Powers Resolution. The resolution raises fundamental constitutional issues and I am glad to have the chance to give my views. I think that everyone will agree that these are very difficult and, unfortunately, inescapable problems resulting from our system of government, and every effort that can reasonably be spent on reconciling the President's role as Chief Executive and as Commander-in-Chief with the appropriate role of the Congress should be devoted to that end.

I would like to talk about four specific areas. The first is section 2(c), which enumerates the powers of the President as Commander-in-Chief. The second is the sixty day cut-off period in section 5(b) of the existing resolution. The third is the congressional veto by concurrent resolution, which is set forth in section 5(c). The fourth is the confusing provisions, as I think they are section 8, which undertake to deal with the relationship between the War Powers Resolution and the treaty obligations of the United States.

In my statement I will deal primarily with the constitutional problems that the War Powers Resolution raises in these areas. However, I have included some observations on the potentially adverse ramifications that the Resolution may have on our foreign and military policy. Several proposals have been made recently to modify the Resolution so as to increase congressional control over the executive. I will address the constitutionality and the practical wisdom of some of these proposals during the course of my remarks.

CONSTITUTIONAL POWERS PROVISION

Section 2(c) is a list of constitutional powers given to the President as Commander-in-Chief. It is my view that this provision does not exhaustively list all the circumstances in which the President can employ the armed forces in hostilities or in situations where hostilities are imminent. The statute mentions the President's power to introduce troops pursuant to a declaration of war, specific statutory authorization, or a national emergency created by an attack on the United States, its territories or possessions, or upon its armed forces.

Besides these situations, the President has, in my judgment, constitutional authority to protect and rescue U.S. nationals abroad, to protect U.S. embassies and legations, and under certain circumstances to carry out our security commitments.

The section also fails to mention the President's authority to use American forces to forestall any direct and imminent threat of attack upon the United States, to suppress civil insurrection, and to implement the terms of an armistice or cease-fire designed to terminate hostilities involving U.S. forces.

I will readily confess my inability to enumerate all the possible contingencies in which the Constitution authorizes the President to use the armed forces. Moreover, I would respectfully submit that

neither this committee nor any other group of lawmakers or constitutional scholars could produce a single list of circumstances that clearly and adequately encompasses every situation in which the President's Commander-in-Chief authority could be exercised. It would therefore, in my opinion, be unwise for Congress to attempt to do so by amending the War Powers Resolution. Either the enumeration of powers in the War Powers Resolution will be incomplete, or it will be so broad that the in hostilities by a simple concurrent resolution, the 60 day provision is no more than an arbitrary starting point which can be lengthened by joint resolution or curtailed by Congress at any time. The 60-day period is not a fixed bright line illuminating the contours of the twilight zone. Instead, it is an elastic band defining Presidential authority which Congress can manipulate like a yo-yo.

Senator CASE. Don't you think that sounds a little bit like a former Executive Branch employee?

Mr. LEIGH. I'm sorry, Senator, but would you repeat that, please? I did not quite hear you.

Senator CASE. Don't you think that sounds a little bit like a prejudiced former executive branch employee—a "yo-yo" is hardly an unbiased term.

Mr. LEIGH. The "yo-yo" argument? I think that is the fundamental objection to it, Senator.

Senator CASE. I can understand your point of view, but I just wanted to make my own clear.

Senator JAVITS. By the way, Mr. Leigh, did you argue the same point when the Act was passed?

Mr. LEIGH. I was not in the Government, Senator, at that time.

Senator JAVITS. But it is the same point.

Mr. LEIGH. I assume that the point must have been argued at great length.

I did not go into the government until 1975.

CONCURRENT RESOLUTION PROCEDURE

I come now to the concurrent resolution procedure.

The 60-day time limit is not the only way the President's use of the armed forces is limited under the War Powers Resolution. Section 5(c) states that the President must withdraw our armed forces at any time short of sixty days if Congress directs him to do so by a concurrent resolution.

I believe that section 5(c) as it stands is unconstitutional. Furthermore, I do not believe that the constitutional infirmities of that section can be removed by an amendment which would allow Congress, by a concurrent resolution, to prohibit the President from spending funds on military activities.

Section 5(c) is presently unconstitutional because it purports to give Congress power to discontinue military operations, even if the President has initiated them pursuant to his independent constitutional authority as Commander-in-Chief. An example will best illustrate my point here.

It is well established that the President can order American forces into hostilities when they are needed for self-defense. In 1801, to take an early example, President Jefferson sent a naval expedition to the Mediterranean with orders to protect American

commerce from pirates operating under the protection of the Barbary Powers. Although the danger that the Navy would become involved in hostilities was great, the President issued his orders without any specific legislative authority from Congress. In the course of the expedition, the American ship "Enterprise" fought an intense battle with a Tripolitan cruiser and emerged victorious. Jefferson justified the constitutionality of his orders on the basis of the President's authority to use the armed forces for self-defense. More than a hundred such instances of Presidential exercise of the Commander-in-Chief power without declaration of war have occurred since the time of Jefferson.

The legislative veto provision of section 5(c) would allow Congress unilaterally to determine whether or not to permit the use of the armed forces in cases of self-defense, for example. A power which lies in the domain of the Executive under the Constitution would thus be transferred to the control of Congress. No resolution of Congress is constitutionally capable of accomplishing this feat.

Furthermore, the provisions of section 5(c) of the War Powers Resolution carry the legislative veto far beyond those areas for which any constitutional justification has been advanced to date. In justifying the constitutionality of early enactments incorporating the legislative veto, Congress maintained that the power conferred upon the President by the legislation, such as the Reorganization Act of 1939, was essentially legislative in character. It was argued that in delegating the legislative power to the President, Congress retained a veto to make certain that the President's use of that power conformed with the letter and the intent of the delegated authority.

The War Powers Resolution is fundamentally different in several respects. Unlike the Reorganization Act and the Federal Salary Act, use of the armed forces in the situations we are concerned with here is essentially the constitutional responsibility of the President. The framers of the Consititution envisioned that the President would have full discretion in the planning and carrying on of certain military operations. In this area, Congress simply has no power to delegate to the President as Commander-in-Chief. Consequently, a legislative veto cannot be justified as a check on the President's use of delegated powers.

One might also question whether it is a proper function of the legislature to determine if the President's actions conform with the letter and intent of a congressional enactment. Traditionally, this power has belonged exclusively to the judiciary pursuant to Article III of the Constitution. In using the legislative veto to enforce the President's compliance with statutory enactments, Congress trespasses on the prerogatives of the courts.

Because doubts about the constitutional viability of section 5(c) persist, some authorities have prescribed use of the spending power by Congress as a miracle elixir to cure the constitutional ailments of this provision. The remedy is something like the ancient technique of bleeding sick patients. If Congress disapproves of the President's use of the armed forces, it need not directly order withdrawal of the troops already committed. It can simply pass a concurrent resolution which would "drain" away all funds from the operation. Alternatively, a provision might be enacted which would automatically deprive the President of funds for military oper-

ations 60 days after the President first deployed the armed forces in a hostile situation, unless, of course, the Congress extended the time period by concurrent resolution. Like the technique of bleeding, however, the healing powers of these leaching proposals have been considerably overstated.

Allowing the Congress to cut off all funds for specified military operations would enable Congress to manipulate after the fact the spending provisions of any and all appropriation enactments that could conceivably support a military operation. I believe that any legislation authorizing the legislative veto violates the Constitution, but a single provision giving Congress a legislative veto over any and all appropriations already approved by the President for military activities is a particularly serious violation. The exercise of such a veto almost inevitably interferes with the President's independent Commander-in-Chief power.

SECTION 8 INCONSISTENCIES

Section 8 of the War Powers Resolution deals with treaty matters, among other subjects. Section 8(a)(2) states that authority to introduce armed forces into hostilities shall not be inferred from any treaty unless that treaty is implemented by legislation specifically authorizing the use of American troops.

Yet, subsection (d)(1) of the same section states that, "nothing in this joint resolution is intended to alter the authority of the Congress or of the President or the provisions of existing treaties."

Even a casual reader can see that the two sentences cancel each other out, or at least are inconsistent.

In my view, the best solution of this dilemma, and I acknowledge that it is a genuine dilemma, is simply to amend the War Powers Resolution so as to delete entirely the provisions just referred to. Silence is better than talking out of both sides of the mouth, especially in areas of constitutional uncertainty, such as this.

Mr. Chairman, it is my firm belief that the proposals we have been discussing this morning take the wrong approach to the problem of controlling abuses of the war powers. They recognize on the one hand the President's independent constitutional power to order the armed forces into hostilities; but on the other they seek by statute to limit the exercise of that constitutional power. They attempt to enumerate where enumeration, in my judgment, is impossible, and where the attempt is unwise. They impose prior restraints where restrictions jeopardize national security. And, in accomplishing these dubious objectives, they use procedural innovations that threaten the balance of powers which they seek to preserve.

I respectfully suggest to this committee that it take a new look at the problem of allocating war powers. Instead of imposing a solution or seeking to impose a solution on the Executive, Congress should devise an accommodation which will be acceptable to both the President and the Congress.

In my experience in government, I have often observed that Presidents earnestly want to consult and cooperate with Congress before making important military decisions. Yet, despite their best intentions, they frequently fail to satisfy Congress, either because they consulted one group and not another, or because the manner

in which they consulted a particular group did not meet that group's expectations.

CONCURRENT RESOLUTION DETAILING WHAT IS EXPECTED FROM PRESIDENT SUGGESTED

I believe that a large measure of the friction between the President and the Congress over war powers could be removed if the Congress were to adopt a concurrent resolution detailing what it expected from the President in situations where the armed forces might be introduced into hostilities. Although such a resolution would not have binding legal effect, if it were developed in close consultation with the President, it could lay the groundwork for fruitful cooperation between the two branches of government.

I realize that my proposal cannot satisfy those who have a preference for tidy definitions and clear delineations of authority. But as I have tried to persuade you this morning, we are dealing with an area where precision is unwise, if not downright impossible. Accommodation must be hammered out through the political process. This committee has the opportunity, and now is the time, to get this process of accommodation under way.

Thank you, Mr. Chairman.

[Mr. Leigh's prepared statement follows:]

PREPARED STATEMENT OF MONROE LEIGH

Mr. Chairman, I appreciate your invitation to testify before the Committee on the War Powers Resolution. Fundamental constitutional issues are at stake and I am grateful for the opportunity to present my views on what most will agree are the difficult but inescapable problems of reconciling the President's role as Commander-in-Chief with the appropriate role of the Congress.

There are four specific aspects of the War Powers Resolution which I would like to comment on this morning:

A. Section 2(c), which enumerates powers of the President as Commander-in-Chief.

B. The sixty day cut-off provision of section 5(b).

C. The Congressional veto by the concurrent resolution procedure of section 5(c).

D. The confusing provisions in section 8 which undertake to deal with the relationship between the War Powers Resolution and the treaty obligations of the United States.

In my statement I will deal primarily with the constitituional problems that the War Powers Resolution raises in these areas. However, I have included some observations on the potentially adverse ramifications that the Resolution may have on our foreign and military policy. Several proposals have been made recently to modify the Resolution so as to increase Congressional control over the Executive. I will address the constitutionality and the practical wisdom of some of these proposals during the course of my remarks.

SECTION 2(c)

Section 2(c) is a list of constitutional powers given to the President as Commander-in-Chief. It is my view that this provision does not exhaustively list all the circumstances in which the President can employ the Armed Forces in hostilities or in situations where hostilities are imminent. The statute mentions the President's power to introduce troops pursuant to a declaration of war, specific statutory authorization, or a national emergency created by an attack on the U.S., its territories or possessions, or its armed forces. Besides these situations, the President has constitutional authority to protect and rescue U.S. nationals abroad, to protect U.S. embassies and legations, and under certain circumstances to carry out our security commitments contained in treaties. The section also fails to mention the President's authority to use American forces to forestall any direct and imminent threat of attack upon the United States, to suppress civil insurrection, and to implement the terms of an armistice or cease-fire designed to terminate hostilities involving the United States. I will confess my inability to enumerate all the possible contingencies

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in which the Constitution authorizes the President to use the Armed Forces. Moreover, I would respectfully submit that neither this Committee nor any other group of lawmakers or constitutional scholars could produce a single definitional statement that clearly and adequately encompasses every situation in which the President's Commander-in-Chief authority could be exercised. It would therefore be unwise for Congress to attempt to do so by amending the War Powers Resolution. Please allow me to elaborate.

The noted constitutional scholar Alexander Bickel once observed that any efforts to codify the President's war powers would "run the risk . . . of being either too restrictive in their definitions of Presidential power, or else of becoming, like the lamentable Tonkin Gulf resolution, blank checks." Professor Bickel's comment goes to the heart of the problem. Either the enumeration of powers in the War Powers Resolution will be incomplete, or it will be so broad that the President can justify any action he wishes to take under its sweeping provisions.

If the enumeration is incomplete, a situation may arise which is not covered by the statute. The failure of the statute to specify the situation will not constitutionally restrict the President's power because that power is derived directly from the Constitution. No legislation enacted by Congress can restrict it. But obviously the omission of an executive power can cause confusion and uncertainty.

On the other hand, if the statute is worded broadly enough to encompass every instance in which the President has constitutional authority to act, it runs the risk of being overbroad, and of giving the President authority he would not otherwise have had. Particularly in the latter case, Congress would have been better off with no War Powers Resolution at all.

Some authorities commenting on the War Powers Resolution have argued that analysis like Professor Bickel's overlooks the subtile interplay in the Constitution of provisions which delegate powers over military matters to both Congress and the President. These commentators claim that there is a twilight zone in the Constitution where the allocation of power between the President and Congress is unclear. In these situations, an explicit statement, like the one that might be contained in an amended subsection 2(c), could clarify the ambiguity.

This argument is defective for three important reasons. To the extent that the Constitution is ambiguous concerning the powers of the various branches of government, a statement by Congress regarding the proper allocation should be given only limited weight. This is because of the natural tendency of all institutions to aggrandize their own authority. Thus, any resolution of Congress pertaining to a constitutional question such as war powers should be viewed with some skepticism when it is passed over a Presidential veto.

Second, even though the resolution would attempt to demarcate the distribution of power within the twilight zone, the attempt is bound to have constitutional defects. Because the contours of the twilight zone are unclear by hypothesis, the Congressional enumeration of war powers is likely to rezone powers which are properly in the President's domain into the twilight zone, and then assign these powers to Congress. Of course this would be unconstitutional. The Congress, even with the approval of the President, cannot alter the distribution of powers delineated by the Constitution.

Finally, I believe that any attempt to eliminate the twilight zones in the Constitution would violate one of the fundamental operating principles of our government. Contrary to popular belief, the Constitution does not rely upon a strict separation of powers to keep each branch of the government in check. As James Madison observed in Federalist No. 48, "a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands." Instead, the Constitution mixes powers among the branches, so that no single branch can proceed too far before running into the competing powers of other branches. In one of his most famous statements, Madison described this fundamental principle of government:

> [T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others. . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. . . . If men were angles, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. . . .
>
> This policy of supplying, by opposite and rival interests, the defect of better motives . . . [is] requisite in the distribution of the supreme powers of the State. Federalist No. 51.

In considering a resolution which tries to separate the powers that are currently mixed in the so-called twilight zone, Congress is in danger of ignoring Madison's wise observations. The proper scope of the President's authority in conducting war cannot be resolved by legislative draftsmen or by judges in the detached atmosphere of a courtroom. The war power is necessarily a political power, and its dimensions must be settled by Congress and the President in the political arena. As James Madison observed, "demarcations on parchment" are not powerful enough to accomplish this formidable task.

The suggestion has been made that Congress amend the War Powers Resolution to impose prior restraints on the President's use of the Armed Forces. These restraints would allow the President to introduce troops into hostilities only in situations enumerated in a revised section 2(c). To the extent that the enumeration in section 2(c) is less extensive that the President's powers under the Constitution, any prior restraints limiting the President's authority in accordance with that section would be unconstitutional. An article in the Minnesota Law Review argues that these constitutional problems can be obviated by prohibiting the use of funds to support troops in hostilities except on the occasions listed in an expanded section 2(c). The author contends that article I, section 9 of the Constitution, which delegates the spending power to Congress, authorizes this innovative use of the legislature's control over the purse strings. Unfortunately the problem is not quite so simple.

It is true that the Constitution gives Congress power over spending and the power to raise and support armies. But these powers cannot be exercised in a way that would emasculate the authority granted elsewhere in the Constitution to the President as Commander-in-Chief. The distinction is between essential and non-essential activities. Congress cannot deny or place conditions on the use of funds for activities that are essential to the exercise of the Chief Executive's independent constitutional powers. To interpret Congress's power in any other way would be to upset the set of checks and balances that are an integral part of our government.

Say, for example, that the Congress disagreed with the President's battlefield strategy during the course of a war. Under the unprecedented interpretation of the spending power which these proposals would for the first time apply, Congress could authorize military funds with a condition that they be used only for tank offensives and not for offensives which relied upon air support or artillery. Such conditions on spending would be patently unconstitutional. In effect, Congress would be arrogating the power of the Commander-in-Chief. As Louis Henkin, one of the foremost authorities in this area of constitutional law, observed, "[e]ven when Congress is free not to appropriate, it ought not be able to regulate Presidential action by conditions on the appropriation of funds to carry it out, if it could not regulate the action directly." Senator Borah, in commenting on the Commander-in-Chief power, stated this point emphatically.

> Undoubtedly the Congress may refuse to appropriate and undoubtedly the Congress may say that an appropriation is for a specific purpose. In that respect the President would undoubtedly be bound by it. But the Congress could not, through the power of appropriation, in my judgment, infringe upon the right of the President to command whatever army he might find. 69 Cong. Rec. 6760 (1928).

Thus, any spending limit linked with an amended section 2(c) of the War Powers Resolution which had the effect of denying funds for specific activities within the purview of the President as Commander-in-Chief, would also be void under the Constitution.

There are also sound policy reasons why Congress should not use its spending power in this fashion. Any provision that limited the use of funds for military operations to a finite set of cases would jeopardize the country's safety. The limitation could prevent the President from responding in an emergency to a grave threat to the nation's security. Because the threat might require a quick response, the President would not have time to obtain an appropriation from Congress before it was to late. Bear in mind that I am talking about situations where the President has constitutional responsibility as Commander-in-Chief to respond, but inadequate funds to fulfill his constitutional mandate.

The requirement that the President seek funds from Congress after the crisis or emergency had arisen would also mean that important military operations could not be kept secret, even if secrecy were necessary for the preservation of American lives. It would simply be impossible to assemble 535 members of Congress on short notice without the media discovering that something of importance was afoot. If Congress decided officially to notify all foreign governments about secret emergency military activities, it could hardly devise a more effective scheme.

The problems with the spending limit proposal do not stop here, though. If Congress wished to grant the President's request for funds, lawmakers would have

to enact legislation and make appropriations. This is usually a protracted process at best. At worst, the funds may not be made available in time to meet the crisis. The principal consequence of the spending limitation amendment to the War Powers Resolution would be to interject delay where delay jeopardized national security.

Finally, a spending limit based upon a finite enumeration of situations in section 2(c) could, in certain circumstances, encourage a hostile power to try to take advantage of the apparent limitations on the power of the President to respond to threats to national interests. If that hostile power can devise a way to threaten American security which does not fall within the enumerated categories of section 2(c), it may indeed assume that the President will not respond until he has received authorization from Congress. In the meantime, our military posture could be seriously impaired. I frankly doubt that in time of emergency the President would consider himself bound by such constitutionally dubious limitations. In any event, there is no reason to encourage a hostile power to make a miscalculation.

B. THE SIXTY DAY CUT-OFF PROVISION

I would like to turn now to the sixty day cut-off provision of section 5(b). Because some of the remarks I will later make regarding the concurrent resolution procedure of section 5(c) are also applicable here, my discussion of the sixty day cut-off will be brief.

My primary reason for believing this provision is unconstitutional may be simply stated. If the President has independent authority under the Constitution to send troops into a particular situation in the first place, there is nothing in the Constitution that terminates that authority or allows Congress to provide for the termination of that authority after sixty days or ninety days or any particular period of time. Consider a case where an American embassy has been besieged by terrorists and American diplomats have been taken hostage. It is not impossible to envision such a situation lasting longer than sixty days or even longer. The President clearly would have authority at the outset to use troops to protect American personnel. I can see no magical reason why this authority should vanish after a statutorily prescribed period of time has run its course.

The argument I mentioned before about a twilight zone where the Executive's and the Legislature's powers are ambiguous comes up in this context as well. In brief, the argument states that at some point, the continued use of our Armed Forces in a hostile situation will amount to an act of declared or undeclared war which must be approved by Congress. Because the Constitution does not define this point in time precisely, Congress, it is argued, should be permitted to define it through legislation.

However, I suggest that it is misleading to speak of the sixty day cut-off as a legislative bright line allocating power within the twilight zone. When the War Powers Resolution is viewed as a whole, it becomes evident there is no sixty day bright line at all. Indeed, because section 5(c) authorized Congress to shorten the period in which the President can deploy troops in hostilities by a simple concurrent resolution, the sixty day provision is no more than an arbitrary starting point which can be lengthened by joint resolution or curtailed by Congress at any time. The sixty day provision is not a fixed bright line illuminating the contours of the twilight zone. Instead it is an elastic band defining Presidential authority which Congress can manipulate like a yo-yo.

The sixty day cut-off may also have serious drawbacks from a policy standpoint. If the President is bound to observe this time limit, he might adjust his military strategy accordingly. Returning to the example of the terrorist attack on an American embassy, prudence and concern for the safety of American lives might lead the President to be patient with the terrorists, in the hope of persuading them to surrender. But the prospect of a sixty day cut-off could force the President to take drastic action before the time period has elapsed. The likelihood of American casualties would increase dramatically.

The time limit could also affect the terrorists' strategy. Normally the terrorists might choose to surrender early because the President can convince them that he will wait indefinitely for them to give up. But if the President is bound by a time constraint, the terrorists may wait until the sixty days elapse.

C. VETO BY CONCURRENT RESOLUTION

The sixty day time limit is not the only way the President's use of the Armed Forces is limited under the War Powers Resolution. Section 5(c) states that the President must withdraw our Armed Forces at any time short of sixty days if Congress directs him to do so by a concurrent resolution. I believe that section 5(c) as it stands is unconstitutional. Furthermore, I do not believe that the constitutional infirmities of that section can be removed by an amendment which would allow Congress, by a concurrent resolution, to prohibit the President from spending funds on military activities.

Section 5(c) is presently unconstitutional because it purports to give Congress Power to discontinue military operations, even if the President has initiated them pursuant to his independent constitutional authority as Commander-in-Chief. An example will best illustrate my point here. It is well established that the President can order American Forces into hostilities when they are needed for self-defense. In 1801, President Jefferson sent a naval expedition to the Mediterranean with orders to protect American commerce from pirates operating under the protection of the Barbary Powers. Although the danger that the navy would become involved in hostilities was great, the President issued his orders without any specific legislative authority from Congress. In the course of the expedition, the American ship *Enterprise* fought an intense battle with a 14-gun Tripolitan cruiser and emerged victorious. Jefferson justified the constitutionality of his orders on the basis of the President's authority to use the Armed Forces for self-defense. More than a hundred such instances of Presidential exercise of the Commander-in-Chief power without declaration of war have occurred since the time of Jefferson.

Section 5(c) of the War Powers Resolution would authorize Congress to curtail military operations, even though the President had ordered them in the belief they were necessary for national self-defense. Moreover, according to section 5(c), Congress could curtail these operations even though they had been under way for only a couple of days. Because no act of Congress can give the legislative branch such power, section 5(c) is unconstitutional.

Section 5(c) is defective for another reason. The concurrent resolution procedure of section 5(c) purports to have legislation effect without the participation of the President. In my opinion, this procedure violates the presentation clause of the Constitution. Article I, section 7, clause 3 of the Constitution requires that:

> Every Order, Resolution or Vote to which the Concurrence of the Senate and House of Representative may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

One of the primary purposes of this provision was to ensure that Congress could not evade the necessity of Presidential participation in the legislative process. Yet this is precisely what section 5(c) purports to allow Congress to do.

The legislative veto provision of section 5(c) would allow Congress unilaterally to determine whether or not to permit the use of the Armed Forces in cases of self-defense, for example. A power which lies in the domain of the Executive under the Constitution would thus be transferred to the control of Congress. No resolution of Congress is constitutionally capable of accomplishing this feat.

By now you understand that my position first is that the President has certain powers under the Constitution as Commander-in-Chief which the Congress cannot interfere with under any procedure. But even if Congressional participation in these areas were permissible under the Constitution, Congress would have to act in conjunction with the President as provided in the presentation clause. That provision applies to "[e]very order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary," not just some orders or certain votes.

It is true that legislative veto provisions have been enacted into law on various occasions since the early 1930's. But these enactments have little value as legal precedent to support the provisions of section 5(c). First of all, the legislative precedents dating from the 1930's are inconsistent with the practice in force from the beginning of the Republic until that time. Moreover, the constitutionality of these veto provisions has never been decided by the Supreme Court. Earlier this year, the District of Columbia Court of Appeals, in *Clark* v. *Valeo*, —— F. 2d —— (1977), observed that the constitutionality of the congressional veto had yet to be conclusively determined. A few weeks ago, the Court of Claims did rule that the "one-House" veto in the Federal Salary Act of 1967, 2 U.S.C. § 359(1)(B), was constitutional. But the court's opinion in that decision provides little support for the concurrent resolution procedure in the War Powers Resolution. The court explicitly stated that it was confining its ruling to the specific features of the act being challenged. *Atkins* v. *United States*, No. 41-76 (Ct. Cl. May 18, 1977) at 50.

Furthermore, the provisions of section 5(c) of the War Powers Resolution carry the legislative veto far beyond those areas for which any constitutional justification has been advanced to date. In justifying the constitutionality of early enactments incorporating the legislative veto, Congress maintained that the power conferred upon the President by the legislation, such as the Reorganization Act of 1939, was essentially legislative in character. It was argued that in delegating the legislative power to the President, Congress retained a veto to make certain that the

President's use of that power conformed with the letter and intent of the delegated authority. Indeed, the Court of Claims, in justifying its decision upholding the constitutionality of the one-House veto in the Federal Salary Act, emphasized that the subject matter of that Act:

> . . . has historically been within the primary domain of Congress, not of the Executive. There are no elements of the regulation or enforcement of, or of the planning or carrying on of, an ongoing or continuing program, or of interference with executive discretion in new or existing programs of substantive character. *Atkins* v. *United States*, No. 41-76 (Ct. Cl. May 18, 1977) at 62.

The War Powers Resolution is fundamentally different in several respects. Unlike the Federal Salary Act, use of the Armed Forces in the situations we are concerned with here is essentially the constitutional responsibility of the President. The framers of the Constitution envisioned that the President would have full discretion in the planning and carrying on of certain military operations. In this area, Congress simply has no power to delegate to the President as Commander-in-Chief. Consequently, a legislative veto cannot be justified as a check on the President's use of delegated powers.

One might also question whether it is a proper function of the legislature to determine if the President's actions conform with the letter and intent of a Congressional enactment. Traditionally this power has belonged exclusively to the judiciary pursuant to Article III of the Constitution. In using the legislative veto to enforce the President's compliance with statutory enactments, Congress trespasses on the prerogatives of the courts.

Because doubts about the constitutional viability of section 5(c) persist, some authorities have prescribed use of the spending power by Congress as a miracle elixir to cure the constitutional ailments of this provision. The remedy is something like the ancient technique of bleeding sick patients. If Congress disapproves of the President's use of the Armed Forces, it need not directly order withdrawal of troops already committed. It can simply pass a concurrent resolution which would "drain" all funds from the operation. Alternatively, a provision might be enacted which would automatically deprive the President of funds for military operations sixty days after the President first deployed the Armed Forces in a hostile situation unless the Congress extended the time period by concurrent resolution. Like the technique of bleeding, however, the healing powers of these leaching proposals have been considerably overstated.

In the first place, as I have already argued, Congress cannot constitutionaly use the spending power in a fashion that would deprive the President of his fundamental authority as Commander-in-Chief. If the President ordered the Armed Forces into a particular situation pursuant to this authority, Congress could not deny him the funds necessary to fulfill his responsibilities without raising serious constitutional problems.

In addition, a *generalized* spending cut-off based upon a concurrent resolution of Congress would be an extraordinary and unprecedented extension of the legislative veto. It would be difficult to sustain such a provision without reading the presentation clause out of the Constitution. Admittedly, legislation has been enacted which gives Congress authority to terminate spending by concurrent resolution under the foreign assistance programs. However, the constitutionality of this legislation has never been tested. Moreover, the proposal we are now considering would go far beyond any existing statute of which I am aware.

Allowing Congress to cut off all funds for specified military operations would enable Congress to manipulate, after the fact, the spending provisions of any and all appropriation enactments that could conceivably support a military operation. I believe that any legislation authorizing the legislative veto violates the Constitution, but a single provision giving Congress a legislative veto over any and all appropriations already approved by the President for military activities is a particularly serious violation. The exercise of such a veto almost inevitably interferes with the President's independent Commander-in-Chief power.

D. THE WAR POWERS RESOLUTION AND THE TREATY POWER

Section 8 of the War Powers Resolution deals with treaty commitments, among other subjects. Section 8(a)(2) states that authority to introduce Armed Forces into hostilities shall not be inferred from any treaty unless that treaty is implemented by legislation specifically authorizing the use of American troops. Yet subsection d(1) of the very same section states that "[n]othing in this joint resolution . . . is intended to alter the authority of the Congress or of the President or the provisions of existing treaties. . . ." Even a casual reader can see that the two sentences cancel each other out, and deprive the provision of any coherent meaning. In a slight variation of the old saying, they give back with one hand what the other hand has taken away.

In my view the best solution to this dilemma is simply to amend the War Powers Resolution so as to delete entirely the provisions just referred to. Silence is better than talking out of both sides of the mouth, especially in areas of constitutional uncertainty such as this.

CONCLUSION AND PROPOSAL

Mr. Chairman, it is my firm belief that the proposals we have been discussing this morning take the wrong approach to the problem of controlling abuses of the War Powers. They recognize on the one hand the President's independent constitutional power to order the Armed Forces into hostilities but on the other seek by statute to limit the exercise of that constitutional power. They attempt to enumerate where enumeration is impossible; and the attempt to enumerate is unwise. They impose prior restraints where restrictions jeopardize national security. And in accomplishing these dubious objectives they use procedural innovations that threaten the balance of powers they seek to preserve.

I respectfully suggest to this Committee that it take a new look at the problem of allocating war powers. Instead of imposing a solution on the Executive, Congress should devise an accommodation which will be acceptable to both the President and Congress. In my experience in government, I have often observed that Presidents earnestly want to consult and cooperate with Congress before making important military decisions. Yet despite their best intentions, they frequently fail to satisfy Congress, either because they consulted one group instead of another, or because the manner in which they consulted a particular group did not meet that group's expectations.

I believe that a large amount of the friction between the President and Congress over war powers could be removed if the Congress were to adopt a concurrent resolution detailing what it expected from the President in situations where the Armed Forces might be introduced into hostilities. Although such a resolution would not have binding legal effect, if it were developed in close consultation with the President, it could lay the groundwork for fruitful cooperation between the two branches of government.

I realize that my proposal cannot satisfy those who have a penchant for tidy definitions and clear delineations of authority. But as I have tried to persuade you this morning, we are dealing with an area where precision is unwise if not downright impossible. Accommodation must be hammered out through the political process. This committee has the opportunity, and now is the time, to get this process of accommodation under way.

Senator CHURCH. Thank you very much.
Our next panelist is Mr. Abraham Sofaer.
[Professor Sofaer's biography follows:]

BIOGRAPHY OF ABRAHAM D. SOFAER

Employment:

1969 to Present: Professor of Law, Columbia University School of Law, 435 West 116th Street, New York, New York 10027, phone: 212-280-5086.

1967 to 1969: Assistant United States Attorney, Southern District of New York. Ref.: Robert M. Morgenthau.

1966 to 1967: Law Clerk to Hon. William J. Brennan, Jr., United States Supreme Court.

1965 to 1966: Law Clerk to Hon. J. Skelly Wright, United States Court of Appeals, District of Columbia.

Summer 1964: Hughes, Hubbard and Reed, One Wall Street, New York, New York 10005, Ref.: Jerome Shapiro, Esq.

Background:

Born May 6, 1938 in Bombay, India. Early education in schools in India, England and the United States. Resided in United States since 1952; citizen since 1959. Active duty United States Air Force 1956-1959.

Education:

Roosevelt School, Stamford, Connecticut, 1953-1956.

Yeshiva College, 1959-1962, A.B., *magna cum laude,* majoring in American History. Prizes in history, political science and speech.

New York University School of Law, 1962-1965, LL.B., *cum laude.* Editor-in-Chief, N.Y.U. Law Review, Root-Tilden Scholar. Awards: Best Law Note, Outstanding Graduate.

Writing:

Note, "Federal Habeas Corpus for State Prisoners: The Isolation Principle," 39 N.Y.U.L. Review 78 (1964).

With Hon. J. Skelly Wright, "Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility," 75 Yale L.J. 894 (1966).

"The Change-of-Status Adjudication: A Case Study of the Informal Agency Process," 1 J. of Legal Studies 349 (1972).

"Judicial Control of Informal Discretionary Adjudication and Enforcement," 72 Colum. L. Rev. 1293 (1972).

"Financing Public Education in New York State: An Analysis of the Fleischmann Commission Report," 48 N.Y.U.L. Rev. 1. (1973).

Book Review, "R. Berger, Executive Privilege: A Constitutional Myth," 88 Harv. L. Rev. 281 (1974).

With Joann Engelke Macbeth, "Recent Developments in Local Government Law," The Urban Lawyer 1 (1975).

"Executive Privilege: An Historical Note," 75 Colum. L. Rev. 1318 (1975).

War, Foreign Affairs and Constitutional Power: The Origins (1976)

"The Presidency, War and Foreign Affairs: Practice Under the Framers," —— J. of Law & Contemp. Probs. —— (1977).

"Executive Power and the Control of Information: Practice Under the Framers," 1977 Duke L. J. ——. (Delivered on October 26, 1976 at Duke University School of Law as the 1976 Brainerd Currie Lecture.)

Professional and Community Activities:

Director, ABA study on the war powers in American history.

Hearing Officer, enforcement action by N.Y. Department of Environmental Protection against General Electric, Co. for discharging "PCB's" into the Hudson River, September, 1975—September, 1976. Opinions published in 6 Environmental Law Reporter 30001, 30007 and 30023.

Member, ALI, ABA, AALS, SALT, AAUP National Council (1974–77).

Member, Boards of Directors, MFY Legal Services and Citizens Union.

Faculty, ALI—ABA seminar on environmental litigation (1976); N.Y.U. Appellate Judges Seminar (1973–74).

Consultant, Administrative Conference of the United States (1970–72).

Director, Ford Urban Fellowship Program (1970–71).

During 1976–77, Professor Sofaer was named Walter E. Meyer Professor of Law and Social Research, and is preparing materials for a course in the regulation of toxic substances.

STATEMENT OF ABRAHAM D. SOFAER, PROFESSOR OF LAW, COLUMBIA UNIVERSITY SCHOOL OF LAW, NEW YORK, N.Y.

Mr. SOFAER. Mr. Chairman and members of this distinguished committee, thank you for inviting me to testify on this important resolution.

In his letter inviting me to testify, the Chairman raised several questions which he asked me to address. I will answer the Chairman's questions to the best of my ability.

But, before doing so, I would like to specify the area of my expertise so that you will be able to place my statement in perspective.

EXERCISE OF WAR POWERS IN AMERICAN HISTORY STUDY

About 4 years ago, the American Bar Association asked me to conduct a study of the exercise of the war powers in American history. I accepted the job and began by surveying the available literature. My survey led me to conclude that most research on this subject has been superficial and one-sided, based essentially on secondary sources and put together for the purpose of advancing some particular position. Even this distinguished committee, I concluded, sometimes relied on incorrect or incomplete versions of our early history.

The American Bar Association committee charged with responsibility for the project, which is chaired by Lyman M. Tondel, of New York, agreed with me that a thorough survey of the primary sources was necessary. I understood that survey and have now completed the first volume of the work, which is entitled, "War, Foreign Affairs, and Constitutional Power: The Origins." It covers the first forty years of experience under the Constitution.

Work has begun on a second volume covering the period 1839 to 1900, and will proceed as swiftly as possible if adequate support is obtained. At least one more volume beyond the second is contemplated.

In addition to the published volume, I have recently written two articles which should be of interest to this committee. I am including both in page proofs. One is entitled, "The Presidency, War and Foreign Affairs: Practice Under the Framers," and the other is entitled, "Executive Power and the Control of Information: Practice Under the Framers," and will appear as a printed version of the Brainerd Currie Lecture I delivered last October at the Duke University School of Law.

The expertise I possess, therefore, is predominantly historical, and primarily limited to early practice under the Constitution.

This is hardly an unimportant period, but I emphasize that I am not going to spend much time at all on anything after those first forty years.

The focus of this hearing is the War Powers Resolution and various proposals to amend it, and I summarize those in my written statement. I am taking the liberty of departing from that statement in order to keep within the time limit.

Numerous proposals have been advanced to deal with these perceived or observed deficiencies in the existing War Powers Resolution, and some of these, the major ones, have already been addressed by the early speakers and described adequately.

I have found during the course of my research considerable information and several precedents pertinent to those issues. I will describe these materials in the following sequence: the Constitution's allocation of power over war and information; practice under the Framers concerning war and information; and some concluding remarks on the possible significance of these materials.

CONSTITUTION'S ALLOCATION OF POWER OVER WAR AND INFORMATION

This committee is well aware of the many relevant powers granted by the Constitution to the three branches of our Government. I find few absolute limits on the powers of either Congress or the President. Contrary to some, I feel that the Constitution does more than simply grant powers to branches that are separate. The Framers strove to assure liberty by both separating the branches and then granting them powers that overlap, in order to enable each branch to have some influence over every major function of Government. Thus, with respect to the war-making function, Congress was granted many very substantial powers. At the same time, the President was also granted very substantial powers.

These grants provide both branches with respectable arguments for authority to affect many of the same decisions. Even the grant

to Congress of the power to declare war fails to demonstrate that the President lacks power to make or to cause war.

All agree that the President possesses authority to defend the Nation against sudden attacks. My own reading of the evidence indicates that a President could also claim the power to defend against attacks that may have been foreseeable; to defend with reasonable force against attacks on American citizens or property outside the United States; to defend against another nation that has declared or makes war; and to prevent attacks before they actually occur.

This is not to say that the framers believed the President had these powers; they never explicitly considered whether he did. But there is an adequate textual and historical basis for a President to claim them.

The existence of mixed powers explains Justice Jackson's extraordinarily valuable formulation in the Steel Seizure Case. When the applicable powers of both branches are joined in seeking a given objective, the President's power is equal to the combined power of both branches. Where Congress does nothing to approve or to disapprove an executive action, the President's capacity to act depends on whether he alone possesses adequate authority. Given the fact that the President has at least some power relating to almost any important matter, an argument for adequate authority can often be made.

On the other hand, a finding of authority to act in the absence of any contrary indication by Congress cannot be equated with the power to act against the will of Congress. The framers explicitly assigned several specific powers to the President, some of which Congress cannot assume. But in general, the Framers seem clearly to have granted Congress by far the greater authority to control the Nation's destiny.

In a confrontation between President and Congress, therefore, the latter's authority would almost always predominate.

One final point. The Constitution imposes no definitive limits on Congress's power to delegate authority to the President. At one point during the Constitutional Convention, a motion was made that would have limited Congress's ability to grant the President "legislative" functions. The motion was rejected.

Of course, if Congress sought to give away absolutely some expressly assigned power, such as the power to declare war, its action could be deemed unlawful. But little evidence exists to suggest that the framers intended materially to limit Congress' discretion to allow the President great leeway in handling the Nation's foreign and military affairs.

PRESIDENTIAL AUTHORITY DURING FIRST 40 YEARS

The predominant pattern of Government during the first 40 years was, in fact, one in which Congress delegated broad power to the President. In my written statement, I summarize some of the types of situations in which the President was granted authority to use the Armed Forces.

Only once did Congress declare war, whereas in many other instances it authorized major hostilities without a declaration.

Broad power was also delegated to the early Presidents over foreign and military affairs, including authority to, in effect, cause war through making policy choices.

Congress also requested information about foreign and military affairs. But here, too, the vast majority of all requests for potentially sensitive materials were qualified to allow the Presidents involved to withhold anything, the disclosure of which was deemed against the public interest.

Our early Presidents engaged in military and foreign affairs initiatives even where statutes or treaties did not expressly authorize them to do so. George Washington, for example, authorized offensive actions against the Wabash Indians, although Congress had expressly approved only frontier "defense." Washington also used the armed forces to subdue the so-called "Whiskey Rebellion" on the assumption that he could do so to execute the revenue laws and to preserve order. When France and Britain went to war in 1793, Washington used troops to enforce his Neutrality Proclamation, though the treaties he construed made no provision for such a policy.

Federalist President John Adams was reluctant to use the Armed Forces without legislative approval by the predominantly Republican Congress. He nevertheless ordered the first naval operations in the Mediterranean, authorizing the defense of American public and civilian vessels. The only statutes on which he could have relied in approving these cruises were those providing for the vessels themselves and for training their crews.

Jefferson continued and expanded the use of public naval vessels in the Mediterranean. He authorized these vessels to sink, burn, or destroy attacking or enemy vessels. He later suggested to Congress that he had approved only defensive actions, but this was not the case.

After Congress sweepingly authorized an undeclared war against Tripoli, Jefferson and Madison, his Secretary of State, approved the use of American funds, vessels and a handful of Marines, to help a deposed brother overthrow the Pasha of Tripoli. This operation was abandoned when the Pasha signed a treaty favorable to the United States. In the process, the naval commanders evacuated from Benghazi, not only the American troops and advisors, but also the Pasha's brother and his retinue, a story with which Senator Javits is most familiar, since he describes it eloquently in his book.

Madison and Monroe went considerably further than any of their predecessors in authorizing the use of force without clear statutory authority. Madison ordered the takeover of parts of West Florida, for example, even though the statute under which he acted, while clear enough, had earlier been treated by Madison to authorize a takeover only by agreement with Spain. Monroe approved the pursuit of pirates onto West Indian islands, under statutes that provided the vessels used or at most authorized actions in the general area.

Most significantly, however, Madison and Monroe approved collaborations with American residents in west and east Florida, specifically designed to encourage revolts against Spanish rule in those areas. Secret agents extremely sympathetic to the takeover of the Floridas by the United States were appointed and given great

latitude in implementing these objectives. They supplied arms and other material support to the rebels in both areas, and secured requests from the rebels for American protection. In west Florida, Madison ultimately assumed control under preexisting statutory authority. In east Florida, Madison's agent took control of several forts through a charade in which American supported and armed rebels were deemed the "local authority" and thereby capable of surrendering territory under a statute undoubtedly passed to allow a takeover by agreement with the Spanish commander as the "local authority."

Our early Presidents also assumed control of foreign affairs, acting frequently without prior legislative authority in situations where their decisions could have led to armed conflict. Most significantly, Jefferson invoked for the first time the so-called emergency power, to justify legislatively unauthorized military purchases and preparations after the British warship *Leopard* attacked the American public vessel *Chesapeake*.

To what extent did the early Presidents consult, or at least inform Congress of their foreign affairs and military initiatives? In general, those great and respected leaders appear to have felt that they had authority to withhold information from Congress, even when Congress requested the information without any qualification allowing withholding.

Washington's Attorney General, William Bradford, specifically advised him that every call for information, "where the correspondence is secret and no specific object pointed at, must be presumed to proceed upon the idea that the papers requested are proper to be communicated." And Washington did withhold information from the Senate, and other Presidents did as well.

Consultation occurred frequently on numerous issues. But the early Presidents unquestionably avoided consulting Congress at several crucial points.

The war between France and Britain presented George Washington with a foreign affairs crisis. His Cabinet unanimously recommended, however, that Congress not be summoned early; instead, he unilaterally proclaimed and enforced neutrality. The Cabinet's fear was that Congress might be too influenced by France's popularity in the United States to be able to adopt the policy most likely to avoid war.

Washington also delayed transmitting to legislators and the public the terms of the Jay Treaty, because he feared its unpopularity would destroy its chances for approval. When he finally sought its ratification, he did so secretly.

Jefferson's Republican philosophy proclaimed the impropriety of executive action without consultation. Yet, when confronted with the "Chesapeake Affair," Jefferson and his Cabinet decided against calling back Congress.

Representative John Randolph later complained that "Congress ought to have been immediately convened at a time when they would have felt a deep and particular sense of national indignity, and not to have suffered this impression to be weakened."

Others applauded Jefferson, however, for postponing the legislature's involvement "till the fermentation should have subsided," as "the hour of extreme feeling was not the proper time for

deliberation;" and Congress overwhelmingly approved Jefferson's "emergency" expenditures.

This recitation of executive initiatives fails to convey the caution and deference to Congress that our early Presidents simultaneously exhibited.

Washington acted unilaterally, but to preserve peace, not to make war. Jefferson used threats and secrecy, yet he moved with extreme caution in all military matters. Madison and Monroe aggressively and secretly sought the Floridas, but these were popular objectives and involved a minimal commitment of material and military resources. Their efforts cannot be equated with unpopular, massive engagements, such as we made in Korea and Vietnam. Furthermore, their secret conduct suggests that they regarded their actions as constitutionally questionable, if not improper.

PRESIDENTIAL/CONGRESSIONAL CONFRONTATIONS

The final and most significant aspect of early practice is those situations in which confrontations occurred between Congress and the President. I summarize some of those in my written statement. I will tell you that my conclusion, after looking at those situations, is that Congress more than amply demonstrated its power to control the President when it acted specifically with the intention of so doing.

My research convinces me that, contrary to this Committee's previous assumptions, the war powers were exercised in roughly the same manner during the first 40 years of our history as they have been exercised during much of the last 40 years.

Until very recently, the predominant pattern of conduct that occurred during both periods was one in which Congress delegated broad power and discretion. Presidents in both periods therefore controlled the processes of formulating as well as of implementing foreign policy.

Senator CHURCH. Excuse me, but when you say "delegated," are you referring to an express delegation or simply to a practice of condoning or acquiescing in initiatives undertaken by the President?

Mr. SOFAER. Express delegation.

Senator CHURCH. Statutory delegation?

Mr. SOFAER. Statutory delegation.

This Senate has done recently a monumental study, in which I believe you had some part, of the enormous number of statutes that had existed on the books delegating emergency powers of various sorts to the President——

Senator CHURCH. Yes, I am very familiar with that.

Mr. SOFAER [continuing]. And trying to put some limits on that. That is why I said until very recently.

Senator CHURCH. It is those general emergency statutes to which you have reference when you talk about that. Well, some were general and some were specific.

Mr. SOFAER. No, not just to those. I would include many of the appropriations acts, many of the treaties, and many other acts that could have been said to expressly delegate power to act.

Senator CHURCH. Yes.

Mr. SOFAER. Certainly there would have been much precedent for such a statement.

Senator CHURCH. I am sorry to have interrupted you. Please proceed.

WAR POWERS PRACTICE COMPARISON

Mr. SOFAER. I will be through in just a couple of minutes, so please bear with me. I wanted to address the War Powers Resolution in light of this historical evidence, and I will spend a few minutes doing that.

There are, obviously, important differences between the first 40 years and these last 40 years, particularly in the way Presidents have claimed recently that their powers are beyond Congress' power to control.

I disagree with those claims.

As I said earlier, I think the fact that a matter is within the President's power to control, in the absence of a legislative statement to the contrary, does not demonstrate that the President can act in that manner when Congress has indicated a contrary intention.

The similarities between early and recent practice remain impressive, however. They prevent us from assuming that executive leadership is necessarily improper or unsuccessful. Times have changed, and we no longer need to allow Presidents to work secretly for the acquisition of territory. But even if Congress is determined to reduce the executive's power, the early history is instructive. It shows that such a reduction will be difficult to accomplish because Congress itself has been a primary, if not the most important reason for the manner in which foreign and military affairs are conducted.

The task before you is not simply to return to the practice of some bygone era of constitutional propriety, but to change the way these matters have been handled since the outset. You will not only have to change the Presidency to do this; you will have to change Congress as well.

Looking at the War Powers Resolution in historical perspective, I cannot escape the conclusion that it is entirely consistent with established patterns of constitutional conduct. Despite assertions that it grants the President nothing, it can be construed as perhaps the most sweeping delegation ever made of the power to use force. If section 2(c) is amended as proposed to include the power to protect Americans and the power to forestall direct and imminent threats of an attack on the United States, it will essentially permit, in advance, almost all the uses of force ever undertaken by a President. If section 2(c) is made operative as a prior restraint, rather than left as an incomplete catalogue, the argument that it prohibits what it excludes adds force to the contention that it permits everything else.

The advantages of listing or delineating the President's authority have never been clear to me. Our Armed Forces and nationals are everywhere in the populated world; the statute cannot prevent a President from involving us in hostilities if he is determined to do so.

POWER OVER INFORMATION

The present War Powers Resolution also implicitly grants considerable power over information under the same basic rationale that I have described earlier.

I think, in that connection, that very little authority exists to support any limitation on Congress' power to request information it deems useful in fulfilling its obligations.

Historically, as we have seen, implied authority has been a great source of executive power. The War Powers Resolution arguably allows Presidents to rely upon implied authority in using the Armed Forces for from 60 to 90 days. After the 60- to 90-day period, the resolution purports to terminate the President's power to act on the basis of implied authority. This provision will not, in my judgment, prevent Presidents from implying authority. Congress cannot, in 1973 or in 1977, convert for all time a situation in which the President has acted and the Congress has not, into a situation in which the President is acting inconsistently with the will of Congress.

For these reasons, incidentally, I am unconvinced that the amendments to the present resolution along these lines will be any more effective than the resolution presently is.

FUND CUT-OFF PROVISION

The same objections apply to the fund cutoff provision, except that I do agree that if those provisions are added, a President would find it more difficult to ignore such a prohibition when a fund cutoff is included in the statue.

I cannot help but feel that a President would never need, however, to argue for implied authority during the first 60 to 90 days of a military operation, even if the proposed amendments were adopted. His powers would be so broad that he could somehow justify every readily conceivable use of force. After 60 to 90 days have passed, he would have somewhat more difficulty. But if he could find a reasonable basis for implying authority, he could use the same basis to legitimaze necessary expenditures. As a practical matter, Congress would then have to act to stop him. One need look no further to find evidence that this is true than the fact that President Ford ignored with impunity the several laws prohibiting the use of funds for military operations in Vietnam and Cambodia. The President unilaterally concluded that the laws were not intended to apply to evacuations, and his reading prevailed in the absence of further legislative action.

This brings me, then, to the Resolution's provisions that allow Congress to express its disapproval of actions after they are undertaken.

Madison long ago anticipated that each branch would compete for authority with all its assigned powers. It is in this spirit, I feel, that we must view recent executive assertions that Congress is unable to regulate or prohibit various types of activity. I think Congress can do so.

I have never found, nor have I been shown, an instance in which a President has openly disregarded an unambiguous legislative prohibition adopted to prevent a specific undertaking. Presidents or their officers may claim that they are free to disregard such prohi-

bitions; but these claims are principally designed to avoid having the laws passed. They would dissipate like so much bluster in the face of concrete legislative directives.

The only other weakness, other than the concurrent resolution weakness, which I detail here—and incidentally, I must agree with Senator Javits—a concurrent resolution would be somewhat less authoritative than a joint resolution or a law; but it would ordinarily represent, at the very least, a legislative disclaimer of great significance of responsibility and support. Such a provision might be questionable legally, but a President would be unlikely to use funds for military actions opposed by a legislative majority.

ARGUMENT FOR ADDING RESTRAINTS

The other argument for adding these prior restraints is the theory that they are needed to prevent the President from undertaking at least some operation so that the subsequent prohibitions, which I think are lawful and effective, need not be relied upon. History casts no light on this matter. I will not pretend to be relying on history in giving you my opinion. Common sense would seem to indicate that the resolution's authority could only be undermined by building in prohibitions that Congress will later be unwilling to enforce.

CLARIFICATION OF POWERS

In conclusion, my study of our nation's formative period convinces me of one general point that seems especially pertinent to changes in our governmental structure. Many writers persist in seeking to have Congress clarify its powers, generally at the expense of executive authority. Whether the War Powers Resolution achieves either clarity or reduced executive power seems dubious to me. Its great value lies, as Senator Javits has said, in forcing Congress to consider and react to Presidential initiatives. To the extent this value is served by the proposed amendments, they seem desirable and unobjectionable. To the extent the amendments seek to limit Executive power further, however, I would urge this committee to turn away from legal questions and to focus on the wisdom of further limitations. Rather than asking whether you can pass these amendments, I urge you to ask whether you should.

Our early history shows that the national interest can be promoted by innovative Presidents, operating under the ultimate control of the legislative branch. It is the national interest that should guide you in clarifying powers, if further clarification is needed, and not the myopic notion that equates better government with more legislative control.

Thank you.

[Professor Sofaer's prepared statement follows:]

PREPARED STATEMENT OF ABRAHAM D. SOFAER

Mr. Chairman and Members of this distinguished Committee: Thank you for inviting me to testify on the War Powers Resolution. I am happy to have the privilege to provide whatever information I have been able to acquire on this important subject. In his letter inviting me to testify, the Chairman raised several questions which he asked me to address. I will answer the Chairman's questions to the best of my ability. But before doing so, I would like to specify the area of my expertise so that you will be able to place my statement in perspective.

About four years ago, the American Bar Association asked me to conduct a study of the exercise of the war powers in American history. I accepted the job, and began by surveying the available literature. My survey led me to conclude that most research on this subject has been superficial and one-sided, based essentially on secondary sources and put together for the purpose of advancing some particular position. Even this distinguished committee, I concluded, sometimes relied on incorrect or incomplete versions of our early history.

The ABA Committee charged with responsibility for the project, which is chaired by Lyman M. Tondel, Jr., Esq. of New York, agreed with me that a thorough survey of the primary sources was necessary. I therefore set about examining our early history, with the help of a small professional staff and several students. The first volume of the study has now been

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published. It is entitled WAR,FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS (Ballinger Pub. Co. 1976), and covers the first forty years of experience under the Constitution. Work has begun on a second volume covering the period 1839-1900, and will proceed as swiftly as possible if adequate support is obtained. At least one more volume beyond the second is contemplated.

In addition to the published volume, I have recently written two articles which should be of interest to this Committee. Publication of both articles is imminent, but I am including page proofs with this statement, since they contain many facts and much analysis on which I rely. One article is entitled "The Presidency, War and Foreign Affairs: Practice Under the Framers," and will appear as part of a symposium on the presidency in the Journal of Law and Contemporary Problems. The other is entitled "Executive Power and the Control of Information: Practice Under the Framers," and will appear as a printed version of the Brainerd Currie Lecture I delivered last October at the Duke University School of Law.

The expertise I possess, therefore, is predominantly historical, and primarily limited to early practice under our Constitution. This is hardly an unimportant period. Many of the Constitution's draftsmen became our national leaders. They construed the provisions which this Committee is presently considering, and put into practice notions about those provisions that are entitled to great weight. Again and again issues arose during the Constitution's earliest years that strikingly resemble the issues you confront today. And these issues were debated with a high degree of awareness, skill, and sophistication.

Important as our constitutional period was, however, it remains only one-fifth of the almost two hundred years of experience under the Consitution. I feel unprepared at this point to speak with assurance on the four-fifths of our history which is as yet unexamined. Consequently, I intend to limit my remarks to evidence accumulated under the Framers. In this connection, I want also to make clear that the opinions I express today are my own. I am neither authorized, nor do I wish, to speak for the ABA. Finally, while I am perfectly willing to express opinions I have formed, the principal focus of my testimony will be to present evidence. Of course, no one can be entirely objective about issues such as the war powers. But it would be impossible to conduct reliable research if I were to force myself to reach conclusions on all the disputed questions this Committee is considering.

The focus of this hearing, as I understand it, is the War Powers Resolution. Proposals have been made to amend the Resolution to overcome weaknesses perceived from the time of its adoption, as well as weaknesses demonstrated since that time by its operation. Proponents of change argue that the existing law fails to prevent executive excesses because it essentially allows all sorts of wars for from 60 to 90 days, a period easily long enough to permit major operations. They also contend that the Resolution fails to require adequate consultation, because the President must report the use of troops only within 48 hours <u>after</u> their introduction into hostilities, and because no sufficiently explicit mandatory reporting obligation exists where troops are not actually used. The inadequacy of these consulting and reporting requirements was further demonstrated, observers contend, by the Vietnam and Cambodian evacuations, and most dramatically during the <u>Mayaguez</u> rescue operation. Those operations also

involved arguably improper actions: violations of the statutes prohibiting the use of funds to finance military operations in Vietnam or Cambodia; the evacuation of many more foreigners than Americans; and retaliatory attacks for the Mayaguez seizure. Finally, statements by former President Ford, and other government officials, indicate that the executive branch may well ignore the limitations written into the War Powers Resolution. Proceeding from the premise that Congress cannot deprive the President of powers granted him by the Constitution, they argue that the following provisions are or may be invalid: the time limit on permissible military operations; the projected use of concurrent resolutions to terminate otherwise permissible military operations; an interpretation of section 8(a)(2) that would prevent the President from executing without further legislative consent treaty provisions calling for the immediate defense of allies; and other improper limitations on executive discretion to keep information secret in the national interest.

Numerous proposals have been advanced to deal with these perceived or demonstrated deficiencies. One important revision would amend section 2(c) of the Resolution to convert it from a nonoperative and partial description of presidential power to use the armed forces, into a purportedly operative and complete set of circumstances in which the President may act. This was the approach followed in the Senate version of the War Powers Act, but rejected in conference. It would create a prior restraint on executive conduct, whereas now Congress must act to stop executive initiatives during their first 60 to 90 days. A second major revision would enforce both the proposed prior restraints as well as the existing "subsequent" restraints (time limits and termination by concurrent resolution) through provisions that prohibit the use of any funds for

proscribed activities. Other proposals would require the President to obtain whenever practicable the "advice and counsel" of Congress, not simply "consultation;" would require that at least key members of Congress be informed 24 hours before any decision to commit forces under section 4(a)(1); and would mandate reporting in all section 4 situations not merely when section 4(a)(1) is invoked. Finally, one proposal would seek entirely to prevent the President from relying on treaties as authority for the use of force.

I have found, during the course of my research, considerable information and several precedents pertinent to those issues. I will describe these materials in the following sequence: the Constitution's allocation of power over war and information; practice under the Framers concerning war and information; and some concluding remarks on the possible significance of these materials.

I. THE CONSTITUTIONAL ALLOCATION

This Committee is well aware of the many, relevant powers granted by the Constitution to the three branches of our government. Chapter 1 of my book sets out in detail the reasons I find few absolute limits on the powers of either Congress or the President. Contrary to some, I feel that the Constitution does more than simply grant powers to branches that are separate. The Framers strove to assure liberty by both separating the branches and then granting them powers that overlap, in order to enable each branch to have some influence over every major function of government. Thus, with respect to the war-making function, Congress was granted (among others) the power to declare war, to control funds, to provide for the common defense, to raise and support armies, and to issue letters of marque and reprisal. The President, on the other hand, was made commander-in-chief, was placed in control of the conduct of foreign relations, and was empowered to execute all the laws, including treaties. These grants, in my judgment, provide both branches with respectable arguments for authority to affect many of the same decisions. Even the grant to Congress of the power to declare war fails to demonstrate that the President lacks power to make or to cause war. All agree that the President possesses authority to defend the nation against sudden attacks. My own reading of the evidence indicates that a President could also claim the power to defend against attacks that may have been foreseeable; to defend with reasonable force against attacks on American citizens or property outside the United States; to defend against another nation that has declared or makes war; and to prevent attacks before they actually occur. This is not to say that the Framers believed the

President had these powers; they never explicitly considered whether he did. But there is an adequate textual and historical basis for a President to claim them.

The existence of mixed powers explains Justice Jackson's extraordinarily valuable formulation in the Steel Seizure Case. When the applicable powers of both Congress and the President are joined in seeking a given objective, the President's power is equal to the combined power of both branches. Where Congress does nothing to approve or to disapprove an executive action, the President's capacity to act depends on whether he alone possesses adequate authority. Given the fact that the President has at least some power relating to almost any important matter, an argument for adequate authority can often be made. On the other hand, a finding of authority to act in the absence of any contrary indication by Congress cannot be equated with the power to act against the will of Congress. The Framers explicitly assigned several specific powers to the President, such as the power to appoint and the power to receive ambassadors. These Congress cannot assume. Furthermore, the Framers certainly intended that Congress not be able to overwhelm the presidency and thereby leave itself without an adequate check. But in general the Framers seem clearly to have granted Congress by far the greater authority to control the nation's destiny. In a confrontation between President and Congress, therefore, the latter's authority would almost always predominate.

One final point. The Constitution imposes no definitive limits on Congress' power to delegate authority to the President over war, foreign affairs, and the control of information. At one point during the Constitutional

Convention a motion was made that would have limited Congress' ability to grant the President "legislative" functions. The motion was rejected. Of course, if Congress sought to give away absolutely some expressly assigned power, such as the power to declare war, its action could be deemed unlawful. But little evidence exists to suggest that the Framers intended materially to limit Congress' discretion to allow the President great leeway in handling the nation's foreign and military affairs.

II. THE WAR POWERS UNDER THE FRAMERS

The predominant pattern of government during the first forty years was one in which Congress delegated broad power to the President. Congress gave the President authority to use the armed forces: to suppress piracy; to protect American commerce; to enforce embargoes; to enforce tax and other laws; to protect harbors; to defend against Indians; to take control of the Louisiana Territory, though its proper boundaries were very much in dispute; and for many other purposes. Only once did Congress declare war (against Britain in 1812). In many other instances it authorized major hostilities without a declaration. For example, it authorized military actions against Tripoli in language as sweeping as that contained in the Gulf of Tonkin Resolution. Its power to authorize the Quasi-War against France was indirectly considered by the Supreme Court and upheld.

Broad power was also delegated to the early Presidents over foreign and military affairs, including authority to raise and disband troops as deemed necessary; to impose or lift trade restrictions with Britain and France on certain contingencies; to negotiate for territories, such as West Florida; and to spend funds secretly, or with few restrictions. Congress frequently requested information about foreign and military affairs. Here, too, however, the vast majority of all requests for potentially sensitive materials were qualified to allow the Presidents involved to withhold anything the disclosure of which was deemed against the public interest.

Our early Presidents engaged in military and foreign-affairs initiatives even where statutes or treaties did not expressly authorize

them to do so. George Washington, for example, authorized offensive actions against the Wabash Indians, although Congress had expressly approved only frontier "defense." Washington also used the armed forces to subdue the so-called Whiskey Rebellion, on the assumption that he could do so to execute the revenue laws and to preserve order. When France and Britain went to war in 1793, Washington used troops to enforce his Neutrality Proclamation, though the treaties he construed made no provision for such a policy. Federalist President John Adams was especially reluctant to use the armed forces without explicit legislative approval, at least partly because Congress was controlled by Republicans. He nevertheless ordered the first naval operations in the Mediterranean, authorizing the defense of American public and civilian vessels. The only statutes on which he could have relied in approving these cruises were those providing for the vessels themselves and for training their crews.

Jefferson continued and expanded the use of public naval vessels in the Mediterranean. Anticipating that Tripoli or Algiers might attack American vessels, or even declare war, Jefferson (with his full Cabinet's concurrence) authorized commanders to sink, burn or destroy attacking or enemy vessels. He later suggested to Congress that he had approved only defensive actions, but this was not the case. After Congress sweepingly authorized an undeclared war with Tripoli, Jefferson and Madison, his Secretary of State, approved the use of American funds, vessels and a handful of Marines to help a deposed brother overthrow the Pasha. This operation was abandoned when the Pasha signed a treaty favorable to the United States; the naval commanders evacuated from Benghazi, not only the American troops

and advisors, but also the Pasha's brother and his retinue. Jefferson also told his commander in the Louisiana Territory to defend part of an area by force, even though Spain claimed title to the area and its commanding officer threatened to take control.

Madison and Monroe went considerably further than any of their predecessors in authorizing the use of force without clear statutory authority. Madison ordered the takeover of parts of West Florida, for example, even though the statute under which he acted -- while clear enough -- had earlier been treated by Madison to authorize a takeover only by agreement with Spain. Monroe approved the pursuit of pirates onto West Indian islands, under statutes that provided the vessels used or at most authorized actions in the general area. Most significantly, however, Madison and Monroe approved collaborations with American residents in West and East Florida, specifically designed to encourage revolts against Spanish rule in those areas. Secret agents extremely sympathetic to the takeover of the Floridas by the United States were appointed and given great latitude in implementing these objectives. They supplied arms and other material support to the rebels in both areas, and secured requests from the rebels for American protection. In West Florida, Madison ultimately assumed control under pre-existing statutory authority; in East Florida, Monroe's agent took control of several forts through a charade in which American-supported and armed rebels were deemed the "local authority" and thereby capable of surrendering territory under a statute undoubtedly passed to allow a takeover by agreement with the Spanish commander. After Congress twice refused to authorize a takeover of East Florida, Madison finally withdrew

American forces. He did so, however, only after extracting from the Spanish a pardon for all the rebels, most of whom lived in East Florida and were therefore foreigners.

Our early Presidents also assumed control of foreign affairs, acting frequently without prior legislative authority in situations where their decisions could have led to armed conflict. Washington, for example, decided that our treaties with France should not be construed to require cooperation against Britain. The ensuing debate between Madison and Hamilton (as Helvidius and Pacificus) ended in a clear cut victory for Washington when Congress expressly approved his conduct and adopted his plan for enforcing neutrality. Jefferson resorted to threats and promises to obtain advantages for the nation. Most significantly, he invoked for the first time the so-called emergency power, to justify legislatively unauthorized military purchases and preparations after the British warship Leopard attacked the American public vessel Chesapeake. Madison exercised the discretion over trade restrictions that Congress had delegated him in a manner favorable to France, in order to force Britain to cooperate; his conduct seems to have made more likely the war that ensued. The emergency power was invoked again by General Andrew Jackson in New Orleans, and approved by Madison in at least a limited form. Monroe unilaterally announced the doctrine that bears his name, warning Europe and Russia against colonizing in the Americas or interfering with the new South American republics.

To what extent did the early Presidents consult or at least inform Congress of their foreign-affairs and military initiatives? In general, those great and respected leaders appear to have felt they had authority

to withhold information from Congress even when Congress requested the information without any qualification allowing withholding. Washington's Attorney General, William Bradford, specifically advised him that every call for information, "where the correspondence is secret and no specific object pointed at, must be presumed to proceed upon the idea that the papers requested are proper to be communicated. . . ." And in that specific instance Washington withheld from the Senate parts of certain dispatches from Gouverneur Morris, the disclosure of which would have undermined Morris' capacity to function as Minister to France. The other early Presidents also delayed information, or withheld it entirely, despite the absence of explicit legislative authority to do so. At least some of these withholdings were part of presidential schemes that had to be kept secret to be effective, most notably the attempts to undermine Spain in the Floridas, and the Seminole War. Executive withholdings were by no means frequent. But they were extraordinarily significant, and generally concerned the most sensitive and important issues of that time.

Consultation occurred frequently on numerous issues. But the early Presidents unquestionably avoided consulting Congress at several crucial points. The war between France and Britain presented George Washington with a foreign affairs crisis. His Cabinet unanimously recommended, however, that Congress not be summoned early; instead, he unilaterally proclaimed and enforced neutrality. The Cabinet's fear, apparently, was that Congress might be too influenced by France's popularity in the United States to be able to adopt the policy most likely to avoid war. Washington also delayed transmitting to legislators and the public the terms of the Jay Treaty,

because he feared its unpopularity would destroy its chances for approval. When he finally sought its ratification by the Senate, he did so secretly.

Jefferson's Republican philosophy proclaimed the impropriety of executive action without consultation. Yet, when confronted with the Chesapeake affair, Jefferson and his Cabinet decided against calling back Congress. Representative John Randolph later complained that "Congress ought to have been immediately convened . . . at a time when they would have felt a deep and particular sense of national indignity . . . and not to have suffered this impression to be weakened." Others applauded Jefferson, however, for postponing the legislature's involvement "till the fermentation should have subsided," as "the hour of extreme feeling was not the proper time for deliberation"; and Congress overwhelmingly approved Jefferson's "emergency" expenditures. Consultation with Congress on the war with Tripoli took the form of requests for authority and vessels; no information was given to the legislature of specific tactical decisions before their implementation, including the scheme to overthrow the Pasha. Madison and Monroe consulted even less than Jefferson, particularly in connection with their initiatives in the Floridas. Even after Madison decided to take control of parts of West Florida, he kept his proclamation and orders from Congress and the general public until the policy had been fully implemented.

This recitation of executive initiatives in foreign and military affairs, and of executive control of information, fails to convey the caution and deference to Congress that our early Presidents simultaneously exhibited. Washington acted unilaterally to preserve peace, not to make war, and he (and his successors) invariably went to Congress for after-the-fact approval.

Adams felt war with France was inevitable and avoided a declaration of war because of its unpopularity. But he sought prior legislative approval of virtually all military actions. Jefferson used threats and secrecy as regular tools of foreign policy; yet he moved with extreme caution in all military matters. Madison and Monroe aggressively and secretly sought the Floridas, but these were popular objectives and involved a minimal commitment of material and military resources. Their efforts cannot be equated with unpopular, massive engagements, such as we made in Korea and Vietnam. Furthermore, their secret conduct suggests that they regarded their actions as constitutionally questionable if not improper.

The final and perhaps most significant aspect of early practice concerning war-related powers is those situations in which confrontations occurred between Congress and the President. Though our early Presidents were forceful and acted unilaterally, Congress demonstrated on several occasions that it could greatly influence if not control the nation's policies when it chose to do so. Washington had his way, for example, in obtaining the appropriation needed to implement the Jay Treaty. But the vote in the House was extremely close, and demonstrated that the House would not necessarily regard itself bound to supply funds for all treaties. During the Quasi-War, a naval vessel went beyond the terms of a statute that described when enemy vessels could be seized. The Supreme Court upheld the imposition of civil penalties on the vessel's commander, reasoning that, even if the President could have ordered the enemy vessel seized in the absence of applicable legislation, Congress had limited the President's power to the types of seizures it had explicitly allowed. Jefferson's influence was

enormous; but even he was unable ultimately to force Congress to accept an embargo. And when he failed to provide information, Congress induced greater cooperation by refusing to adopt legislation he proposed.

A particularly dramatic (and little known) confrontation took place between the Senate and President Madison. The conflict began when the President appointed Albert Gallatin to serve as one of three ministers to negotiate with Britain, retaining in the meantime his position as Secretary of the Treasury. The Senate authorized one of its committees to meet personally with Madison and discuss the matter. Madison agreed to meet the committee but refused to discuss the appointment, asserting that the presidency would be undermined if such a means of obtaining information were tolerated. The President noted, however, that the Senate was free to reject the appointment, which is precisely what it did. Another dispute between the Senate and President Madison was less dramatic but perhaps more important. Madison twice sought approval to take over East Florida. The Senate twice refused. He stubbornly delayed withdrawing American forces, hoping the declaration of war against Britain (Spain's ally) would induce a change in policy. But eventually he acquiesced in the Senate's policy. President Monroe was probably influenced to recognize the South American republics more quickly than he otherwise might have, because of a Senate resolution calling on the United States to recognize them. In sum, therefore, the record shows that Congress more than held its own in confrontations with even the most influential Presidents. The details of all these examples, and many others, may be found in my book.

II. CONCLUSION

My research convinces me that, contrary to this Committee's previous assumptions, the war powers were exercised in roughly the same manner during the first forty years of our history as they have been exercised during much of the last forty years. Until very recently, the predominant pattern of conduct that occurred during both periods was one in which Congress delegated broad power and discretion over foreign and military affairs as well as over the control of information. Presidents in both periods therefore controlled the processes of formulating as well as of implementing foreign policy. Furthermore, Presidents during both periods exercised independence and leadership even in the absence of clear legislative authority, and sometimes despite the presence of apparently inconsistent legislative direction. Finally, recent Congresses have been no less successful in controlling Presidents when determined to do so than were our early Congresses. This was most clearly demonstrated by the legislature's insistence that an end be made of the war in Indo-China, and that no military involvement be permitted in Angola.

There are, of course, important differences between practice during the first forty years and the most recent period. The most awesome difference is in scale. The nation has much more military power at its continuous disposal today, with troops and weapons all over the world. Decisions today must often be made much more swiftly, though consultation with Congress is much easier to accomplish than in earlier times. Perhaps the most blatant difference, however, is in rhetoric. Our first Presidents were overtly deferential to Congress, whereas more recent ones have been challenging and condescending. Most importantly, none of our early Presidents claimed that their constitutionally granted powers were beyond the

legislature's authority to control. None also claimed he could freely use whatever raw power he had -- monetary, diplomatic, and military -- to advance the "national interest." Even Jefferson's rationale for escaping the limits imposed by the Constitution required an emergency as well as after-the-fact legislative approval. Though early Presidents claimed and exercised authority to withhold information, none ever claimed that Congress lacked power to compel production or to punish for nonproduction.

The similarities between early and recent practice remain impressive, however. They prevent us from assuming that executive leadership is necessarily improper or unsuccessful. Times have changed, and we no longer need to allow Presidents to work secretly for the acquisition of territory. But even if Congress is determined to reduce the Executive's power, the early history is instructive. It shows that such a reduction will be difficult to accomplish because Congress itself has been a primary if not the most important reason for the manner in which foreign and military affairs are conducted. The task before you is not simply to return to the practice of some bygone era of constitutional propriety, but to change the way these matters have been handled since the outset. You will not only have to change the presidency to do this. You will have to change Congress as well.

Looking at the War Powers Resolution in historical perspective, I cannot escape the conclusion that it is entirely consistent with established patterns of constitutional conduct. Despite assertions that it grants the President nothing, it can be construed as perhaps the most sweeping delegation ever made of the power to use force. If section 2(c) is amended as proposed to include the power to protect Americans and the power to forestall direct and imminent threats of an attack on the United

States, it will essentially permit, in advance, almost all the uses of force ever undertaken by a President. If section 2(c) is made operative as a prior restraint, rather than left as an incomplete catalogue, the argument that it prohibits what it excludes adds force to the contention that it permits everything else.

The advantages of listing or delimiting the President's authority have never been clear to me. What uses of force are implicitly forbidden? Given the fact that American troops and nationals are everywhere in the populated world, the statute cannot prevent a President from involving us in hostilities if he is determined to do so. What it most clearly seems to prevent is the use of force to protect or rescue foreign nationals. On this point, though Presidents might be constitutionally empowered in some situations to protect foreign nationals, as Jefferson and Madison did, Congress could in my judgment limit this power. Yet, is it worth granting or confirming so much in order to take away so little?

The present War Powers Resolution also implicitly grants considerable power over information. It requires very little in the way of consultation and reporting; but by requiring anything it enables Presidents to contend, with minimal effort, that they have adequately involved and informed the Congress. The proposed changes would go a long way toward correcting this situation, especially a requirement that the President consult before using the armed forces. I cannot comment on the wisdom of all the proposed information requirements. But very little authority exists to support any limitation on Congress' power to request information it deems useful in fulfilling its obligations. A President could nevertheless withhold material; but he would assume a grave political and legal risk

in doing so, especially if Congress adopts a safe and sound mechanism for receiving and handling the information it seeks.

Historically, as we have seen, implied authority has been a great source of executive power. The War Powers Resolution apparently allows Presidents to rely upon implied authority in using the armed forces from 60 to 90 days. After the 60 to 90-day period, the Resolution purports to terminate the President's power to act on the basis of implied authority, requiring legislation that explicitly allows the action involved and specifically refers to the Resolution. This provision will not in my judgment prevent Presidents from implying authority. Congress cannot in 1973 or in 1977 convert for all time a situation in which the President has acted and the Congress has not, into a situation in which the President is acting inconsistently with the will of Congress. The President is undoubtedly less free to imply authority after the Resolution than before, but the requirement that he act pursuant to specific authority is simply not as authoritative evidence of a future Congress' will as an outright prohibition aimed at specific conduct. The warning that authority cannot be implied from an appropriation is an especially weak device. I personally doubt that any one Congress has the power to decide for all others, and for the courts, what constitutes consent. If a later Congress is found to have intended to consent by granting funds, it will probably be assumed implicitly to have modified the existing Resolution. Another provision suggests that authority to use the armed forces may not inferred from treaties; but that provision is ambiguous and specifically exempts any authority the President might derive from the Constitution.

The proposed amendments would change the Resolution by prohibiting the use of funds for any purpose not expressly authorized. First, I disagree with the view that Congress cannot use its power over funds to prevent hte use of force, or to stop a President from an action he has undertaken. On the other hand, even if Congress' power over funds is absolute as a practical matter, it does not follow that every use of that power would be constitutionally proper, let alone wise. For example, Congress should not -- even if it could -- pass a law cutting off funds unless a President abides by the tactical decisions of a designated military officer or of a congressional committee. Other, equally objectionable statutes could readily be imagined. A fund cut-off directed generally at types of operations, such as efforts to rescue foreigners, or aimed at terminating a specific Executive initiative, is unlikely to pose any constitutional difficulty, however.

The fact remains, though, that the fund cut-off when used as a prior restraint suffers to some extent from the same weaknesses as would the proposed catalogue of presidential power to use force. No President could ignore an implicit prohibition of some types of operations, and if a fund cut-off were added the force of the prohibition would increase. Nevertheless, a fund cut-off would not entirely prevent Presidents from implying authority from statutes and treaties. Situations would undoubtedly arise in which Presidents could reasonably contend that an expenditure was justified because a given operation was implicitly authorized. Unless Congress then acted to remove the basis for the implication, or to prohibit the specific operation and expenditure, the President's decision would probably be final as a practical matter. Furthermore, I cannot help but feel that Presidents would seldom need to argue for implied authority during the first 60 to 90 days of a military operation, if the proposed amendments are adopted. His powers would be so broad that he could

somehow justify almost every readily conceivable use of force. After 60 to 90 days have passed, he would have somewhat more difficulty. But if he could find a reasonable basis for implying authority, he could use the same basis to legitimize necessary expenditures. As a practical matter, Congress would then have to act to stop him. One to look no further to find evidence that this is true than the fact that President Ford ignored with impunity the several laws prohibiting the use of funds for military operations in Vietnam and Cambodia. The President unilaterally concluded that the laws were not intended to apply to evacuations, and his reading prevailed in the absence of further legislative action.

This brings me, then, to the Resolution's provisions that allow Congress to express its disapproval of action after they are undertaken. Madison long ago anticipated that each branch would compete for authority with all its assigned powers. It is in this spirit, I feel, that we must view recent executive assertions that Congress is unable to regulate or prohibit various types of activity. I have never found, nor have I been shown, an instance in which a President has openly disregarded an unambiguous legislative prohibition adopted to prevent a specific undertaking. Presidents or their officers may claim that they are free to disregard such prohibitions, but these claims are principally designed to avoid having the laws passed. They would dissipate like so much bluster in the face of concrete legislative directives.

The question remains whether a concurrent resolution may constitutionally be utilized to prohibit executive conduct arguably authorized by the Constitution. This is a matter on which there are no specific precedents during the first forty years. But I doubt that a concurrent

resolution could be given much less weight than legislation if it pertains to the use of force. A concurrent resolution would be somewhat less authoritative than a joint resolution or law, but it would ordinarily represent at the very least a legislative disclaimer of responsibility and support. If the proposed amendments are adopted, Congress could add to its resolution a provision ordering that no further funds be expended on the specific project. Such a provision might be questionable if court enforcement were required. But a President would be unlikely to use funds for military actions opposed by a legislative majority.

The only other weakness I have heard expressed about the present Resolution's provision allowing Congress to terminate an executive operation is that congress might not do so. The theory seems to be that "prior" prohibitions are needed to prevent the President from undertaking at least some operations so that the "subsequent" prohibitions need not be relied upon. History casts no light on this matter. Common sense would seem to indicate, however, that the Resolution's authority could only be undermined by building in prohibitions that Congress will later be unwilling to enforce.

Many writers persist in seeking to have Congress clarify its powers, generally at the expense of Executive authority. Whether the War Powers Resolution achieves either clarity or reduced Executive power seems dubious to me. Its great value lies, as Senator Javits has said, in forcing Congress to consider and react to presidential initiatives. To the extent this value is served by the proposed amendments, they seem desirable and unobjectionable.

To the extent the amendments seek to limit Executive power further, however, I would urge this Committee to turn away from legal questions and to focus on the wisdom of further limitations. Rather than asking whether you can pass these amendments, I urge you to ask whether you should. Our early history shows that the national interest can be promoted by innovative Presidents, operating under the ultimate control of the legisltaive branch. It is the national interest that should guide you in clarifying powers, if further clarification is needed, and not the myopic notion that equates better or even more peaceful government with more legislative control.

Senator CHURCH. Thank you very much, Professor, for an excellent presentation, as have been this morning.

Our final panelist is Myron Curzan. Mr. Curzan, please proceed.

[Mr. Curzan's biography follows:]

BIOGRAPHY OF MYRON P. CURZAN

Attorney-at-Law, Arnold & Porter, Washington, D.C.—Mr. Curzan graduated from Columbia College in 1961. He received a masters degree from Yale University in 1962 and graduated from Columbia Law School in 1965. After serving as a legislative assistant to Senator Robert F. Kennedy, he joined his present firm. Since then, he has specialized in housing and community development work. He has also worked on various foreign policy issues which raise particular constitutional problems. In particular, Mr. Curzan worked closely with Senator Thomas Eagleton in the drafting of the Senator's original War Powers Resolution and in the development of historical and constitutional precedents supporting that Resolution. He has spoken at several public forums in regard to the relative powers of the Legislative and Executive Branches in the war-making area.

STATEMENT OF MYRON P. CURZAN, ARNOLD AND PORTER, WASHINGTON, D.C.

Mr. CURZAN. Thank you, Mr. Chairman and members of the committee.

I am pleased to appear before you to discuss possible legislative amendments which would improve the War Powers Resolution of 1973.

I have submitted a lengthy statement which I would like to appear in the record. Today I would prefer to touch on various portions of that statement and move from there to a discussion of certain of the more specific amendments which have been suggested in the committee print which is now before this committee.

I think it is important to recognize that today we have the luxury of reviewing this important legislative enactment—the War Powers Resolution and possible amendments to it—during a period of relative international calm and good feeling between the executive and legislative branches. It was not so during the early 1970's, when the original hearings on war powers legislation took place before this commitee. Then, all statments and actions had to be judged against the backdrop of the war in Vietnam. Then, too, the Congress, which was locked in an ongoing and escalating struggle with President Nixon as to his rights and powers, seemingly believed that since the President opposed the concept of any War Powers Resolution, the Congress' most important function was to pass a bill and then override a Presidential veto.

But in this process, however, the Congress lost track of some of the substance of its actions. I believe that the result was a poorly drafted compromise resolution.

I was spending a fair amount of time then working with Senator Eagleton on his bill and its relationship to Senator Javits' and Senator Stennis' proposals. I think that in fact, as these bills went through the legislative process, the basic theory of restraining Presidential action was lost and that, in fact, the resolution—and in this I agree with Professor Sofaer—tends to provide the President with more power than the Constitution originally contemplated he should have.

It is for these reasons that various proposals are now circulating to amend this resolution so that it will conform to the intent of various Senators and Congressmen when they introduced and supported war powers legislation in the early 1970's. I think that to understand the significance of these proposals and the problems posed by the War Powers Resolution of 1973—as well as some the conflicting comments of the three other panelists—it would be useful to take just a few minutes to provide a brief historical overview as to what the Founding Fathers contemplated in the war-making area at the time that the Constitution was adopted.

With that, let me just dwell for a minute on what I would view as certain very basic principles of the Constitution.

First, the Founding Fathers were reluctant to grant too much authority to the Chief Executive. Their concern was that this country's President should not possess a variety of powers which he might exercise exclusively at his own whim and in the absence of any collective judgment.

Second, I think there is a corollary to this concern about restricting the authority of the Chief Executive. The Founding Fathers believed that within the framework of the powers delegated to the central government, the widest range of authority should be granted to the legislature. A two-house Congress would be comprised of a number of individuals. Its decisions would therefore be reached through a process of deliberation and would represent a collective judgment. It was not without forethought that Hamilton conceded "the superior weight and influence of the legislative body in a free government."

Third, and I think this becomes very important as we consider the relative powers of the President and Congress, the framers of the Constitution were aware that by giving specific and residual powers to the Congress and a somewhat undefined charter to the President, they had created a system of overlapping authority.

However, I believe that they had little doubt that the overriding power to resolve this conflict would remain with the Congress.

Again, it was Hamilton who wrote: "The legislature is still free to perform its duties, according to its own sense of them though the Executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decisions."

In short, a Congress moving to reverse the policies of a President should step carefully. Nevertheless, it could not be forbidden ultimately to take steps which might circumscribe antecedent Presidential action. Collective decisionmaking under the Constitution was to be given more weight than singular judgment.

SPECIFICATION OF PRESIDENT'S CONSTITUTIONAL POWER

I think, as you move into the war powers area itself—and this has certainly been detailed in Senator Javits' book and in Senator Eagleton's book—the Constitution is fairly clear in terms of where the wide range of these powers is to be left. It is left with the Congress, and while some of the statements made here go to the problems that the Congress would get into if it stepped into the tactical area of warfare, I think that this is essentially a straw-

man. The concern of the Founders was that the Congress should be able to set an antecedent state of affairs in terms of war-making, and, as has been so fully dealt with during the Vietnam and Cambodian situations—and Senator Church was a spokesman for the Congress during this period—there was certainly no feeling that the Congress could not step in to again deal with the policy-making matters, even if it had created the antecedent state of warfare.

With that I think I would like to turn to the committee print itself which is before the committee and discuss at least some of its aspects and why I believe they would enormously strengthen the War Powers Resolution itself.

Senator JAVITS. May I ask one question of fact? Are you aware of the fact that when Senator Eagleton testified, that was rather streamlined, down to the question of the specification of the President's constitutional power, and that he took a good deal out of that prospective legislation?

Mr. CURZAN. Out of the current print that has been circulated?

Senator JAVITS. That is correct. But please testify as you wish. I just thought I should bring that to your attention.

Mr. CURZAN. I think that all I was presented with was the original print, Senator. I would like to comment on that. I am not familiar with a more narrow version of it.

The committee print's key provision is designed to make section 2(c) of the War Powers Act mandatory rather than precatory. In short, this proposal sets forth in detail the necessary guidelines for restoring the general process of joint congressional and Presidential decision-making before this country engages in hostilities abroad. At the same time, it leaves the President with sufficient discretion to take emergency action in response to attacks, or the "direct and imminent threat" of attacks, on the United States and its forces and under certain limited circumstances, as was in this print, to rescue American civilians under seige abroad.

Correctly, in my judgment, it takes this step by providing the greatest discretion to the President when he is dealing with an attack or the imminent danger of an attack upon the United States.

In line with historical precedents and sound constitutional theory, it establishes the narrowest range of Presidential power in the third category where American citizens and nationals abroad are under attack.

Explicitly, it requires that all military action taken in emergency circumstances be directly proportional to the threat involved.

The proposal then goes on to establish several other important propositions which are not covered by the present War Powers Resolution. Thus, it takes the constitutionally permissible step of prohibiting the use of funds by the President whenever the use of the armed forces would be prohibited under the resolution.

In effect, a double prohibition on unauthorized congressional action is thereby established. By utilizing the power of the purse, the Congress has removed any claim of executive branch residual authority that is inconsistent with an amended War Powers Resolution.

Again, as I think has been established, both by the framers and as noted in certain judicial decisions, the most famous being the "Steel Seizure Case," in this area of concurrent power, the Congress does have the ability to take action and to restrict Presidential power.

PRESIDENTIAL/CONGRESSIONAL CONSULTATION

Second, the proposal broadens the concept of required Presidential consultation with the Congress to encompass situations where American forces are not being introduced into hostilities or likely hostilities. This step should serve to foster the principle of executive branch-legislative branch consultation in all situations involving use of the Armed Forces. I would think that this change would be welcomed by this administration, which has pledged itself to keeping Congress fully informed of its actions in the foreign policy field.

INTRODUCTION OF ARMED FORCES INTO HOSTILITIES DEFINITION

Third, the proposal tightens the definition of when armed forces shall be considered to have been introduced into "hostilities," so as to encompass defensive responses to attacks, and clarifies the fact that aerial bombardments shall be treated as hostilities.

UNILATERAL COMMITMENT OF ARMED FORCES BY PRESIDENT

Fourth, it insures that in virtually all cases, unilateral commitments of the Armed Forces by the President will be subjected to congressional review and that without the passage of new legislation, their involvement would have to be terminated within a 60-day period. Here, while I think that there is some question as to the ability of Congress to take this action by concurrent resolution instead of the more normal route of a legislative enactment or a joint resolution, I think that a fairly strong legal case could be presented for the Congress in this particular warmaking area. Therefore, a concurrent resoltuion should be satisfactory.

Finally, the proposal makes clear that existing treaties, broad executive agreements, and concurrent resolutions do not constitute present authority for a unilateral Presidential use of American Armed Forces. Again, I believe that this step is clearly constitutional and in line with the underlying proposition that the Congress and the President should deal with specific situations in which hostilities may result at the time that these factual situations arise.

The theory that broad mutual security treaties or executive agreements should somehow be treated as self-effectuating when specific circumstances arise is antithetical to the constitutionally prescribed warmaking powers.

In my judgment, the proposal which has been circulated is an important step forward in righting the balance of power between the President and the Congress in the warmaking area. Its adoption would signal the end to an era in which Congress' role in the warmaking process, probably the most important type of decision that can ever face a country, is to rubber stamp or retrospectively reverse Presidential action.

Thank you for giving me the opportunity to appear here before you.

[Mr. Curzan's prepared statement follows:]

STATEMENT OF

MYRON P. CURZAN

ARNOLD & PORTER, WASHINGTON, D.C.

Mr. Chairman, I am pleased to appear before this Committee to discuss possible legislative amendments which would improve the War Powers Resolution of 1973.

Today, we have the luxury of reviewing this important legislative enactment and the amendments which should be made to it during a period of relative international calm and good feeling between the Executive and Legislative Branches. It was not so during the early 1970s when the original hearings on War Powers legislation took place before this Committee. Then, all statements and actions had to be judged against the backdrop of the war in Viet Nam. Then too, the Congress, locked in an ongoing and escalating struggle with President Richard Nixon as to his rights and powers, seemingly believed that since the President opposed the concept of any War Powers Resolution, its most important function was to pass a bill and then override a Presidential veto.

But in this process, it seems to me that the Congress lost track of the substance of its actions. The result was a poorly drafted compromise Resolution. Its theory was to restrain Presidential action. In fact, it provides the President with more power than the Constitution originally contemplated he should have in the war-making area.

It is for these reasons that various proposals had been made to amend this Resolution so that it will conform to the intent of various Senators and Congressmen when they introduced and supported war powers legislation in the early 1970s. The purpose of these proposals is to redress the present balance of power and establish an institutional structure within which both the President and the Congress can perform their constitutional functions when this country must engage in hostilities.

To understand the significance of these proposals and the problems posed by the War Powers Resolution of 1973, I think it necessary to provide a brief historical overview as to what the Founding Fathers contemplated in the war-making area and what time and strong Presidents have attempted to do to

this framework. In setting forth various of these propositions, I shall be borrowing freely from material incorporated in Senator Eagleton's book, War and Presidential Power. I had the privilege and pleasure of working with the Senator on that book and I must admit to being a captive of some of its prose and much of its historical analysis. In my judgment, it still sets forth the most accurate perspective for reviewing the accretion of Presidential power in the war-making area and the right of Congress to assert its constitutional heritage and rectify the balance of power between these two branches of the federal government.

A. The Constitution and Its Underlying Principles

It is clear that the men who wrote the Constitution were influenced not only by the writings of theoreticians, like Locke and Montesquieu, but by the governmental practices and procedures which either were preached and followed or simply preached in England. At various times, they noted that many of their ideas

were in fact derived "from the nation from whom the inhabitants of these states have sprung." (The Federalist Papers #26.) In formulating a Constitution to create a central government of broad but not unlimited powers, our Founding Fathers therefore worked from certain basic premises.

First, they were reluctant to grant too much authority to the Chief Executive. All of them were familiar with the autocratic powers which had been exercised over the colonies by the King of England. Their concern was that this country's President should not possess a variety of powers which he might exercise exclusively at his own whim and in the absence of any collective judgment. Alexander Hamilton -- often cited as the leading proponent of the need for extensive Presidential authority -- wrote that the Executive Branch shall deal with "executive details" in its administration of government. (The Federalist Papers #73.) That is not to say that the Founding Fathers believed that the Chief Executive should be completely

stripped of discretion and left at the mercy of the other branches of the central government. Rather, they preferred that the Chief Executive's discretionary powers be set within structured guidelines and be subject to legislative check before they carried this country too far down a path selected by one man on the basis of his singular wisdom.

Second, as a corollary to this concern about restricting the authority of the Chief Executive, the Founding Fathers believed that within the framework of the powers delegated to the central government, the widest range of authority should be granted to the legislature. A two-house Congress would be comprised of a number of individuals. Its decisions would therefore be reached through a process of deliberation and would represent a collective judgment. It was not without forethought that Hamilton conceded "the superior weight and influence of the legislative body in a free government." (The Federalist Papers #73.) And it was not without concern that he defended the

need for the independent election of a Chief Executive to serve a reasonable number of years so that he might set himself against "the tendency of the legislative authority to absorb every other." (The Federalist Papers #71.) To the Founding Fathers, strong Presidents and an independent judiciary would be needed to counter-balance the powers of the Congress. But it was in Congress -- with its more cumbersome and therefore deliberative decision-making process -- that the framers of the Constitution rested their primary hopes for thoughtful policymaking. Thus, it was the Congress which not only received the longest and fullest list of powers but was also given the residual authority:

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

To James Madison, it was this grant of power which could provide the Congress with the ability to usurp authority from the other two branches of the central government and the States. Obviously, that was the danger inherent in the grant. Nevertheless, to Madison, this

risk had to be taken, for if Congress should be "without the substance of this power, the whole Constitution would be a dead letter." (The Federalist Papers #44.)

Third, the framers of the Constitution were aware that by giving specific and residual powers to the Congress and a somewhat undefined charter to the President, they had created a system of overlapping authority. They had little doubt that by doing so they were creating the basis for possible conflict. How these struggles -- if they occurred -- should be resolved was also clear to them. Compromise should be sought, but if inter-institutional negotiations proved fruitless, overriding power would remain with the Congress. Again, it was Hamilton who wrote:

> "The legislature is still free to perform its duties, according to its own sense of them; though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decisions." (7 Works of Alexander Hamilton 83 (J. Hamilton ed. 1851).)

In short, a Congress moving to reverse the policies of a President should step carefully. Nevertheless,

it could not be forbidden ultimately to take steps which might circumscribe antecedent Presidential action. Collective decision-making -- under the Constitution -- was to be given more weight than singular judgment.

B. An Application of These Basic Principles to the War-Making Powers

Obviously, the results of applying these principles appear throughout the Constitution. But in no area are they more evident than in the extensive treatment given to the war-making powers by the Founding Fathers. Unlike most issues which are dealt with by the Constitution through one reference, the question of waging war and building up military forces is treated at various places throughout that document. Thus,

-- Article I, Section 8 gives the Congress power to "declare War," grant "Letters of Marque," order "Reprisal," "raise and support Armies" but for no longer than two years at a time, "provide and

maintain a Navy," make rules which will regulate and govern the military forces, and provide for organizing the militia and calling it up so that insurrections can be suppressed and invasions repelled.

-- Article I, Section 10 forbids the States -- absent Congressional consent -- from keeping military forces in time of peace or from engaging "in war, unless actually invaded, or in such imminent Danger as will not admit of delay."

-- Article II, Section 2 makes the President "Commander in Chief" of the Armed Forces as well as the state militia, when it is called into service for use by the federal government.

-- Article IV, Section 4 provides that the central government shall guarantee "a Republican Form of Government" to every state and "shall protect each of them against Invasion."

To the framers of the Constitution, these provisions were not designed to provide specific answers to every war-making question. Rather, they were structured so that the Congress, the Chief Executive, and the States might understand how they were to mesh their roles in protecting this Nation from possible enemies. For the framers, even going to war was intended to be an orderly process in which reason and caution would not only be given every opportunity to play a part before conflict began, but would even be permitted a role once hostilities had actually commenced.

In short, it was recognized that war brought too many awesome consequences to be permitted to start through chance or mistake. To the framers of the Constitution, basic ground rules should therefore be set which might at least control "the dogs of war" to as large an extent as possible. Their actual guidelines were relatively simple.

First, they drew a key distinction between offensive and defensive hostilities. If the United States were attacked, the President would respond. He would

repel the attack. If an individual state were militarily challenged -- even it would have to possess a right to fight back.

Second, in cases where defensive responses were supplemented or replaced by offensive action, the Congress should participate before any final decision was made. That time might be lost in this process was viewed as no real reason for concern. To the framers, the judgment of the entire nation, acting through its elected representatives, should be sought once the issue no longer involved the repelling of attacking forces.

Third, the President's role in the war-making process would be to direct military operations. If simple day-to-day tactics were at issue, Congress would play no part. This specific decision of the draftsmen of the Constitution was made clear when they decided to change the term "make war" -- which might imply the idea of Congress conducting hostilities -- to "declare war" -- which carried with it the connotation of Congress simply initiating hostilities.

Concomitantly, the exact role of the President as Commander-in-Chief was clarified by both the delegates to the Constitutional Convention and the authors of The Federalist Papers. To the framers of the Constitution, the title "Commander-in-Chief" did not carry with it war-initiating powers. In words that the members of this Committee have heard many times before, Federalist Paper #69 declared that to be Commander-in-Chief:

> 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 of which, by the Constitution under consideration, would appertain to the legislature."

Fourth, the start of hostilities was not to mark the end of Congressional responsibility. Clearly, Congress was not to be involved in making particular tactical decisions; but policymaking could still take place during wartime. Thus, the changeover from defensive to offensive action would have to be sanctioned by the legislature. Similarly, decisions resulting

in major changes in tactics -- changes which might bring new opponents into a war, for example -- would constitute an appropriate subject for Congressional concern.

C. Interpreting the War-Making Powers

1. The formative years under the Founding Fathers. During the period following the adoption of the Constitution, that document's provisions dealing with war-making and the use of American military forces were interpreted by all three branches of the federal government. What makes this historical overlay so significant is that most of the decisions and writings of this period were the product of men who had either participated in drafting the Constitution or were intimately familiar with the context of its provisions. In seeking out the meaning of the Constitution's war-making powers, it seems obvious to me that we should place great weight on the manner in which these men -- when placed in roles requiring daily decision-making -- approached the vital questions of war and peace and the use of American military power.

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The United States' first trial by arms came in 1798 -- with its oldest ally, France. It was the product of a number of French actions, including various depredations perpetrated by French cruisers on this country's shipping. President John Adams took no independent action to initiate hostilities. Rather, he waited until the Congress had passed a variety of statutes suspending commercial relations with France and authorizing American vessels to seize certain French ships as well as other ships trading with the French. Thus, it was Congress which took the role of originating and broadly defining our combat response to a hostile foreign power.

What is also interesting for present purposes is that this naval struggle with France produced a series of judicial decisions by our Supreme Court -- decisions which cast light on the principles underlying the war-making provisions of the Constitution.

In Bas v. Tingy, 4 U.S. (4 Dallas) 37 (1800), the Court was faced with the issue whether the United States was at war at the time that an American ship

was rescued from the French. The Court ruled that at the time of the naval rescue, the Congress had taken action placing us at war -- even though the hostilities authorized were limited and involved only naval combat. In reaching this decision, the Court laid down the proposition that under the Constitution, Congress can declare war in either of two ways -- as a public or perfect war or as a limited or imperfect war. Justice Washington went on to state:

> "If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nations declaring war, are authorized to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war all the members act under a great authority, and all the rights and consequences of war attach to their condition.
>
> "But hostilities may subsist between two nations, more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no further than to the extent of their commission. Still, however, it is a public war, because it is an external contention by force between some members of the two nations, authorized by the legitimate powers. It is a war between two nations, though all the members are not authorized to commit hostilities such as in a solemn war, where the government restrain [sic] the general power."

To Justice Washington, this "war of the imperfect kind, [was] more properly called acts of hostility or reprizal" and was within the constitutional power of Congress to declare. Justice Chase, concurring, noted that Congress had taken the permissible route of declaring "hostilities . . . by certain persons in certain cases." He went on to state that for Congress to take this type of deliberate action "only proves the circumspection and prudence of the legislature."

If the Bas case should be interpreted as delineating the range of Congressional powers to declare and also to circumscribe hostilities, then Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801) should be read as putting the Court on record as to which branch of government must bear the sole responsibility for taking this country into either full-scale or limited hostilities. In Talbot, Chief Justice John Marshall wrote:

> "The whole powers of war being, by the Constitution of the United States, vested in congress, the acts of that body alone can be resorted to as our guides in this inquiry. It is not denied, nor in the course of the argument has it been denied, that congress may authorize general hostilities, in which case the general laws of war apply to our

> situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed." (Emphasis supplied.)

Three years later, Marshall spoke again on the Constitutional structuring of the war-making powers. In Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804), the issue before the Court again involved the legality of a ship seizure during naval hostilities. In a short opinion, Marshall held that the seizure was in conflict with the Congressional will; therefore it was illegal. In reaching this decision, the Chief Justice stressed that if Congress had simply declared a naval war against the French, the President, "as Commander-in-Chief of the armies and navies . . . might . . . without any special authority for that purpose," have had power to seize an American ship bound from France. But Congress had not just taken this type of broad action. It had also stated that only American ships bound to France could be seized. By doing so, it had effectively preempted Presidential discretion and "prescribed that the manner in which this law shall be

carried into execution . . . exclude[s] a seizure of any vessel not bound to a French port."

Thus, through these three early decisions, the Supreme Court set forth a solid underpinning for later interpretations of the war-making powers. To the Court, "the whole powers" of entering into an offensive war were vested in the Congress "alone." Included in these powers was authority to declare either general or narrowly limited hostilities. Presidential authority to take offensive action under the guise of the Commander-in-Chief power arose only after Congress had acted. Moreover, while the tactics of warfare might require that the President have certain discretionary powers, even these powers could be narrowed by precedent legislative action.

This straightforward interpretation of the constitutionally prescribed dichotomy regarding the war-making powers was not held by the Court alone. In 1789, Thomas Jefferson wrote:

> "We have already given in example one effectual check to the dogs of war by transferring the power of declaring war from the Executive to the Legislative body, from those who are to spend to those who are to pay." (7 Writings of Thomas Jefferson, at p. 461 (Lipscomb and Bergh eds. 1903.)

In 1793, Secretary of State Thomas Jefferson wrote that if this country should ever decide to take "reprisal on a nation . . . Congress must be called upon to take it; the right of reprisal being expressly lodged with them by the Constitution, and not with the Executive." (7 Moore, Digest of International Law 123 (1906).) Twelve years later, Jefferson -- now as President -- sent a message to the legislature in which he noted that "Congress alone is constitutionally invested with the power of changing our condition from peace to war." (1 Messages and Papers of the Presidents, 1789-1908 at pp. 389-90 (Richardson ed. 1908).)

In their actions, both Presidents James Madison and James Monroe followed this Jeffersonian

guideline. The War of 1812 was declared by Congress after Madison presented that body with a long list of grievances. In 1824, both President Monroe and Secretary of State John Quincy Adams made clear that the Monroe Doctrine, setting forth this country's protective interests in Latin America, did not alter the constitutional balance in regard to the question of war-making. Monroe stated that in responding to requests for assistance from Latin American countries, "The Executive has no right to compromit the nation in any question of war." (6 Moore, Digest of International Law 446 (1906).) Secretary Adams added that should an attack be launched by a nation in Europe on a South American Republic, the Monroe Administration's position would be that "the power to determine our resistance is in Congress." (Robertson, South America and the Monroe Doctrine, 30 Political Science Quarterly 89 (1915).)

But it is often argued that during this formative period in our history, one voice -- that of Alexander Hamilton -- was to be heard asserting

broader war-making powers for the President. In support of this theory, reliance is placed on his writings during the 1801 to 1805 war with Tripoli. The facts do not, however, support this proposition. Let us examine them: During the early years of our history, American shipping in the Mediterranean and Eastern Atlantic was preyed upon by the warships of the Barbary States. This country tried treaties and tribute to protect its commerce -- all to no avail. In 1801, Jefferson decided to station a squadron of American warships near Gibraltar to supervise our shipping. Tripoli declared war and attacked these ships. Under orders from Jefferson, the American fleet defended itself, disarmed the attackers, and then let them go. It was Jefferson's opinion that he was "unauthorized by the Constitution" and "without the sanction of Congress to go beyond the line of defense" in dealing with these attacks. (1 Message and Papers of the Presidents, 1789-1908 at pp. 326-27 (Richardson ed. 1908).) He thereupon requested "authorizing measures of offense;" the Congress quickly granted them to him.

Jefferson's timidity under these factual circumstances enraged Hamilton. In structuring his attack on the President, however, Hamilton took precautions to make it consistent with generally agreed upon principles regarding the war-making powers. He wrote:

> "'The Congress shall have power to declare war;' the plain meaning of which is, that it is the peculiar and exclusive province of Congress, when the nation is at peace, to change that state into a state of war; whether from calculations of policy, or from provocations or injuries received; in other words, it belongs to Congress only to go to war." (Morris, Alexander Hamilton and the Founding of the Nation 526 (1956).)

But to Hamilton, the Tripoli situation did not fall within these guidelines, for that country had declared war on the United States by proclamation and by deed -- through an attack upon American naval vessels. Under those conditions, he believed that the Constitution left the President with power to respond without requesting Congressional sanction. Surely, the President could take offensive action against the enemy -- at least to the extent of eliminating the particular military forces which were engaged in attacking U.S. forces.

By most standards, Hamilton's position is not an unreasonable one. (As pointed out below, similar propositions were also asserted by President Abraham Lincoln during the Civil War.) But one thing should be clear: Hamilton's statements during the war with Tripoli cannot reasonably be read as urging a new war-initiating power for the President which would be out of harmony with the basic principles underlying the Constitutional separation of powers. Hamilton asked only that the President interpret his right to repel attacks on American military forces as meaning that he could take all necessary action to eliminate the military threat which the enemy posed even before Congress acted.

2. The carry-forward of the basic concept behind the war-making powers. At various times in this country's history, the basic principles of war-making -- laid down in the Constitution and scrupulously followed in practice by the generation of men who wrote that document -- have been reasserted and supported by each of the three branches of the federal government. Moreover, in almost

every instance where major hostilities with a foreign power seemed imminent or were to be commenced, our Presidents have come to the Congress for authorization.

However, it would be senseless for any of us not to recognize that on many occasions -- and in particular during the twentieth century -- the Constitution's apparent directives on war-making have either been sharply stretched or totally disregarded by strong Presidents. At a later point in this statement, I shall deal with these various Presidential initiatives in an effort to describe and to categorize them in terms of their consistency with controlling Constitutional provisions. But for the moment, let me place these deviations in context by setting them against an historical backdrop of statements and actions consistent with the Constitutional provisions on war-making and the use of American military forces in foreign lands.

For example, in 1839, when war with Great Britain over competing claims to Maine seemed imminent, it was the Congress which responded by taking swift action to

authorize the President to conduct whatever military operations might be necessary. In 1851, Secretary of State Daniel Webster refused to permit U.S. military forces to participate in a dispute between France and the Kingdom of Hawaii. At that time, he wrote that:

> "the war-making power in this Government rests entirely with Congress; . . . the President can authorize belligerent operations only in the cases expressly provided for by the Constitution and the laws." (7 Moore, Digest of International Law 163 (1906).)

Three years later, President Franklin Pierce informed the Congress that Spanish forces in Cuba had seized an American vessel. He noted that he was seeking an "amicable adjustment" but that if negotiations failed, he would "not hesitate to use the authority and means which Congress may grant to insure the observance of our just rights." (5 Messages and Papers of the President 1789-1908 at p. 235 (1908).)

President James Buchanan, during his term in office, sought power from Congress to respond to attacks on American ships and U.S. citizens by various Latin American governments. In 1859, he stated:

> "The executive government of this country in its intercourse with foreign nations is limited to the employment of diplomacy alone. When this fails it can proceed no further. It cannot legitimately resort to force without the direct authority of Congress, except in resisting and repelling hostile attacks." (5 Messages and Papers of the Presidents, 1789-1908 at 516 (Richardson ed. 1908).)

Abraham Lincoln, too, saw Constitutional limits on Presidential war-making authority -- although as I shall discuss shortly, he interpreted his exclusive powers to repel attacks or insurrections which threatened the very survival of the nation quite broadly. But on the question of Presidential power to invade foreign countries in order to prevent limited attacks on American citizens or their property, his views were in line with those of Jefferson. He wrote that the Constitution was framed so "that no one man should hold the power of bringing oppression upon us "through a commitment to hostilities. The Constitution did not allow any President "to make war at his pleasure." (2 The Writings of Abraham Lincoln at 51-52 (1905).)

In 1869, President Ulysses Grant authorized the American navy to protect the Dominican Republic from

attack by Haiti. It should be added that Grant had previously signed a treaty with the Dominican Republic under which that country would be annexed to the United States. The treaty was pending before the Senate at the time the President issued his authorization to the navy. Senate disapproval of Grant's authorization was quickly made evident. Resolutions were introduced condemning this usurpation of war-making powers; the proposed treaty was rejected. Grant thereupon withdrew his order -- prior to the time that any naval hostilities had actually occurred. Five years later, when Grant believed that U.S. action might be necessary to restore order in Cuba, he informed the Congress that if a response should be required, he would recommend to that body "what may then seem to me to be necessary." 2 Messages and Papers of the Presidents, 1789-1908 at p. 1302 (Israel ed. 1966).

In 1898, President William McKinley led this country into military hostilities with Spain. He did so, however, after receiving a declaration of war from Congress. His request for that authorization noted that

he would "await your [Congressional] action" before executing "every obligation imposed upon me by the Constitution." (Putney, Executive Assumption of the War-Making Power, Nat'l Univ. L. Rev. 1, 30 (May 1927).

During the twentieth century, it is admittedly far more difficult to find clear Presidential statements recognizing Congressional jurisdiction over questions of initiating hostilities abroad. Certainly some verbal bows to Congress' Constitutional powers to declare war can be found in the statements of virtually all of this century's Presidents -- with the exception of Richard Nixon. Thus, President Taft noted that he could not simply intervene in Mexico on behalf of American citizens and property because "I seriously doubt whether I have such authority under any circumstances." (3 State of the Union Messages of the Presidents, 1790-1966 at pp. 2447-48 (Israel ed. 1966).) President Eisenhower stated at the time he requested authority to use troops in the Middle East that he did so because "only with that cooperation can we give the reassurance needed to deter aggression." (Public Papers of President Dwight D. Eisenhower, 1957

at pp. 11-12 (1958).) President Kennedy in his proclamation interdicting Soviet vessels carrying missiles to Cuba placed primary reliance on an authorizing resolution of Congress -- a resolution which he had obtained as a crisis situation began to build up involving that Latin American country. (Public Papers of President John F. Kennedy 1962 at pp. 809-811 (1963).)

But virtually all of these post-1900 statements have either included references, or been followed by statements alluding to certain Presidential powers which permitted the initiation of hostilities in various undefined "emergency situations" without Congressional sanction. And until recently, neither the Congress nor the Courts have seriously disputed these broad assertions of Presidential power. That is not to say that individual members of Congress, such as Robert Taft and Wayne Morse, did not attempt to warn their brethren that they were allowing their Constitutional powers to slip away. And that is not to say that dicta in various Supreme Court opinions did not reaffirm the basic Constitutional dichotomy between Chief

Executive and Congress on the subject of war-making. Thus, Justice Black in the famous case of Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) wrote that the President's Constitutional authority as Commander-in-Chief sanctions only "broad powers in military commanders engaged in day-to-day fighting in a theater of war," rather than such lawmaking functions as the seizure of private property.

But once these isolated statements are put side, it is fair to say that until recently, neither the American public nor the Congress as a whole has paid much attention to these Presidential incursions into legislative power. Perhaps part of the explanation for this negligence can he found in the limited nature as well as the success of most unilateral Presidential ventures into hostilities abroad. Another partial explanation is perhaps to be found in the pride which most Americans have taken in this nation's efforts to play worldwide policemen and their concomitant lack of concern about how this power was actually being exercised.

And finally, explanation must be sought in the circumspection of most of this century's Chief Executives, who have asserted unilateral Presidential power only when initiating relatively limited military actions. In contrast, where major military operations were either contemplated or to be initiated, these same Presidents have sought Congressional authorization.

Thus, both World War I and World War II were declared by Congress. President Eisenhower obtained authorizing resolutions to defend Formosa from attack and to use American armed forces to protect any requesting nation in the Middle East against "armed aggression from any country controlled by international communism." A similar authorizing resolution was obtained by President Kennedy in dealing with the threat posed by Cuba -- a threat which the resolution stated was coming from Cuba's efforts to export aggression and to become an "externally supported offensive military base." And finally President Johnson obtained the ill-conceived and poorly worded Gulf of Tonkin Resolution before he sent American combat forces into South Viet Nam.

D. Historical Support for Presidential War-Making Powers

But no amount of analysis can avoid the fact that this country's history includes a number of unilateral Executive Branch excursions into military hostilities -- many of a trivial nature but a few of major significance. More importantly, in recent years, various of our Presidents -- supported by some members of Congress -- have asserted wide-ranging Constitutional powers to go to war without legislative sanction. In support of this proposition, they have relied upon these various instances -- adding up to between 100 and 200, depending upon the person doing the counting -- in which past Presidents have used American armed forces without consulting Congress.

These commitments of American armed forces are, however, susceptible to categorization. Once this is done, their precedential value is weakened. For the fact is that most of these military involvements do not constitute justifications for either large- or small-scale troop commitments in a world where all

too often small skirmishes can rapidly escalate into warfare involving several super-powers. Within that framework then, let us proceed with a category-by-category analysis beginning with those Presidential initiatives which, at the time that they were undertaken, were most sustainable under the Constitution's delineation of the war-making powers and finishing with those which are the least justifiable.

1. Hostilities with pirates and other politically unorganized entities committing acts of banditry. Probably the first category of Presidentially initiated hostilities which should be dealt with -- because in many ways it is the easiest -- consists of those instances in which Presidents have utilized the armed forces against pirates on the high seas or against countries or communities devoid of any regular political organization committing acts of banditry. Thus, when U.S. commercial vessels were attacked in 1832 by inhabitants of Sumatra, President Andrew Jackson sent a U.S. frigate "to demand satisfaction" if an organized government were found, but "to inflict such a chastisement

as would deter them and others from like aggression" if they were simply "a band of lawless pirates." (2 Messages and Papers of the Presidents 1789-1908 at p. 596 (Richardson ed. 1908).) To Jackson and to the various other Presidents who have sanctioned these military actions, the enemy was not an organized state; the conflict could therefore not be considered war; and as a result it was unnecessary to involve the Congress through obtaining an antecedent authorization.

2. Hostilities caused by pursuing pirates or bandits within a country bordering on the United States. Closely related to the instances described in the first category are cases in which Presidents have unilaterally authorized American soldiers to pursue pirates or bandits within a foreign country bordering on the United States. In most of these instances, either the explicit or tacit consent of the foreign government whose territory was affected has been obtained. Thus, in 1916, when Pancho Villa and his men raided across the U.S.-Mexican border, President Woodrow Wilson negotiated a reciprocal agreement with the Mexican government

sanctioning governmental pursuit of bandits into either country. Thereafter, Wilson sent troops into Mexico to capture Villa -- in what incidentally proved to be a disastrous expedition frought with misunderstandings which almost led this country into war with Mexico. From a Constitutional standpoint, these interpositions once seemed easy to justify. For the use of American armed forces had come with the consent of a neighboring country and the forces involved had been turned against only a politically unorganized group of persons rather than against a state. But, as must be recognized, these seemingly simple cases are no longer useful precedents in an ever-more complex world involving guerilla movements and civil uprisings in countries far-removed from the North American continent.

3. Consented-to interpositions to protect American lives or property in foreign countries. Somewhat related to the cases involving consented-to pursuit are situations in which American armed forces have been interposed -- with the consent of the government whose

territory was being invaded (or without consent in cases where no organized government existed) -- for the sole purpose of protecting American lives or property. In instances such as these, it has been asserted that the explicit or tacit consent of the government whose territory was involved reduced the possibility of hostilities with foreign military forces and thereby eliminated the need for antecedent Congressional authorization. This argument has been most persuasive where the protection offered involved evacuating Americans as rapidly as possible so that the U.S. military presence could be quickly removed. But as noted below, this type of strictly confined interposition has been the exception, rather than the rule, throughout our history. And once American troops have come with orders to stay or to interfere in the internal politics of the country, then rescue becomes intervention and the Constitutional questions posed are obviously different.

4. Military responses to attacks on American armed forces or on the United States. As previously

discussed, the major conflict between Jefferson and Hamilton over interpreting the war-making powers involved the question of the limits imposed on U.S. forces repelling attacks upon themselves or upon American citizens whom they were protecting. To Jefferson, only defensive action was authorized by the Constitution in the absence of Congressional approval; to Hamilton, the Chief Executive could unilaterally order appropriate offensive action to eliminate any clear danger that similar attacks might recur. Unresolved, this issue on the limits of Presidential power in repelling attacks made another appearance -- in a slightly different guise -- during the American Civil War.

After the secession of various Southern states and the attack on Fort Sumter, President Lincoln took a number of steps to defend the Union. Among these was the issuance of an order blockading various Southern ports. Thereafter, Lincoln sought Congressional ratification for his orders and received it.

However, during the period of time following the proclamation of a blockade but prior to Congressional ratification, several Southern ships were seized. The legality of the seizure was challenged and this challenge, of course, brought the legality of the Presidentially imposed blockade into question.

The Supreme Court in the Prize Cases, 67 U.S. (2 Black) 635 (1862) split 5 to 4 on the issue, with the majority opinion reflecting Hamilton's position and the minority opinion adopting Jefferson's reasoning. Interestingly enough, in light of the weight which many proponents of Presidential power have placed on this case, it should be recognized that the majority of the Court took precautions to place its holding in context and to assert that no major changes in Constitutional theory were being proposed. Thus, the opinion noted that the President had "no power to initiate or declare a war against a foreign nation or a domestic state." But once war had been declared on the United States, the President had to determine "the shape" of the conflict and decide upon "the degree of

force the crisis demand[ed]." Certainly, this doctrine did not mean that the response could be completely out of proportion to the attack or that ex post facto Congressional ratification should not be sought. What it did mean was that when the viability of the nation's political structure was under military challenge, the President should have power to respond through ordering at least a blockade of the attacker's ports. And while such a theory may stretch the original Constitutional framework regarding the war-making powers, it does not, in my judgment, seriously distort that framework or tear apart the basic separation of powers doctrine.

5. The intervention of American armed forces to protect American lives or property in foreign countries. It is the category involving cases in which American armed forces have been ordered by the President to intervene in a foreign country either without the consent of that country's government or for a purpose other than protecting Americans, that marks

the dividing line between those Presidential actions which can be reconciled with the Constitution and those which cannot. Interestingly enough, a majority of the 100 to 200 instances often referred to as examples of Presidential war-making fall within this category. Thus, in past years, U.S. troops have been used time and again in the Orient and throughout Latin America -- all on the pretext of saving U.S. citizens from mob violence or the effects of internal revolt. Often these forces have remained in the invaded country to influence its political structure or leadership. On occasion, as in the so-called Boxer revolt in China, hostilities have resulted.

In my judgment, the President does not possess unilateral power to commit U.S. troops to "protective" interventions in foreign countries -- since such a commitment may easily result in an outbreak of hostilities involving these troops. Only one exception exists to this rule -- namely in cases where the foreign government or local citizens, who cannot be controlled by

the government have attacked American citizens and the U.S. intervention can be justified as an emergency effort for the sole purpose of withdrawing these citizens. Thus, a U.S. citizen may well have a right "to demand the care and protection of the Federal Government over his life, liberty, and property when on the High Seas or within the jurisdiction of a foreign government." (Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).) But nowhere in our Constitution does language appear giving the President power to determine what other protective acts should be taken that go beyond the emergency need of assisting American citizens threatened by personal danger.

6. The use of American military forces in limited offensive operations. On several occasions during our history, Chief Executives have unilaterally authorized limited offensive operations against foreign countries. These have occurred in differing degrees of severity. Thus, several of our Presidents, such as Franklin Pierce and Woodrow Wilson, have sanctioned military reprisals against countries which insulted or

mistreated or captured American citizens. Even more seriously, Presidents like Theodore Roosevelt and William Taft have believed that it was within their prerogatives to order American troops to invade countries in Latin America in order to expel governments we did not approve of and substitute rulers more to our choosing. And finally Presidents Woodrow Wilson and Franklin Roosevelt took it upon themselves to order limited offensive action against major world powers. Thus, near the end of World War I, Wilson ordered a small contingent of American troops to participate in Allied operations within the Soviet Union (after that nation had signed a peace treaty with Germany) -- for the multiple purpose of preventing the Germans from seizing ports, of protecting Allied forces evacuating the country, and of hindering the Bolsheviks from stabilizing their control of the country. Again, in 1940, Roosevelt unilaterally authorized our naval vessels to convoy Allied ships in the Atlantic and to destroy German submarines in our so-called "defensive waters" on sight. Regardless of the success which

these isolated actions have had, they represent serious Presidential incursions into Congressional war-initiating power. They therefore constitute precedents which should not be followed in the future.

7. Full-scale warfare. In my judgment, only one instance exists in U.S. history where American armed forces have been sent into full-scale combat on the basis of a decision made unilaterally by the President. That instance is the Korean war. Admittedly, "emergency" conditions existed after the North Korean invasion of South Korea. There was also a so-called authorizing resolution passed by the United Nations Security Council. However, the Security Council resolution which specifically authorized a United Nations police action in South Korea was passed after President Truman had already committed American air and naval forces to that country. More importantly, no Congressional enactment had ever taken effect giving the Security Council delegated power to commit American soldiers to hostilities under the United Nations Charter. President Truman's action

must therefore be viewed as a sharp incursion into Congressional war-initiating power. It stands as a solitary case in our history, and it represents a precedent which should be avoided rather than followed.

E. The Need for a Strong War Powers Resolution

All of these historical precedents -- i.e., those supporting the overriding authority of Congress in the war-making area and those favoring unilateral Presidential power -- were raised and argued in the early 1970s during not only the debates on terminating the war in Viet Nam, but also during the heated discussions which took place regarding the passage of a War Powers Resolution. The results as to the broad question of war-making powers were unfortunate. In effect, the Congress decided to turn a constitutional process on its head. The resolution that was enacted gave the President the power to commit American forces to hostilities of every sort without prior approval from the Congress. All that was required of the President was that he report back to the Legislative Branch,

which would then have the power to curtail his action by the affirmative passage of a concurrent resolution or, after 60/90 days, by a failure to pass new supporting legislation.

Arguments that this broad delegation of power was inconsistent with the theory of the Constitution and of its framers were overriden in the rush to "slap the hands" of Richard Nixon. But today, we have another opportunity to debate this exceedingly important issue. This country has a new President, who has asserted different concepts regarding Executive Branch power and the type of cooperative relationship that should exist between the Executive and Legislative Branches of the federal government. It therefore seems more than appropriate that this resolve should be tested in the war powers area where the Constitution itself requires a sense of collective determination -- in all but the more dire emergency circumstances -- before this country goes to war.

And this is what the draft proposal which has been submitted by Senator Eagleton to this Committee

seeks to compel. Its most significant provisions are those which amend Section 2(c) of the War Powers Resolution and make mandatory what was formerly precatory language. In short, this portion of the proposal sets forth in detail the necessary guidelines for restoring a general process of joint Congressional and Presidential decision-making before this country engages in hostilities abroad. At the same time, it leaves the President with sufficient discretion to take emergency action to respond to attacks -- or the "direct and imminent threat" of attacks -- on the United States and its forces and to rescue American civilians under seige abroad. Correctly, in my judgment, it takes this step by providing the greatest discretion to the President when he is dealing with an attack or the imminent danger of an attack upon the United States. In line with historical precedents and sound Constitutional theory, it establishes the narrowest range of Presidential power in the third category where American citizens and nationals abroad are under attack. Explicitly, it requires that all

military action taken in emergency circumstances be directly proportional to the threat involved.

The proposal then goes on to establish several other important propositions which are not covered by the present War Powers Resolution. Thus, it takes the Constitutionally-permissible step of prohibiting the use of funds by the President whenever the use of the armed forces would be prohibited under the Resolution. In effect, a double prohibition on unauthorized Congressional action is thereby established. By utilizing the power of the purse, the Congress has removed any claim of Executive Branch residual authority that is inconsistent with an amended War Powers Resolution.

Second, the proposal broadens the concept of required Presidential consultation with the Congress to encompass situations where American forces are not being introduced into hostilities or likely hostilities. This step should serve to foster the principal of Executive Branch-Legislative Branch consultation in all situations involving use of the armed forces;

I would think that this change would be welcomed by this Administration which has pledged itself to keeping Congress fully informed of its action in the foreign policy field.

Third, the proposal tightens the definition of when armed forces shall be considered to have been introduced into "hostilities," so as to encompass defensive responsives to attacks, and clarifies the fact that aerial bombardments shall be treated as hostilities. These changes simply insure that both the prior approval and reporting concepts which are at the heart of the war powers legislation will be followed.

Fourth, it insures that in virtually all cases, unilateral commitments of the armed forces by the President will be subjected to Congressional review and that without the passage of new legislation, their involvement will have to be terminated within a 60-day period.

Finally, the proposal makes clear that existing treaties, broad executive agreements, and concurrent resolutions do not constitute present authority for a

unilateral Presidential use of American armed forces. Again, this step is clearly constitutional and in line with the underlying proposition that the Congress and the President should deal with specific situations in which hostilities may result at the time that these fact situations arise. The theory that broad mutual security treaties or executive agreements should somehow be treated as self-effectuating when specific circumstances arise is antithetical to the Constitutionally prescribed war-making powers.

In my judgment, this proposal which has been circulated is an important step forward in righting the balance of power between the President and the Congress in the war-making area. Its adoption would signal the end to an era in which Congress' role in the war-making process -- probably the most important type of decision that can ever face a country -- is to rubber stamp or restrospectively reverse Presidential action.

Thank you for giving me the opportunity to appear before you.

Senator CHURCH. Thank you all for your excellent presentations this morning.

STATUTORY DEFINITION OF WARMAKING POWER

I suppose that only a lawyer with the competence of the Senator from New York would ever have undertaken a mission so difficult as to attempt a statute to better define the powers of the Congress and the President in the warmaking field.

I supported that undertaking and I voted for the bill because it came in the aftermath of the Vietnam experience and it seemed that Congress should at least endeavor to prevent another war initiated and pursued on the basis of executive decision.

Still, I have had my doubts that it is possible to accomplish such an objective by statute, not only because it is so hard to foresee future circumstances, but because my reading of history indicates the following—and nothing that has been said here this morning would contradict these observations.

First, if the President, as Commander-in-Chief, uses the Armed Forces in an action that is both swift and successful, then there is no reason to expect the Congress to do anything other than applaud.

If the President employs forces in an action which is swift, but unsuccessful, then the Congress is faced with a fait accompli, and although it may rebuke the President, it can do little else.

If the President undertakes to introduce American forces in a foreign war that is large and sustained, then it seems to me that the argument that the War Powers Resolution forces the Congress to confront that decision is an argument that overlooks the fact that Congress in any case must confront the decision, because it is the Congress that must appropriate the money to make it possible for the sustained action to be sustained.

So, I wonder really whether we have done very much in furthering our purpose through the War Powers Resolution. I say that very respectfully because I appreciate the difficulty, and I also fully supported the motive.

60-DAY PROVISION

Another problem with the Resolution, I think, is the 60-day period. Here again I think the historical references have been extremely helpful. In most cases, the actions taken by Presidents have been actions that were popular or that the Congress would support, anyway. There are very few cases of confrontation between the Congress and the President. When those cases have arisen, it is not within 60 days of the outbreak of hostilities.

I cannot imagine a situation where the President would take us into a foreign war of major proportions under circumstances that would not cause both the public and the Congress to rally around the flag, at least for 60 days. It is hard for me to envision how the Congress would use the powers as prescribed in this resolution for the purpose of cutting off funds in that situation. It is only when a war is pursued for a period of time and the public begins to question whether it is a war in the national interest, or whether it is a winnable war, or a foolish one, that you will ever get a majority in the Congress to exercise the authority that we finally

did exercise by pulling up the purse strings on the broadening theatre of war in Southeast Asia, and finally in forcing an end to the bombing in Cambodia.

But, in both those cases it was done with Presidential acquiescence. It was not done by concurrent resolution. It was done by law, and the President joined and made it law by signing the legislation that contained the Cooper-Church amendment and later the Case-Church amendment.

So, those were circumstances where the political confrontation had reached a point and popular disenchantment with the war had become so serious a matter that the President saw fit to sign legislation that contained restrictions on the spending powers, and, having signed, felt obliged to comply.

I think that this whole exercise is something like trying to count how many angels can stand on the head of a pin. It is elaborately interesting and absorbing from a lawyer's point of view, and certainly is a good subject for a lot of learned writing in the constitutional field; but, as a practical matter, I think it is going to come down to the arena of politics and the tug of war between the two branches in the self-assertion of their two powers. There is no neat formula that can accommodate the needs of the future in this respect. I say that regretfully, because I wish there were, and I know that this is a brave undertaking, to try to formulate procedures for the future. Perhaps amendments to the War Powers Resolution, as it presently stands, will be helpful.

I have just one question to ask you because I know that Senator Case and Senator Javits have a keen interest in this subject matter.

PRESIDENTIAL TROOP DEPLOYMENT ABROAD AMENDMENT

My question is this: What do we accomplish, given our effort to prescribe for the future, by attempting to list the various ways that we feel the President can constitutionally deploy troops abroad? What does that add to this effort, and would it not be more sensible simply to strike such a provision entirely from the resolution since what we are really trying to accomplish here is a vote on the part of Congress within 60 days after hostilities commence by which the President's action is either ratified or reversed?

I do not see anything to be gained, therefore, by trying to list in advance the various circumstances that would constitutionally permit the President to deploy troops in the first place.

Mr. SOFAER. Do you want us to answer that, Senator?

Senator CHURCH. Yes.

Mr. SOFAER. I think you will give the President enormous powers if you amend 2(c) as proposed.

Senator CHURCH. But that was not the purpose of the War Powers Resolution, to delegate expressly all these powers. The purpose was the very opposite, and given the purpose, why do that?

Mr. SOFAER. The only practical and conceivable area in which the President would implicitly be denied power, it seems to me, is in the ability to rescue foreigners. That would be taking away very little in exchange for giving a heck of a lot. So, Senator, I agree with you entirely in that regard, that very little would be accomplished by amending 2(c).

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Senator CHURCH. Professor Franck?

Mr. FRANCK. I have two comments to make in reply to that question. One of them is that the Case-Church amendment itself was prospective legislation. Your amendment to the Foreign Assistance Authorization succeeded not only in prohibiting the use of funds in that authorization, but also in future authorizations, and that seemed to me to be the difference between the political approach which you are now apparently favoring, and a legal approach, which you appear to have favored at that time, and I think successfully favored at that time.

Senator CHURCH. I think our amendment was legal. I certainly think it was very legal and within our power.

Mr. FRANCK. I did not mean only a legal approach. I meant an approach using prospective regulation of conduct. It did not only purport to stop the President from using that year's funds, but all subsequent years' funds. That seems to be the difference also between the approach of having Congress, each time the President uses force, start de novo to say, "we don't like it," or "we do like it," and a general regulation of law which says that under certain circumstances we do not like it now, we did not like it in the past, and we are not going to like it in the future, and we are going to prohibit it in the past, the present, and in the future.

ROLE OF LAW AND POLITICS

That brings me to the second point raised by your question, which is really a question of the relative place in public affairs of politics and law. I can only answer that it seems to me that that is a false conflict, that each time the President uses force in world affairs a political judgment will be made, and in some instances—in many instances, perhaps—that will be the decisive factor. But there seems to be no reason why Congress—which, after all, is both a lawmaking body and a political body—should not also use its other tool, which is the proscription of certain kinds of conduct. In a nutshell, it seems to be that prospective proscription has several different uses. One of them is that it tends to educate the President as to what to expect of Congress, and when Congress does not live up to that expectation, as it did not in the case of the *Mayaguez*, then that may have a counterproductive effect, and Professor Sofaer may be right.

But I would hope that would be the exception.

Second, it seems to me to educate Congress itself as to what moral standards and what code of conduct is expected of it.

Third, it seems to me to be a basis upon which, under certain circumstances, one can enlist the support of the court to do what the court did in the Steel Seizure Case, that is, absent any indication by Congress, particularly any indication on the part of Congress that attempts to interpret constitutional provisions in a way that undoes 40 or 50 years of congressional acquiescence in the accretion of Presidential power—but absent something of that sort, the courts really are at sea as to what would be expected of them. One of the effects of prospective legislation is to attempt to lay out what Congress itself thinks the Constitution means. There is plenty of evidence as to what the Executive thinks and there is quite a lot of evidence as to what Congress used to think, which was that the

President's position is essentially correct. But if that is no longer so, the Congress had better signal the President, the public, and the courts that there is the congressional perspective.

Senator CHURCH. Thank you very much.

Mr. Leigh?

Mr. LEIGH. Mr. Chairman, I would like to make three points briefly.

First, I do agree, as is obvious from my statement, that it is undesirable to attempt a listing because I do not think we can be farsighted enough to envision every possible contingency over the years ahead.

"MAYAGUEZ," INDOCHINA EVACUATION EXAMPLES

Second, I had not wanted to talk about the *Mayaguez* Affair, but twice it has been said this morning that the President disregarded the fund limitation provisions in rescuing those men from the ship. The same thing also was said regarding the Indochina evacuations.

Let me mention that the President did, in a joint session on April 10, 1975, ask the Congress to confirm his authority to remove Americans and some foreigners, if necessary for the safety of the Americans, from the scene of hostilities when it was obvious that Indochina was going to collapse. That legislation was still pending, in fact, it had gotten as far as a conference report, at the time of the major evacuation, which was from Saigon.

But, as far as I can recall from testifying as to what happened in those rescue operations, there was no criticism of the President for having violated the fund limitation provisions. There was great criticism of the fact that he had not consulted as fully as many Members of Congress thought he should have.

Nevertheless, I believe there was a general understanding between the executive branch and the Congress at that time that the fund limitation provisions were not intended to preclude the President from a rescue operation, especially as to American nationals. So, I don't think that it is quite correct to say that the experience in the Indochina evacuations demonstrated that the President was disregarding the fund limitation provisions. He was giving to them, I think, the same interpretation which most Members of Congress gave to them.

CONCURRENT RESOLUTION PROCEDURE SUGGESTION

The third thing I have to say concerns the proposal which I made, which I admit is a very modest one. I, as you can tell, am not in favor of trying to prescribe by statute, which is supposed to be the supreme law of the land, an allocation of powers which does violence either to the President's prerogative or to the congressional prerogative. So, when I suggest the possibility of using a concurrent resolution for this purpose, I am doing it for the very purpose that I think has been most plausibly presented in support of the war powers approach. I have heard Senator Javits articulate this very eloquently.

It lays down a procedure, and it creates a set of expectations on both sides of the twilight area.

Now, it does seem to me that it is worth considering that at the beginning of each new administration the Congress might have a

rather detailed negotiation with the President and undertake to lay down in a concurrent resolution the expectations on each side, what reports would be given, and what steps would be taken.

In this sense, it would be not unlike the ancient British historical practice in which each time a new sovereign took his seat on the throne, he had a negotiation with the Parliament. Usually he was required to confirm the Great Charter or to undertake this or to undertake that.

At any rate, that process of doing it on a cyclical basis in an area where, admittedly, I think, the powers of the two branches overlap and are confusing, would at least have the virtue of giving a contemporaneous interpretation to the expectations on each side.

Thank you, Mr. Chairman.

Senator CHURCH. Yes, Mr. Curzan.

Mr. CURZAN. Senator, may I make just a few more comments regarding these statements?

Senator CHURCH. Please.

INTENT OF CONSTITUTION IN DECISIONMAKING PROCESS

Mr. CURZAN. I think we still have to go back to the basic document. The theory of the Constitution was to require joint decisions before most warmaking actions were taken.

The problem we have right now is that you have the War Powers Resolution on the books, which doesn't mandate a collective decision-making process. It, in fact, permits the President to take unilateral action. If he decides to consult—he will do so. Otherwise he will take the action he believes best.

The theory of section 2(c), as amended was to delimit those situations which would be viewed as a sufficient emergency that the President could take that action without coming to the Congress first. But the idea that large scale movements of troops should occur—in many instances, commitments of these troops to hostilities—without the need to bring such action before the Congress and at least get a decision by that body seems to me, to be wrong.

We keep going back to *Mayaguez*, and I think there is one other thing that should be remembered. It was applauded by many. It resulted, if I remember correctly, in the rescue of 39 lives, though it cost 41 lives to do it. I think one has to ask whether that would have been the logical event to occur had there been consultation and a decision by the Congress at the time as to whether a rescue was the appropriate course of action.

Senator CHURCH. I just have one more comment and then I will be finished.

PRESIDENTIAL, CONGRESSIONAL CONSULTATION

I don't think, in a case of that kind, where you have an American ship taken into custody and Americans imprisoned, that you are ever going to get consultation and debate in the Congress and a congressional decision. That is a crisis in which very swift action must be taken if American lives are to be saved, or at least it be so perceived at the time. In those circumstances, I don't know what "consultation" means in a statute. Consultation with whom?

We have a situation today we can mention. I read in the newspapers that an American helicopter flying over North Korea had been shot down. Apparently three Americans have been killed.

Now the President is considering some kind of response. Who should be consulted? Who has been consulted? I was asked this morning by the press and I was unable to say. How does the President consult Congress? Does he talk to the Chairman of the Foreign Relations Committee, the Chairman of the Armed Services Committee? Is that adequate consultation?

It just seems to me that terms of this kind are extemely hard to comply with. When you say Congress, you are talking about 545 elected representatives, and if you have to consult with Congress, you must come to the Congress, before all of it, and not just consult with the Chairman of the Foreign Relations Committee, or the Chairman of the Armed Services Committee, and not just with two or three people with whom the President has personal rapport.

Yet, obviously in a situation of that kind you cannot come before the entire Congress with a special message and open up the question to debate. The President is either going to have to take swift action or the occasion will pass.

It is so hard for me to understand your argument.

Senator Case, do you have any comments?

Senator CASE. Yes, thank you, Mr. Chairman.

COMMENDATION OF WITNESSES

Gentlemen, I want to say personally how much I am obliged to you and how gratified it is to have two members from Columbia here. I don't like any possible implication that it takes two Columbia men to balance one of any other kind as this is not true indeed. It may be rather the reverse. [General laughter.]

RESERVATIONS CONCERNING STATUTORY DEFINITION

Senator Church and I feel very much the same about these things. I expect that if it were not for our great respect as well as our deep affection for Senator Javits we would probably not have supported this institutionalization of some procedures in these matters.

That does not, as I think you all know, indicate any lack of interest in the performance of congressional responsibility in these matters because we have tried on some occasions—and this is a matter of record—to deal with our responsibilities. Senator Church's reference to an existing situation, the events concerning the downed helicopter in Korea, is an illustration of how hard it is to deal with things of this kind by prescription and by a structured kind of machinery.

This comes up all of the time. We were dealing with it last night on the floor, really, in the question of what we are going to do about the neutron bomb. This is more our role than our role is to deal with such matters as the Korean thing immediately; although I do agree that it is most desirable to have our attention fixed and riveted on every situation that comes up, because our influence probably informally, rather than through exercise of functions, our legislative function, has a real importance here.

I wish that I could stay longer and talk with all of you about this. Please any time anybody has a chance to drop in and see any of us when you have a chance. I am still a benevolent skeptic as far as this whole business goes, even though I voted for it.

I wish you would comment in general about this. You all have different views on this, I am sure some of you feel that we have no business messing around with this at all, formally or informally.

Mr. SOFAER. Well, I know that Senator Javits is going to be a perfectly adequate defender of his position.

Senator CASE. Oh, he has done this already. He has gotten us all to vote for it.

Mr. SOFAER. I have read his defenses and I would like to respond to the negative feeling that both you, Senator Case, and Senator Church have expressed about the existing resolution.

I, as you know, have no love for section 2(c), either as drafted or as it would be if the proposed amendment were to be adopted. However, I do think that the resolution serves several salutary and concrete ends. I think it has had a deterrent effect on executive conduct and will continue to have that. I think Presidents have been given a clear message from the day that resolution was adopted into the future, that Congress is interested in what they are doing and wants a report from them about what they are doing.

I would not be a bit surprised if actions on which Congress' advice has been sought in recent years would have been undertaken without any request for Congress' approval. For example, I think Angola is an excellent example of a situation in which a President, an active, aggressive President, might have taken action unilaterally. There were certainly Americans in Angola that a President could have claimed he was going in to save. Instead, the President was forced, I think by the expression of interest and the desire on the part of Congress to assume more responsibility where it had not been assuming responsibility in the past——

Senator CHURCH. But if you remember, there what happened was that we discovered we were getting very close to an involvement in Angola and we just said "no funds for that." We cut off the funds. That was more than just a message of congressional concern. It was a refusal to appropriate money for that purpose.

Senator CASE. And it did not have anything to do with the War Powers Act. We are more conscious, I hope, of our responsibilities in these matters than we used to be. This, I think, is going to continue, at least I hope so. But I think that is a little different from the question of an institutionalized apparatus.

Mr. SOFAER. It has helped create a new environment in which many of these issues can be more collectively dealt with. I think that you are both overly pessimistic about its political effects.

Senator CASE. Let me tell you about what we did in the Senate last night. We accomplished a minimal, though not worthless, result in our effort to delay Senate authorization until we knew something about this business. The proponents were "pell mell" to act and to give the President authority to produce and deploy this weapon before we had the information that he feels he needs before he can make his decision.

We did succeed finally in persuading a majority, or at least in persuading the leadership, that we perhaps had a majority for a

concurrent resolution veto, and so they offered it themselves, and that is what happened.

It was just this way on the question of a single House veto, which would have been roughly the equivalent of an initial authorization by Congress because it makes necessary, in effect, the recognition of either House as right, as if it were first authorizing it.

I am not arguing with you. I am just saying that I am not sure that we need to do much more in attempting to change this thing, which has its great value.

I remember 3 or 4 years ago, we had a session up at Columbia one Saturday afternoon on this general proposition. I think Arthur Schlesinger was there. He argued against any real institutionalization but took the occasion to praise the Case Act. Monroe really tried to perform his obligations under that and I appreciate that very much and always will. It provides that agreements should be made available to Congress within a reasonable time after they become operative. But he said that we had better not try to go much further than that in trying to structure this kind of thing.

It is more a matter of making us live up to our obligations than anything else. I feel very strongly about that. I feel frustrated many times because you run into the desire of the Democrats now to uphold Jimmy Carter. And they can, you know, this is a perfectly reasonable thing. They talk about upholding the Presidency, but they are talking about their Party man, that is it. Monroe used to do it for President Ford all the time and properly so, and for his Administration.

You have to overcome that. It is a lot harder for Mr. Church now to be in opposition than it was a couple of years ago.

Senator CHURCH. You would not know that from my conduct during this past week. [General laughter.]

Senator CASE. But he is one of the exceptions.

I think anything that would really help us is good. I just question whether you can get too precise about the steps to be taken in these matters. That is really what I am talking about.

Mr. CURZAN. Senator, it seems to me that an interesting instance is posed by the downing of the helicopter. Under the present War Powers Resolution, the range of presidential action is broad. The President may even decide that the bombing of North Korea is justified at this point in time. Under an amended vesion of the Resolution, he would not have this power. I think that he should come back to the Congress. I think that the use of troops in a situation such as is now presented is an important decision and not one which requires an emergency response on the President's part.

The problem is whether or not Congress wishes to make it clear that that is what it expects the President to do or whether it leaves it to the political process, as Senator Church has suggested. In most cases you would hope the President would come back and discuss it with the Congress before he did anything.

PRESIDENTIAL RESTRAINT

Senator CASE. Yes, but the bombing of North Korea is not a credible possibility—not for reasons of the War Powers Act, but just because of the whole situation in which we live in a semi-

civilized world. You can say, "Well, what about Vietnam?" And I will say "What about Vietnam?" This is not quite the same.

I don't think any President is going to do much more perhaps than to go in and get these boys. Can you imagine Congress saying no to that, really? Isn't the President more likely to show restraint than Congress in the matter of an emergency? Isn't that the real situation? What do you really think about that?

Mr. CURZAN. That the President would show more restraint in the situation?

Senator CASE. Yes. Don't you think so?

Mr. CURZAN. I think it is quite possible, but why shouldn't it be the President and the Congress? One body may have one view as to the matter. The whole theory of the Constitution is to obtain collective decisions.

Senator CASE. I am not against it. I am just trying to think of the practicalities of the situation. What I really was saying is, I guess, that the Congress is not going to be much of a restraint in hot pursuit matters of that kind.

PRESIDENTIAL CONSULTATIONS WITH CONGRESS

Senator CHURCH. With whom does the President consult when he consults with Congress?

Senator CASE. Yes, that is true. It happened that last night Cy Vance called me up at 1:30 a.m. or something like that. What good did that do anybody, except it was nice of him to do it.

Mr. CURZAN. In the case of North Korea, it would not be advance consultaion. It would require a decision by the Congress.

Senator CHURCH. Mr. Franck.

Mr. FRANCK. Mr. Chairman, again I do think that the intelligence oversight activities of the Senatorial committee offer the use of a precedent. It does participate in the decisionmaking process. It does it quickly and it does it before the decision is made, and it maintains the security of the information that it obtains. I think it is quite conceivable that you would have, again in the future, a situation in which the Presidential perspective is different from the Senatorial perspective or is different from the perspective of some important members of the Congress. If the process of consultation, the process of broadening consultation, and the process of requiring consultation—quite aside from the constitutional aspects of whether consultation can be made obligatory——

Senator CHURCH. I'm sorry to interrupt you, but the law that established the permanent Intelligence Committee—which was an outgrowth of investigations that I conducted, so I am familiar with that law—specifically provides that the Executive Branch, that the President, in effect, shall keep the committee fully informed, even of new, insignificant covert operations, for the purpose of enabling the committee to consult and to be consulted with. But the law is drawn very differently than the War Powers Act. The War Powers Act talks about consultations with Congress. The Intelligence Committees is set up under a special statute which places an affirmative duty upon the Executive to come to that committee.

Now maybe that is what we ought to do to clear up the fuzziness about consultation with the Congress. Maybe we should try to amend this act to say that before the President initiates an action

using American forces abroad—which is certainly more important than a given covert operation would be, more pregnant with danger for the country—he should be obliged to confer with the Foreign Relations Committee because under the Constitution we are to advise and consent in foreign policy matters. Maybe we should specify, lay an affirmative duty upon him, in such circumstances to come and confer with the committee.

But I don't think that this language in this act accomplishes that purpose. In fact, I know it does not.

Mr. FRANCK. The specifying of who shall be consulted, when they shall be consulted, and what consultation means, seems to me to be one of the important objectives to which the committee could address itself in these amendments.

CENTRAL INTELLIGENCE AGENCY

Senator CASE. We have half a dozen laws now about consultation. The CIA goes crazy trying to keep all of us posted. They are crazy to have an Intelligence Committee so that they could have one place to go. [General laughter.]

Senator JAVITS. Gentlemen, I think the time has come to cut through some of this fog. [General laughter.]

Senator CHURCH. All right. We will turn the spotlight on Senator Javits.

Senator JAVITS. This all illustrates, I must say, a failure to consult the law itself. I don't mind your criticisms or anybody else's so long as they at least take account of the statute.

STATUTORY CONSULTATION REQUIREMENT

The fact is that in the present situation of the helicopter, if the President wishes to engage in hot pursuit, he would have to immediately let us know under a section of this statute which requires notice and specifies to whom it is given and to whom the notice is referred, and that is "consulting the Congress," to wit, the notice must go to the Speaker, to the President Pro Tempore of the Senate, then it must be referred to each of the committees, and then the committees presumably have the liberty to act or not act.

Now, as to the consultation to which the chairman of this particular hearing has referred, to wit, section 3, "the President in every possible instance shall consult with Congress." That is a general precatory provision which does not have the same force that the specific reporting for specific things does have under section 4, and hence it was very loosely drawn. It is informal in quality and it is actually informal in fact.

The other thing, Mr. Chairman, that I think has kind of crept into this, which troubles me, is that it really is interesting to me that 1973 and 1977 and the discussion especially this morning so clearly indicate why we do not keep troops when we ought to keep them, why we are not alert to powers of Congress or powers of the Presidents or the power of our country. The minute we get out of an emergency everybody relaxes. When we get into another, we get very hot about it.

The fact is, Mr. Chairman, that we found the fund cut-off completely unsatisfactory. We did not make anybody get out of Vietnam until it was really almost civil war in this country, that is, by

fund cutoffs. We would not vote them. Why? Because the troops were there and we would not take their money away. That is the reality of it. So, we had to find some other procedure.

Senator CHURCH. But won't that continue to be the reality?

Senator JAVITS. The difference here is that the President loses power unless we give it to him. That gives us the responsibility for putting the blood on our hands, too. We can't get away with the fact that the troops are there, so we have to support them.

However, I realize this is essentially a reargument of what caused the resolution to be passed rather than any new light being cast on a situation in which our country stands. I think the point made by Professor Sofaer is very important, to wit, that this is a restraint on Presidents. Whether it is a tight restraint or a lesser restraint is less important than the fact that he knows it is there and he has to contend with it. That is all I had in mind.

Senator CHURCH. That is why I voted for it.

Senator JAVITS. I know. That was all I had in mind.

Senator CASE. And it also makes us try harder.

Senator JAVITS. Exactly. The blood is on our hands, too.

PRESIDENTIAL WAR POWERS

There is one other thing which I would like to ask the witnesses, and it did trouble me. I think it was Mr. Curzan who said, and please correct me if I am wrong, that the resolution gave the President more war powers than the Constitution gave him.

Now of course that is impossible. No resolution can give him more war powers than the Constitution gave him. Did you really mean that? What did you mean?

Mr. CURZAN. Under the Constitution, Senator, the power of declaring war is left with the Congress. Now, it does have broad power to delegate. Absent any resolution that was passed in 1973, the situation would have been as it was at that time. There was then a great deal of fuzziness as to when Presidents could take unilateral action and when they should come to the Congress, not just for consultation, but for a legislative decision by this body.

In 1973, the act, in effect, delegated power to the President to go into hostilities for 60 days, or for up to 90 days, in certain circumstances. In that sense, yes, I think it did delegate power to him, power which the President did not have by himself.

CONGRESSIONAL DELEGATION OF WAR POWER

Senator JAVITS. Do you say that Congress can delegate the war power?

Mr. CURZAN. I think that generally the courts have held that in the foreign affairs area, the power of delegation on the part of the Congress is very broad. It has never really been tested fully in the war powers area.

Senator JAVITS. Can the Congress delegate to the President the power to ratify treaties?

Mr. CURZAN. Can it?

Senator JAVITS. Yes.

Mr. CURZAN. No.

Senator JAVITS. Of course not.

Can it delegate to the President the power to confirm Ambassadors?

Mr. CURZAN. No.

Senator JAVITS. Well, then, why should it have the authority to delegate to him the war power? The Constitution says the Congress shall declare war.

Mr. CURZAN. In lots of emergency circumstances the Congress has certainly delegated very broad powers to the President.

Senator JAVITS. That is not an answer to my question. You said that it could not delegate to him the power to confirm Ambassadors, the power to ratify treaties, so why do you pick the war power as something it can delegate?

Mr. CURZAN. I think that your theory would have to be, then, that section 2(c) is not a precatory statement but is, in fact, the actual statement of those powers given to the President.

Senator JAVITS. I'm sorry. That does not have to be my theory at all. That is your theory, it is not mine.

I asked you a direct question: Why are there two areas in which it cannot give him power, but in the war power area it can?

Let me relieve you of that by saying that I affirm, and I have affirmed for years, and I have affirmed when the Senate and House acted in conference and thereafter, that this resolution can't give and does not give the power to the President any more than he has under the Constitution. We cannot give any and we cannot take it away.

This resolution is strictly an effort—and I like your words, Frank, very much—to establish a methodology to more nearly regularize the—and now I go to Senator Church's characterization—"tug of war between the two powers in the assertion of their powers." That is all it is. It is no more, and I hope it is no less.

Now I will come to the amendments, because that is really what we are here to consider, if there is a way, if our methodology is flawed and we have some recommendations or suggestions as to how it can be unflawed. You know, nobody is more in the market here than I, but to assume that I assume that we could make or unmake Presidential powers or congressional power is wide of the mark. I have no such design or intention.

The second point, which I think is also very important, is that we failed for years, 197 years, to assert our power because we found it very difficult to find a way to do it. The Vietnam War and the fund cutoff efforts were the best example of that. So, I and others—we happen to be the first, but that is not critical—used our brains to try to find some way to improve that situation so we would have a better channel than we apparently had ever had.

I would like to say to you gentlemen again, quite apart from whether or not you challenge the premises on which this resolution has been passed—which is an argument antecedent to its enactment, unless you are contending for its repeal, and I got that implication from Mr. Leigh, that he is contending for its repeal. That is really what he is doing. He is not here to argue anything else except "expunge it." I doubt the Congress will do that, but nonetheless he has a right to make the argument.

METHODOLOGY IMPROVEMENT

But, as to the other members of the panel, would you concentrate your great skills and expertise upon how we could improve our methodology, in addition to everything you have already said, which, of course, is most congenial to me. I would be very interested to hear your further views on this subject. If you think we are not doing all that we can in that regard as effectively as we should, I would greatly appreciate hearing further from you on this.

Mr. Curzan, you, of course, testified as to the ideas which had been proposed for amendments. You are not bound to that, of course. There are perhaps other ideas which I would welcome from any of the panel as to how we can really fix up the machinery based on experience.

Mr. Chairman, I think that would be my view.

Perhaps the panel could think about that and supply it for us for the record because we will be considering the issue of whether or not this statute needs change, and if so, what the changes should be.

CONGRESSIONAL DELEGATION OF WAR POWER

Senator CHURCH. Before we conclude the hearing, I think that some answer should be supplied to that very pointed professorial question that Senator Javits asked our witnesses; namely, can Congress delegate the war power. It seems to me that the Congress cannot delegate the power to declare war. But the problem arises in situations where the use of American troops takes place without a formal declaration of war.

Senator JAVITS. Of course. Exactly. That is what we really want to get at.

Senator CHURCH. That, of course, is the grey area that Senator Javits attempted to get at with this War Powers Resolution. Whether or not that is possible, only the future can tell. I do feel, however, that it has had a salutary effect by giving notice to current Presidents that the Congress intends to take its own authority much more seriously in these cases in the future.

Mr. Franck, did you have something to add?

ENUMERATION OF SECTION 2(c)

Mr. FRANCK. Senator, repeatedly during these discussions there has been the suggestion that the enumeration of 2(c) and, in my opinion, the improved enumeration of 2(c) under Committee Print No. 2, would either give the President more powers in that grey area than he apparently has, or, in any event, would permit the President to do anything that he chose to do. I think that is true only in the sense that all laws, I suppose, are capable of misconstruction, and unless there is some form of appeal to tell the misconstruer that the words have been misconstrued, misconstruction sometimes stands.

But certainly 2(c), even as it would be amended by print No. 2, does not include three categories of Presidential assertion of power made by Mr. Leigh in his testimony as legal adviser. These are well established Presidential assertions. He enumerates ones that are currently there. He enumerates others that would be there if print

No. 2 is to become law. Then he also adds: to suppress civil insurrection; to implement and administer the terms of an armistice or a cease-fire, which, after all, was the basis for the Presidential continued bombing in Cambodia after the Paris Agreement; and, to carry out the terms of security commitments contained in treaties.

So, language does mean something, it seems to me. Section 2(c), as it stands and as it would be amended, is considerably restrictive of the assertions of power made by the President and by the President's lawyer.

Mr. SOFAER. But Professor Franck himself notes in his able article that American troops are everywhere in the world and the President would not have to rely on a treaty to go into a place that he really wanted to go into.

Mr. FRANCK. I don't believe that is true. I don't believe American troops are everywhere in the world. I don't believe I said that. I can think of many situations without any difficulty at all where the President might wish to use force but could not do so, either under the enumeration of 2(c) as it stands or 2(c) as it would stand if the Committee Print No. 2 were adopted.

Senator CHURCH. You are right. Our American troops are not everywhere in the world, yet. We have an extremely difficult time getting them out of any place where they have gone. [General laughter.]

Senator JAVITS. Then they would have to be attacked or in some danger.

Mr. SOFAER. In my view, Senator Church, I would suggest that the area in which the committee ought to concentrate in terms of amendments would be the area of improving the flow of information about actions that are either undertaken or that may be undertaken from the executive branch to the legislative branch.

CHURCH. I want to thank you all very much for your testimony this morning.

Senator JAVITS. May I suggest, too, Mr. Chairman, that if any of the witnesses, pursuant to my own invitation as to specifics on the methodology, wish to make any suggestion, that we hear from them within a week and that that be included in the record.

Thank you, Mr. Chairman, and gentlemen, thank you all very much.

Senator CHURCH. Thank you again, gentlemen.

[Whereupon, at 12:33 p.m., the committee adjourned, subject to the call of the Chair.]

WAR POWERS RESOLUTION

FRIDAY, JULY 15, 1977

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, D.C.

The committee met, pursuant to notice, in room 4221, Dirksen Senate Office Building, at 10:32 a.m., Hon. Dick Clark [presiding].

Present: Senators Clark, and Javits.

Senator CLARK. The committee will come to order.

OPENING STATEMENT OF SENATOR CLARK

The Committee on Foreign Relations today concludes its hearings on the operation and effectiveness of the War Powers Resolution. Our witnesses today are representatives of the administration, Herbert Hansell, legal adviser, and Douglas Bennet, Assistant Secretary of State for Congressional Relations.

The administration's early comments on the War Powers Resolution have been favorable. President Carter said that he viewed it as an appropriate reduction in Presidential warmaking power. During Secretary Vance's confirmation hearings before this committee, he was asked by Senator Javits, "Do you or the new administration see any problem with the good faith observance of that law?" Secretary Vance replied, "I do not." Senator Javits then asked; "Do you challenge it under the Constitution as to the President's power?" Secretary Vance responded, "No."

We have asked the administration to present testimony today because we would like them to elaborate on that position. We will also be interested in getting its views on various proposals to amend the resolution. I hope the witnesses will be specific, both in their statements and in answers to our questions. It is of the utmost importance that Congress and the executive branch know what their roles and responsibilities are under the resolution.

Statements of good faith intent and a desire to cooperate are encouraging, of course, but what we really need to know is what the administration believes the resolution requires. For war inevitably breeds disagreement, and disagreement, confrontation, and in a confrontation what matters is not whether intentions are honorable or good, but whether one's actions are legal. We have been down that road in some very difficult times in the past, so we think these hearings are particularly important.

Mr. Hansell, we are glad to have you here today, and I hope that you will feel free to proceed in any way you think appropriate.

STATEMENT OF HON. HERBERT J. HANSELL, LEGAL ADVISER, DEPARTMENT OF STATE; ACCOMPANIED BY HON. DOUGLAS BENNET, ASSISTANT SECRETARY FOR CONGRESSIONAL RELATIONS, DEPARTMENT OF STATE

Mr. HANSELL. Thank you, Mr. Chairman. Mr. Bennet and I are pleased to participate in this committee's review of the War Powers Resolution. The War Powers Resolution was born in the midst of tumultuous political pressures at home and military conflict abroad. It was created as a response to a perceived abuse of authority. As section 2(a) suggests, Congress intended the Resolution as a remedial measure to insure the decisions to commit United States Armed Forces to hostilities should involve "the collective judgment of both the Congress and the President."

This Administration is of the view that, as a matter of constitutional law and of public policy, this country should not go to war without that collective judgment. Supreme Court Justice Joseph Story once stated that the awesome decisions involving matters of war and peace deserve "the utmost deliberation, and the successive review of all the councils of the nation."

The War Powers Resolution of 1973 also recognized the needs of a modern nation to respond to emergency situations. It acknowledged the constitutional responsibility of the Commander-in-Chief to act, expeditiously when necessary, to preserve the security of our Nation.

CONSULTATION AND REPORTING REQUIREMENTS

We realize that collective judgments cannot constructively be applied if the Congress is not well informed in a timely fashion; neither can they be usefully applied if there are not effective consultation procedures between these two branches of government. By establishing the consultation and reporting requirements contained in sections 3 and 4 of the War Powers Resolution, the Congress took a useful and desirable step toward reducing information and communications obstacles which have impeded coordination in the past.

For example, as a direct result of section 4, the Departments of State and Defense have formalized a review process to insure that reports to the Congress are promptly submitted whenever they are required by the law. Under this review process the legal adviser to the Chairman of the Joint Chiefs of Staff informs the Department of Defense General Counsel of all troop deployments routed through the chairman's office which could raise a question whether a report to the Congress is required. The General Counsel of the Defense Department then has the responsibility to advise the Secretary of Defense as to whether to recommend to the President that a War Powers report be submitted.

In the Department of State, the Legal Adviser of the Department receives the same information supplied to the Defense General Counsel and has the responsibility of bringing to the attention of the Secretary of State all cases in which the submission of a report should be recommended to the President.

These arrangements, supplemented by close informal contacts between the Departments of State and Defense, provide in our view a valuable mechanism both for advising the President and for

assuring that the implications of a proposed use of the Armed Forces will be more fully discussed at an early stage. This Administration is firmly committed to respect the requirements of section 4. In addition, we are committed to insuring that these reports contain meaningful information and that they are submitted as promptly as possible, and in any case within the prescribed 48-hour period.

We recognize, of course, that reports under section 4 relate to actions the President has taken pursuant to his constitutional or statutory authority. In emergency cases it is important for the President to obtain the advice and counsel of the Congress whenever possible before he acts. By their very nature some emergencies may preclude opportunity for legislative debate prior to involvement of the Armed Forces in hostile or potentially hostile situations. However, in the great majority of cases we believe that meaningful consultations with an appropriate group of congressional representatives should be possible.

Such consultations serve both to keep the Congress well informed in a timely manner and to permit the Executive Branch to benefit from advice from Members of Congress as it deals with international crises. In order to facilitate such contacts, the Administration is prepared to work with the Congress to develop reliable and efficient consultation procedures. By improving such procedures, we may both increase the quality and usefulness of consultations and decrease the number of instances in which the President is compelled by an emergency situation to act before such consultations can be organized.

The first requisite for meaningful consultations is a genuine intention of both the Congress and the Executive Branch to make them work. This Admininistration has manifested such a commitment on several occasions, in both word and deed. While we are all mindful of the necessity to insure the President's ability to act quickly, this Administration is equally convinced of the necessity to have broad public support for a national commitment to undertake the potential risks and burdens of involvement in hostilities.

A second requisite is efficient machinery for conducting those consultations. In the past when an international crisis has erupted, Executive Branch officials have notified the leadership of each House of Congress and the chairmen and members of appropriate committees. The initial contacts between the Executive Branch and the Congress have been on an individual basis, which at times makes it more cumbersome to carry out consultations and to have the benefit of collective judgments.

In order to help overcome these problems, Congress may wish to consider establishing a streamlined structure for carrying out consultations, not only in the war powers context, but also in other crisis situations. An improved institutional mechanism would facilitate a more ready flow of information to the Congress at an early stage of a situation and assure the Administration's receipt of timely congressional advice. We are, of course, prepared to work with the leadership in whatever manner they deem best. On our part, we want to assure you that we will be responsive.

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SECTION 5 ADHERENCE

In addition to the consultation and reporting provisions, the debates over the War Powers Resolution have elicited considerable discussion about several other provisions of the Resolution. In particular, I am thinking of section 5(c), which refers to a concurrent resolution, and section 5(b), which refers to a 60-day automatic cut-off period. This Administration as a matter of policy intends to follow the letter and spirit of section 5.

We believe that conscientious observance of the procedures set forth in the Resolution, including effective consultation and timely reporting, will assure that both the Executive and Legislative Branches possess the means to exercise their full and proper constitutional responsibilities.

AMENDMENT CONSIDERATION DEFERRAL RECOMMENDATION

The Administration will follow the provisions of the existing Resolution. We believe, however, that the consideration of emendments should be deferred, for two reasons. First, the existing law has been in effect only 4 years. We believe the passage of more time is necessary to assess the desirability for further legislation, time for the development of the cooperative working relationship we foresee and the healing of the deep divisions that were reflected in the debates on the present Resolution.

Second, we believe the existing law, conscientiously applied, is an effective instrument for insuring that the Nation will not be committed to war without adequate deliberation and participation by both Congress and the Executive. A prolonged debate over elusive constitutional issues, with no assurance as to what the final form of the amendments would be, could well produce new uncertainties within our own Government, and in the minds of our allies and potential adversaries, and might even detract from the effectiveness of the existing law.

In conclusion, we intend to work with you in fulfilling the goals underlying the War Powers Resolutiion. Through our joint efforts, we hope to demonstrate once again the health and vigor of our constitutional system.

Mr. Chairman, this concludes our formal presentation. Mr. Bennet and I will be glad to try to answer any questions.

Senator CLARK. Thank you very much for a most forthcoming statement. I know Mr. Bennet will obviously be working as the congressional liaison, between the Administration and the Congress, and will play an important role should this resolution come into effect. In view of this are there any comments you wish to make, Mr. Bennet, with regard to this issue.

ADMINISTRATION COMMITMENT TO WORKING WITH CONGRESS

Mr. BENNET. Thank you, Mr. Chairman. I do not have a prepared statement. I would just like to reiterate the commitment that Mr. Hansell has made on behalf of the Administration to work with the committee and with the Congress to try to establish practical systems for putting the War Powers Act into effect. I think that we are all aware, as you said, of the dangers of unlimited Presidential warmaking. We have had debate off and on for nearly a decade

about the constitutional aspects of the war powers issue—sufficient debate, I think, to sensitize all of us to the constitutional questions that might arise in any crisis. We have a War Powers Act which provides an adequate basis for consultation and flow of information back and forth.

We have an Administration which I am very proud to represent today, which is committed to working within the parameters of that Act, and I think that we therefore have an opportunity to put together a methodology for handling crises which can be effective. If we are successful in doing that—in putting together a practical system—I think that we will give the American public a degree of safety and assurance which it may not have had heretofore, and I think we will have served the cause of representative government very well.

Senator CLARK. Thank you very much. I have some questions, but Senator Javits has joined us, and as one of the authors of the War Powers Resolution, I wonder if he might have any opening statement or any comments.

COMMENDATION OF WITNESSES

Senator JAVITS. Mr. Chairman, simply to express my very deep gratification at the position taken by this Administration. We had to fight the preceding Administrations. We passed this bill over President Nixon's veto. I awaited this morning's testimony with the greatest expectation, and I am not a bit disappointed. I expected this, and I am delighted. I would like that communicated, if you would, to your superiors and to the President.

We are now faced with a problem of the trees, not the forest. You have all seen the forest. Mr. Chairman, I would like my turn to question, but that concludes my remarks at this time.

Senator CLARK. Why don't we operate on under the 10-minute rule. Others may well come, and that way we will all have an opportunity. Again, I want to join with Senator Javits in saying that I find it a most forthcoming statement, and one that expresses certainly good intent and good direction.

PRESIDENTIAL POWER LIMITS

Judging from the testimony you gave this morning, I take it that you do not regard the President's power under the Commander-in-Chief clause then as being unlimited. Is that correct, Mr. Hansell?

Mr. HANSELL. Yes, sir.

Senator CLARK. In that case, would you spell out for us what you believe are the limits of the President's warmaking powers, as best you can? I know that is a tall order, but if you agree, as you certainly have throughout your testimony, that it is limited, what do you believe are the limits of the President's warmaking power?

Mr. HANSELL. I think, Mr. Chairman, that is beyond my capacities in any definitive sense, and I suspect perhaps beyond the capacities of all of us collectively, to define the outer bounds or to write a catalog. It is extremely difficult. A number of scholars have undertaken to define some of the principal components, and in fact the Resolution, of course, identifies some emergency powers. It would take a great deal more time and preparation, I think, than I have given to undertake to do that, and I don't think, frankly, that

even then a very satisfactory comprehensive definition would be producible.

Senator CLARK. Can you speak even in general terms about what you consider to be some obvious limitations?

Mr. HANSELL. In terms of your original question, I think it is a little easier to speak in terms of some of the basic Presidential powers in this general area which, of course, are to function as the Commander-in-Chief of the Armed Forces. I think we would be prepared to say that the President's most basic authority relates, of course, to defending the security and integrity of the Nation. There is a statement in the Resolution itself, which is quite helpful in this regard that we would endorse, including a reference to response to emergency situations. It is the 2(c) statement.

Senator CLARK. Section 2(c)?

Mr. HANSELL. Section 2(c). Constitutional powers to introduce the Armed Forces into hostilities, the authority basically to respond to emergencies, to take those actions that are necessary to defend the Nation in time of crisis. Now, once you go beyond that very basic statement of his responsibilities, and begin to try to think of specifics, a catalog of specific instances, I think you would have real trouble.

Senator CLARK. You can think of no specific limitation on the President's power?

Mr. HANSELL. Yes, of course, there are limitations. The original question I thought related to Presidential authority in terms of limitations.

Senator CLARK. The question, just so it is clear, is whether you can spell out for us what you consider to be the limits of the President's warmaking power. You have indicated that you feel very clearly, and I think we all agree to it, that those powers are not unlimited. The President cannot commit the entire Army and Navy whenever he may desire without a declaration of war. A declaration of war, I guess, is really to some degree a limitation, but if his power is not unlimited, what are some of its limitations, or how would you characterize those limitations, or how can we speak of limitations to the President's warmaking powers?

Mr. HANSELL. Well, it seems to me difficult to be specific as to the limitations on the President's warmaking powers. Now, as for a declaration of war, that power resides in the Congress. That, for example, would not be something that the President could undertake to do. The President alone under the Constitution, of course, cannot commit the country to a treaty. He can negotiate, but ratification requires two-thirds of the Senate.

Senator CLARK. I am speaking just of the warmaking power here.

Mr. HANSELL. I would find it difficult, perhaps, to discuss with precision the nature of the limitation, but I think pretty clearly we would all share the view that he cannot make war unilaterally, that is, that whatever his powers may be, they are primarily of a defensive and protective nature, and that there is a limit beyond which he obviously cannot go in terms of initiating war.

Senator CLARK. Mr. Bennet, do you have anything to add to that?

Mr. BENNET. I would rather leave this to the constitutional scholars, being a historian myself.

ARMED FORCES INTRODUCTION INTO HOSTILITIES WITHOUT CONGRESSIONAL APPROVAL

Senator CLARK. I suffer from that same affliction. Let me try to be more specific, then, because it is a difficult area to define with exact precision or great specificity. Are there any situations, Mr. Hansell, other than those set out in section 2(c) of the War Powers Resolution, in which you believe the President could introduce the Armed Forces into hostilities without congressional authorization?

Mr. HANSELL. Yes, sir, I am sure there are, and I am certain that if we applied our imagination and thoughtful consideration, we probably could find several.

Senator CLARK. I think it might be wise to speculate about some of those, because it could very well become an issue before this Government.

Mr. HANSELL. A rescue situation, for example, is not referred to in 2(c), but he might face the necessity for rescuing either civilian or perhaps military personnel of the United States.

Senator CLARK. The rescue of civilians or military personnel. That is a good example. Can you think of others?

Senator JAVITS. We have it right now, Mr. Chairman, with the helicopter.

Senator CLARK. It could be an example of what he is saying. Can you think of other kinds of examples?

Mr. HANSELL. Well, there is no reference in 2(c), for example, to withstanding an attack, or to the national emergency created by an attack, to the extent that that would encompass such a situation.

Senator CLARK. Clause three would really cover that, wouldn't it, "a national emergency created by attack upon the United States, its territories or possessions"?

Mr. HANSELL. In an imprecise way, but in terms of an inquiry as to whether there are circumstances not covered by 2(c), I would have to say that I would certainly want a clearer and more precise statement of his power to respond to an attack upon either the Nation or its Armed Forces, if we were to rely solely on that as a statement of his powers to respond to such a situation.

I am not sure I know what the reference to national emergency implies.

Senator CLARK. One of the best examples, it seems to me, that you have come up with is in fact if the President wanted to recover civilians or military personnel. Senator Javits mentioned the helicopter incident. That would be one specific illustration. I am not speaking necessarily of that incident, but that kind of case.

Mr. HANSELL. I would prefer not to speak about that incident.

BROADENING SECTION 2(C) SCOPE

Senator CLARK. Yes, but that kind of case, perhaps. My guess would be another kind of case. My question really is this. If there are other cases, as you have indicated, and I think there are, where the President would have the authority to introduce the Armed Forces into hostilities, why should we not amend section 2(c) to broaden its scope and recognize those situations? Wouldn't that lead to less confusion and less chance of disagreement and confusion in time of crisis between the two bodies?

Mr. HANSELL. Obviously, it depends to a very large extent on what is done and how it is done. If the effort were to undertake an exhaustive or exclusive enumeration, I think that would probably be a will-o'-the-wisp, a fruitless pursuit. First of all, it would either have to be an extensive enumeration that would be pointless and would probably wind up as a grant of authority beyond that which I think is intended, or if it were something short of that, my guess is that we would be involved in endless discussion as to where you do in fact try to draw very difficult lines.

It is conceivable that understandings and agreements and compromises could be struck, but I wouldn't be optimistic that it could be done easily or in short order, which is not to say that one cannot always tinker with language. I think one can, but I doubt whether it is a constructive endeavor or useful to try to engage in that.

Senator CLARK. I wonder if the list would be so endless. I have asked you on the spur of the moment here for other illustrations. You have been able to describe one that you can think of, and I am sure, given some time, you could think of others, but I am not sure that it is that endless. I am not quite sure that it makes much sense to list two or three, if one agrees that there are other specific illustrations, and say, let's not list those, but let's keep the three we have.

Mr. HANSELL. I am not defending the current version. Candidly, Mr. Chairman, I think if we were to begin to engage in this exercise, and frankly it is one we would choose to avoid for a good many reasons, the list could be and would be quite lengthy. It is not one that we are prepared to undertake or did prepare to undertake, and not one that we think would be profitable or useful as a joint endeavor. We are hopeful that the committee would concur with us that that is not an exercise to which the energies either of the Congress or the Administration and the emotions of the people ought at this particular stage to be devoted.

Senator CLARK. My 10 minutes are up, and I want Senator Javits to have an opportunity. Let me just say in conclusion that I am not sure I agree with you about that. I guess there is room for disagreement. It seems to me that in the coolness of the period we have now, without crisis, that it might be better to try to define that relationship and our attitudes toward it rather than waiting until we get into a very critical period, and then begin to say, let's see what all this means, and let's try to define it. Does it fall under 2(c) or doesn't it? It seems to me that it does not have to raise the national emotions and so forth to begin to look more specifically and carefully at how you are going to operate and how we are going to operate when and if the crisis comes.

Mr. HANSELL. May I speak to that, however, before we go on? I think there is a misapprehension there, however, that somehow the existence of such a catalog would assure the absence of any confusion.

Senator CLARK. It wouldn't assure it, but it might relieve it.

Mr. HANSELL. But I think it is just as likely, and maybe even a little bit more likely, that the same problem might exist, that is, that we might go through the exercise, and simply become convinced that the catalog could not ever be comprehensive. It just

would not be feasible to envision every situation, and I think there is no assurance that you would be any better off having gone through it.

Second, while we understand the point that you would rather do it now at a time when there is a congenial Administration, there is nothing that guarantees that a comprehensive list worked out with a congenial administration would deal with the problem that I think you are concerned about: what happens if you don't have a congenial administration? No catalog is going to deal with that problem. That is a problem we must face.

Senator CLARK. It seems to me it is as true of what is in 2(c) now as it would be of what further things we could create, but Mr. Bennet, you wanted to comment, and then Senator Javits.

Mr. BENNET. Senator Fulbright, if I remember the earlier debates, always had a problem with that section. He feared that in an effort to create a catalog, one might end up broadening the President's powers—not that it would have an effect on the Constitution, obviously, but I think that is something to keep in mind when we are talking about creating a mechanism for consultation. I am sure we are all aware of the broad issues that are likely to be involved, but on rereading the consideration of the evacuation of Americans in three of the four cases in which the War Powers Act has been applied, one senses that the problem which arose there could not possibly have been foreseen when the act was drafted—the prospect that foreigners or non-Americans might also be evacuated in a situation where Americans were being evacuated. I was interested in Monroe Leigh's testimony yesterday in which he said perhaps it would be clear if there were nearly all Americans to be evacuated, but suppose the case were one American and 999 non-Americans? That is the kind of difficulty that you get into in facing a situation in real life, when you have to deal with it quickly. It seems to us that the more important and more reliable thing to have is a mechanism where people can sit down and make the most cogent possible judgment they can about a situation, cognizant of the Constitution as it is written, cognizant of the War Powers Act as it is in effect, and decide what to actually do. The utility of creating a catalog, I think, should be measured by whether or not it will help you in that real life situation. Does it help you to prepare for that situation, because the situation itself isn't going to be in the catalogue, in all probability.

My own feeling, speaking personally now, is that we have come to a point historically in this evolution where we really should turn our attention to the mechanics, because we have alerted ourselves sufficiently to the complexity of the Constitution and of the catalog of issues, if you will.

Senator CLARK. Senator Javits, you have 15 minutes.

SECTION 2(c) ENUMERATION OF POWERS WHEN READ WITH SECTION 8(d)

Senator JAVITS. Gentlemen, is it a fact that if you read 2(c), to wit, an enumeration of the constitutional powers of the President, with 8(d), that then it makes more sense, because 8(d) says: "Nothing in this joint resolution (1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of

the existing treaties, or, (2) shall be construed as granting any authority to the President with respect to the introduction of the United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by these circumstances which authority he would not have had in the absence of this joint resolution."

In other words, would you accept 2(c) as a reasonable enumeration of powers not exclusive provided that it is read with 8(d)?

Mr. HANSELL. Yes, sir. I think it is a statement of Presidential powers. Yes, sir.

SENATE/HOUSE RESOLUTION DIFFERENCES

Senator JAVITS. One other thing and then I will get to the main point. The Senate bill did proceed on a different theory from the House bill. That is one thing on which you need the testimony of old men like me to get clear, because I went through this entire bill as an author of the bill and as a conferee.

Let me then state my posture and get any comment. The Senate bill sought to delineate the powers of the President in order to clarify a grey area which had become very important—the conditions under which the President can act in an emergency before the Congress has had a chance to act. I ask unanimous consent that the delineation from the Senate bill be contained in the record at this point. The House did not even address this issue in its bill which stated as a "consultation" and "notice" bill.

Senator CLARK. Without objection.

[The information referred to follows:]

DELINEATION FROM SENATE BILL

In the absence of a declaration of war by the Congress, the Armed Forces of the United States may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, only—

(1) to repel an armed attack upon the United States, its territories and possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and immenient threat of such an attack;

(2) to repeal an armed attack agaist the Armed Forces of the United States located outside of the United States, its territories and possessions, and to forestall the direct and imminent threat of such an attack;

(3) to protect while evacuating citizens and nationals of the United States, as rapidly as possible, from (A) any situation on the high seas involving a direct and imminent threat to the lives of such citizens and nationals, or (B) any country in which such citizens and nationals are present with the express or tacit consent of the government of such country and are being subjected to a direct and imminent threat to their lives, either sponsored by such government or beyond the power of such government to control; but the President shall make every effort to terminate such a threat without using the Armed Forces of the United States, and shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States to protect citizens and nationals of the United States being evacuated from such country; or

(4) pursuant to specific statutory authorization. . . .

Senator JAVITS. It included a provision which allowed the President to protect while evacuating citizens or nationals of the United States under certain conditions. We actually specified that. The House bill had no such provision. The theory of the Senate bill was to define the powers of the President. He will sign the bill. He will therefore agree with us and from now on this is the way each of us

understands it. Now we have a methodology, and that is the rest of the bill, as to how we implement that understanding.

We sent it over to the House, but their bill as it finally matured proceeded on the theory of strictly a "performance" test. They completely omitted any effort to agree with the President upon the delineation of his emergency powers.

In the conference, the House view had to be accepted. We couldn't have gotten any bill otherwise. They had moved a long way from a pro-President position but not far enough; OK? But at my insistence and because I knew how my colleagues here felt, including Senator Eagleton and others who were then here, I fought and bled and died for this limited delineation contained in 2(c), at least to have a skeleton, a beginning, to try to get an agreed delineation. I argued with the House and prevailed in that when you read 2(c) in connection with 8(d), it is clear that the bill didn't do what has been contended. We couldn't change the Constitution anyhow, and then that was not an exclusive identification, but at least it was a beginning, something upon which we could agree with the President, a minimum, but something upon which we could agree, again thinking the President would sign. But the President didn't sign, so we overrode his veto. And that is what creates the confusion, because it now stands as an absolute statute, not a compact with the President, and the first compact that has occurred has been your testimony.

This is a compact. You are willing to agree on this. You are not willing to agree on anything else. You may agree, you may not, but you are telling us now that the President agrees with the Congress on this. Is that correct?

Mr. HANSELL. Yes.

Senator JAVITS. That is, this War Powers Resolution, Public Law 93-148.

Mr. HANSELL. I think that is correct, Senator, and I think our additional message is: Before we conclude that it is not a good compact, or before the Congress would conclude that it hasn't worked, our recommendation is, let's try it. There are those who are saying that it has failed when in fact we haven't ever really tried. What we are saying in essence is, it is premature to reach the conclusion that it is not a good compact. Let's try it as a compact.

We think, as Mr. Bennet has said, that there are implementing procedures that haven't yet been undertaken pursuant to it, the consultation mechanism, for example. We have indicated some ideas that we hope would be considered, and that we think it is that kind of activity that ought to engage the energies and emotions of the Congress and the Executive and the people rather than esoteric debates over fine constitutional points.

SECTION 4(A)(1) NOTICE TO CONGRESS

Senator JAVITS. The fact is, is it not, that under section 4(a)(1) of this resolution, which reads: "In the absence of a declaration of war in any case in which United States Armed Forces are introduced, one, into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances", if the President sent in a party to bring out the injured soldier

from the helicopter in Korea that he would have to give us notice under section 4(a)(1). Obviously, they would have already shown that they will shoot anybody who comes in there.

Mr. HANSELL. I hope you will take this in the spirit in which it is put forward, but I think we would all be much better off if we could deal in terms of situations other than those currently before us.

Senator JAVITS. All right, then, I will withdraw that question as posed but it is a fact that whenever and wherever the President wishes to send in troops as Commander-in-Chief, in a situation meeting the definition where the circumstances clearly indicate imminent involvement in hostilities 4(a)(1) operations. The administration accepts that?

Mr. HANSELL. Yes, sir.

Senator JAVITS. Now you have given me an excellent lead for legislation, and I am obliged for it. I think your statement that in order to help overcome these problems Congress may wish to consider establishing a streamlined structure for carrying out consultations not only in the war powers context but also in other crisis situations, is an excellent suggestion. I will immediately address myself to it. I will do my utmost to try to work with all my colleagues, especially on the Foreign Relations Committee, to develop such a Congressional posture.

DEFINITION OF "CONGRESS" IN SECTION 3

I think you have a right to know that when Section 3 says, "The President in every possible instance shall consult with Congress before introducing Armed Forces into hostilities . . ." and so on, you have a right to know who is the Congress, as far as that consultation is concerned. I think you have a right to know what you do now, and I think it is admirable that you have done that. I like that suggestion very much, and I shall address myself to it.

Mr. HANSELL. I might add, Senator, that Mr. Bennet has been a thoughtful student of that issue for some time, and I think perhaps when you have occasion to get to it, would have some very constructive suggestions that you might want to take into account.

Senator JAVITS. I certainly would. Mr. Bennet, why don't you furnish them for the record? I think every Senator ought to have an opportunity to consider your suggestions, though it seems natural that I should go to work on them. So, if you would be kind enough to do that, the Chair would receive that as part of the record.

Senator CLARK. Without objection.

[The information referred to follows:]

DEPARTMENT OF STATE
Washington, D.C. 20520

August 2, 1977

COMMITTEE ON
AUG 4 1977
FOREIGN RELATIONS

Dear Mr. Chairman:

During the course of testimony on the War Powers Act before your committee on Friday, July 15th, Senator Javits solicited my views on ways in which Congress might streamline its crisis consultations procedures. I would like to respond on a personal basis rather than as a representative of the Executive branch because any decision regarding such procedures should be Congress's alone.

At present there is no regular system in either House for consultation in foreign policy crisis situations. In practice, the State Department notifies the leadership of each House and the Chairmen of the appropriate committees whenever a crisis breaks out. The same Members are usually then notified from time to time as the crisis evolves and as major decisions are taken by the Executive branch. While the Members consulted are able to supply individual reactions which provide helpful guidance to the Department, they have no regular means of keeping abreast of developments, ordinarily do not meet together, and therefore cannot provide collective judgments.

Under these circumstances, one or both Houses might wish to establish a regular system whereby the Congress could be kept informed and participate appropriately in the decision-making as the Executive branch manages major international crises. Something along the following lines could be tried on an informal basis without requiring any additional legislation, staff, or institutional change:

The Honorable John Sparkman
Chairman, Committee on Foreign Relations
United States Senate

The leadership of each House should identify a single person to serve as the initial point of contact when a crisis develops. That person would initiate a simple, pre-arranged procedure.

The first step would be to establish an ad hoc committee with whom the Department can consult as a crisis unfolds. Membership of the committee might be permanent, but it would seem desirable to leave open the option of including members whose interests or expertise are particularly relevant to the crisis at hand. Perhaps a mixture of permanent and ad hoc members would work best.

The committee should number no more than eight to ten members, so that it can be quickly assembled.

When necessary, the committee should serve as the instrument for consultation described in Section 3 of the War Powers Resolution.

The contact person should have authority to designate all ad hoc members of the committee, and should be responsible for informing all committee members that the committee is being activated.

Briefing and discussions of policy options would be provided initially for each committee, and subsequently as either the committee or the Department desire.

Staff for the committee could be provided on an ad hoc basis from the foreign relations committees or other sources. Potential staff members would require security clearances.

Provisions should be made, perhaps in the foreign relations committee of each House, for receipt of regular situation reports, for getting these reports to members, and for protecting classified reports.

It is important to emphasize, I believe, that any such system must be designed so that it does not alter the distribution of authority and responsibility between the Executive and Legislative branches, or among the committees and membership of Congress. It's purpose should be simply to help all parties exercise their responsibilities on the basis of the best available information and in a way that will yield its best possible judgments.

I would be happy to work with the committee and the leadership in developing such a system if you wish.

With best wishes,

Sincerely,

Douglas J. Bennet, Jr.
Assistant Secretary for
Congressional Relations

Attachment

CRISIS CONSULTATION

The objective is to establish regular procedures whereby Congress may be kept informed and may participate appropriately in decision making as the Executive branch manages major international crises.

The problem is that there is no regular system in either House at this time for consultation in crisis situations. In practice, the State Department notifies the leadership of each House and the Chairmen of appropriate Committees when a crisis breaks. The same members are then usually notified from time to time as the crisis evolves and as major decisions are taken by the Executive branch. While the members consulted are able to supply individual reactions which provide helpful guidance to the Department, they have no regular means of keeping abreast of developments, ordinarily do not meet together, and therefore cannot provide collective judgments.

While the Executive branch has a responsibility to manage most international crises, at least until such time as the provisions of the War Powers Act are triggered by the need to deploy US armed forces, the Executive has a clear need for Congressional consultation in crisis situations and Congress undoubtedly wishes to provide it.

Proposed Solution. Each House should establish (1) a regular point of contact and (2) standard procedures for creating an ad hoc committee of members with whom the Department of State can consult as crises unfold.

The committee should number no more than eight to ten members, so that it can be quickly assembled.

Membership of the committee could be permanent, or ad hoc so that it could be adjusted to include members with interests or expertise particularly relevant to the crisis at hand. Membership might include some permanent and some ad hoc members.

The ad hoc committee should serve as the instrument for consultation described in Section 3 of the War Powers Resolution.

The contact person should have authority to designate members of the committee.

The contact person should follow simple established procedures for forming the committee and beginning consultations.

Provision should be made, perhaps in the foreign relations committee of each House, for receipt of regular situation reports, for getting these reports to members, and for protecting classified reports.

Briefing and discussions of policy options would be provided initially for each committee and subsequently as either the committee or the Department desires.

Staff for the committee could be provided on an ad hoc basis from the foreign relations committees or other sources. Potential staff members would require security clearances.

Simplicity. The purpose of this exercise is not to establish rigid procedures or permanent institutions -- just a modest system on an experimental basis to see whether crisis consultation can be both simplified and improved for all concerned.

Drafted: H:DJBennet
6/28/77

Senator JAVITS. Bearing in mind, of course, that there is a statutory set-up here for reports under section 4, that is concerned with section 5 and section 6 and section 7. Please bear that in mind in your suggestions, as we will have to.

ADMINISTRATION STATEMENT

The last thing I wanted to ask you is this. I like the fact that the President has worked out this procedure. By the way, this is an Administration statement? We take it this is the President.

Mr. HANSELL. Yes.

Senator JAVITS. I would ask you whether or not we should simply rely upon this presentation of it or whether you think it ought to be formalized in some kind of communication, the appropriate authority, perhaps even the President himself, to the Speaker and the President Pro Tempore. Would you consider that? I don't want to have you make a decision you haven't even thought about. Consider it, whether or not it would be good, because it is a very high-level question, to formalize what you have said in some appropriate documentation.

Now, we have a letter from Kissinger dated 1975, stating some such procedure, and that would have to be assimilated into whatever this Administration would say. We have no desire to do anything different, but we would like to be sure that it is very authoritative.

I would like to ask you a followup question. A good deal of authority, of course, is put in the various departments, the Joint Chiefs of Staff, the Department of State, the Department of Defense. Would the President also in the letter, if you gentlemen decide one is deserved, and I would strongly favor it, also point out that he has instructed, as I hope he has instructed, the various departments to decide doubts in favor of consultation and notice.

MEANING OF "REPORTS TO CONGRESS"

You say in your statement, ". . . have formalized a review process to insure that reports to the Congress are promptly submitted whenever they are required by the law." You know what that means to a lawyer. It depends on what the boss tells him. Do you want to lean one way or do you want to lean the other? What is your tilt? I think it would be very reassuring if, in this case, the tilt was to deciding doubtful questions in favor of an open rather than a closed operation. I don't mean any publicity, because it may be classified, but in any case the idea of complying rather than not complying, in terms of the policy of this administration, I think that would be very helpful.

Mr. HANSELL. I will certainly reflect that to him.

Senator JAVITS. Would you do that? I think that would be helpful. Your attitude on this, what we can develop, will have a very important bearing on whether there is legislation. That doesn't mean members are not free to introduce bills, including myself, but I think that now we are on a very much more constructive track with an administration which is leaning with the Congress rather than against it in this particular respect. I must say to you that I consider it extremely gratifying, and I consider it a great contribution towards peace that the administration is taking this position

because the broader the responsibility for war is, the less likely it is in some cases that there will be one.

WAR POWERS RESOLUTION AUTHORITY

My final question is this. We had occasion to hear before the Foreign Relations Committee testimony from a high administration official. I won't identify him. You can easily be acquainted with the details of what I am talking about. You may answer this question now or later. That high administration official, in respect to the situation which could involve the War Powers Resolution made 2 points. I will summarize them.

One, that the War Powers Resolution authorizes the President to introduce the Armed Forces into hostilities for up to 60 days; and two, that the U.S. mutual security treaties also authorize the President to introduce the Armed Forces into hostilities.

Is that the position of the administration? Just a word of explanation before you answer. What interests me is not what may be the construction in a given situation. What interests me is whether the administration thinks that they have something more than the Constitution gives them. I don't see how the bill can possibly give the President anything he hasn't already got under the Constitution. Therefore I doubt very much that this is really the proper answer to our question.

Mr. HANSELL. If the incident to which you refer is the one that I rather suspect it was, I think my most appropriate response would be that I don't believe it is a definitive expression of the legal interpretation of the War Powers Resolution that the administration would want to make. I think our view on it would be that we do not regard the War Powers Resolution as having granted authority to introduce the Armed Forces into hostilities.

Senator JAVITS. Thank you very much. I think that is a very desirable clarification.

Mr. HANSELL. Senator, we are obviously grateful to you for that very gracious statement and for the leadership you have provided in directing us to a compact of accommodation on the subject.

Senator JAVITS. Thank you very much. Thank you, Mr. Chairman.

Senator CLARK. Thank you, Senator Javits.

PRESIDENTIAL POWERS UNDER TREATIES, CONSTITUTION

In terms of Senator Javits' last statement, I gather you do not feel that the President has the authority under the treaties to commit Armed Forces without prior consultation?

Mr. HANSELL. Mr. Chairman, I think that is a wholly different question than the one Senator Javits asked.

Senator CLARK. No, you did not deal with that, but in the statement which he read, that issue was raised. That is why I wanted you to deal with that or to make any statement that you can make with regard to that point.

Senator JAVITS. Mr. Chairman, may I try to help? I think we want clarity. Would your answer be the same if the question related to treaties as it did to the powers of the President under the Constitution? Is that right?

Senator CLARK. That's it.

Senator JAVITS. Thank you. I thought that was the answer you were getting at.

Mr. HANSELL. The answer would certainly be the same, that is, that we do not regard the resolution as having expanded Presidential powers either under the Constitution or under the treaty, and we further do not regard any treaty as having granted war powers to the President.

Senator CLARK. Good. I just have two or three more questions.

Senator JAVITS. Gentlemen, would you excuse me? I have to go to another meeting.

Senator CLARK. As you know, President Carter in his March 5th telethon, when he was asked about the War Powers Resolution, said this about the resolution. "It is a reduction, obviously, in the authority that the President has had prior to the Vietnam War, but I think it is an appropriate reduction. My own attitude toward government is that I would never see our Nation approach a time of war with any sort of predictability about it without discussing it thoroughly and letting the American people know what is going on."

Again, if I may repeat for the record here, Secretary Vance's statements during his confirmation hearings before the committee, he was asked by Senator Javits, "Do you or the new administration see any problem with the good faith observance of that law?" Secretary Vance replied, "I do not." Senator Javits then asked, "Do you challenge it under the Constitution as the the President's power?" Secretary Vance responded, "No."

CONSTITUTIONALITY OF RESOLUTION

Now, I take it from your testimony and your answers today, Mr. Hansell and Mr. Bennet, that you therefore would reiterate the administration's belief that the resolution is constitutional. Is that correct?

Mr. HANSELL. I would like first to be precise with regard to Secretary Vance's testimony. I don't think it goes to the merits of your question.

Senator CLARK. On constitutionality?

Mr. HANSELL. I think both in your statement and in earlier references there have been some broad readings of what the Secretary said. I am not sure it is really relevant to our discussion, but in all fairness to him I think we ought to be very clear that that exchange was preceded by a reading of section 3 by Senator Javits, so that the reference to the good faith observance of that law was undoubtedly to section 3.

Senator CLARK. On consultation.

Mr. HANSELL. I am not sure the answer would have been any different, but I think it is important to be absolutely clear as to what he did say, and what he said was, he did not see any problem with the good faith observance of section 3. We are saying today that we see no problem with the good faith observance of the law, either section 3 or the terms of the entire resolution. Then going on, do you challenge it under ther Constitution? Mr. Vance said no, and we are saying to you today, no.

Senator CLARK. With regard to the resolution——

Mr. HANSELL. We are not challenging it under the Constitution. We are not engaging in debates on a good many constitutional issues, we are not challenging it.

Senator CLARK. But it is your impression that Secretary Vance was speaking in answer only to section 3, was asked only about section 3?

Mr. HANSELL. I am simply reading the transcript. I was not present. I have never asked him, and don't propose to, but a fair reading of it, I think, is that that must have been what Senator Javits was referring to.

Senator CLARK. Let me ask you about observance of "that law".

Mr. HANSELL. The transcript reads, "Senator Javits. Section 3 reads as follows." Then he read section 3. "Do you or the new administration see any problem with the good faith observance of that law?" I would think at least that is how I would have interpreted that question in that context, although I can't say to you that the answer would have varied if the question had related to the entire resolution. I have no reason to think it would have.

Senator CLARK. In any clase, as far as you are concerned at this hearing you don't question the constitutionality of the law?

Mr. HANSELL. That is correct. This administration is not going to challenge the constitutionality. That is correct, sir.

Senator CLARK. "That is correct, sir." That would necessarily, I assume, include the provisions of the resolution including the 60-day time limit and the current resolution on withdrawal procedure.

Mr. HANSELL. We have already indicated that we intend to observe the intent of those sections as well, sir.

Senator CLARK. That is good, but that is not what I am asking you. I am asking whether you think it is constitutional, whether this administration is prepared to go on record or not as saying that the War Powers Resolution is constitutional.

Mr. HANSELL. There is a difference, I think—let's be clear—between that issue, and saying, as the Secretary did, that we do not challenge the constitutionality, which is the critical question. You have already had 48 hours of testimony on the constitutional questions, and these debates are going to go on indefinitely. I think our message is that we would like to avoid getting into that kind of dialog.

Senator CLARK. Why so?

Mr. HANSELL. Because we think it is probably not productive.

Senator CLARK. I don't see what would be unproductive about this administration going on record as saying that they think the War Powers Resolution is constitutional.

Mr. HANSELL. Please don't misunderstand, Senator. What we said is that the administration does not challenge the constitutionality of it.

Senator CLARK. I understand that.

Mr. HANSELL. And I think that is the critical question.

Senator CLARK. It may be the critical question, but it is really not the question I am asking.

Mr. HANSELL. That is right. I understand that. I am not, I guess, prepared to say that in all respects the administration would render an affirmative determination that yes, it is constitutional.

Senator CLARK. In your judgment.

Mr. HANSELL. That's right. For example, the concurrent resolution issue as you know has already been addressed by the administration in another context, and no doubt will be addressed through the life of the administration and its relationships with the Congress in a variety of contexts. I can understand the desire for what I will characterize as an academic expression on the rather esoteric issue of constitutionality, but candidly, I do not think it would advance the cause that I think we are all interested in here, to try definitively—I am not sure there is any way we could do it—to resolve the question of constitutionality of the congressional veto.

Senator CLARK. I certainly agree with you that we could not in a final way determine its constitutionality. Only the Supreme Court could do that, but that doesn't mean that Members of the Senate or the administration do not have an opinion as to whether it is constitutional. I am merely asking for the legal adviser's opinion of it.

Let me ask something in a different kind of way. You have indicated that you would not challenge the constitutionality of it. If you felt it was unconstitutional, you certainly would challenge the constitutionality of it, would you not?

Mr. HANSELL. If we felt it was unconstitutional——

Senator CLARK. Yes.

Mr. HANSELL [continuing]. Yes, I suppose we would.

Senator CLARK. I think that answers that question in a candid way. Mr. Bennet, did you want to add something?

Mr. BENNET. I just wanted as a nonlawyer to reiterate the testimony in which we are saying that whatever our attitude about the constitutionality is, we will follow the letter and the spirit in section 5, which is the concurrent resolution.

SECTION 5(c) WORDING COVERAGE CONCERNING INTERMITTENT AERIAL BOMBARDMENT

Senator CLARK. I didn't find that adequate, you see. That is why I asked the question.

Well, let's go on. I have just a couple of other questions. Section 5(c) of the resolution, if you will take a look at that, allows the Congress to terminate hostilities by adopting a concurrent resolution. It refers to the "removal" of the Armed Forces from hostilities. Would this wording in your judgment allow the Congress, for example, to halt intermittent aerial bombardment?

Mr. HANSELL. I'm sorry, Senator. I did not hear all of that question.

Senator CLARK. Referring to section 5(c) of the War Powers Resolution, and perhaps I could read it here, it says, "Notwithstanding subsection (b), at any time that United States 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."

Now, my question is, would this wording allow the Congress, in your judgment, to halt intermittent aerial bombardment by concurrent resolution? Would this wording allow the Congress to pass a concurrent resolution to stop intermittent aerial bombardment?

Mr. HANSELL. I am inclined to think the answer to that probably is yes. I do want to say something here, Senator. We recognize the desire for as much certainty and precision as one can introduce into this, and we share the desire to achieve a mutuality of understanding. But, though I want to be cooperative, I am reluctant to respond to questions of such minute precision, and to talk in terms of specific instances, because I think they can only contribute to misunderstanding in particular cases.

I recognize that it sounds as though it is a perfectly innocent and simply inquiry, and one might ask why in the world shouldn't anybody be willing to answer a question like that, but it is one of infinite complexity. I am not sure if it is going to contribute to the dialog to do very much of this, but my answer to that question is that I think the term, "engaged in hostilities," almost surely would include aerial bombardment of a military nature.

LANGUAGE SPECIFICITY

Senator CLARK. I would tend to agree with that, too. I understand the complexity of trying to answer the question. I suspect that your answer would be about the same in terms of Congress's ability to halt the firing of, let us say, tactical ground-to-ground missiles. You get into the same kind of debate and discussion, right? You testified that a prolonged debate on amendments, which obviously this committee is now considering, could in your judgment produce no uncertainties, but I think at the same time you do recognize as you discussed here this morning, that the resolution does raise, as you put it, elusive constitutional issues, and I gather that in spite of the fact that it does raise these issues, that you feel at this time it would be better to leave those elusive rather than to try to be more specific in additional language, to try to improve or make them somewhat less elusive. Is that an accurate statement of your position?

Mr. HANSELL. Yes, sir, and I gather from consultations with my colleagues that I may have already wandered into just the kind of quagmire that led to that concern, in responding to your earlier question with regard to whether there would be a challenge in all instances of a provision that was deemed to be unconstitutional.

I am advised and reminded that that is obviously not a commitment that one could make or should be expected to make on behalf of the administration. There are a good many circumstances that may be involved. Coming back to the concurrent resolution, for example, if we were to throw down a gauntlet to the Congress each time there were a transgression that conceivably might be thought to be unconstitutional, we would be engaged in a guerrilla war between the Executive and the Legislative, and that is not the spirit or the atmosphere in which we want to function.

ADMINISTRATION CONSTITUTIONALITY CHALLENGE

Senator CLARK. So if it was your judgment that the War Powers Act was not constitutional, it wouldn't necessarily mean you would challenge it. Is that what you are saying?

Mr. HANSELL. We know it is a complex piece of legislation, and I am saying that we intend to observe it. We are not going to engage in a process of trying to decide whether we want to get into

constitutional confrontations with the Congress. We are much more concerned in working with the Congress and in utilizing and implementing these procedures.

Senator CLARK. You see, the question really is not so much in my judgment what your intentions are or this administration's intentions, but it does seem to me that it is very important for the future of the country for you to realize that it is not just you that is going to work with us. You see, you may not be here next year, or the administration may not be here for one reason or another.

Mr. HANSELL. But that is a will-o'-the-wisp, Senator, because there is no way that anything that we can do with you will protect you against that problem.

PUBLIC RECORD IMPACT ON FUTURE ADMINISTRATION, COURT DECISION

Senator CLARK. I am not sure that if you were prepared to go on record here as to the constitutionality of this legislation, that that would not have some impact on a later court decision with regard to that question. To say that it would have no impact——

Mr. HANSELL. It would not commit a future administration.

Senator CLARK. It would not commit a future administration but I think it might have a real impact on the view of the court.

Mr. HANSELL. Of course it would. I do want to react to that desire, because I understand that it underlies a good deal of this. I think it is a will-o'-the-wisp to think that a ringing declaration by this administration would remove the element of uncertainty, as to what another administration might do.

Senator CLARK. I don't see that as the issue.

Mr. HANSELL. But I understand that that is the justification for a good deal of what has been proposed in the pending amendment.

Senator CLARK. I think we are in complete agreement on that. There is nothing that you can say or President Carter can say or anybody on this side of the table can say that would put beyond question what some future administration might do. To me, that is not the issue at all. The issue is really whether we can give some substance and some backing, some further backing. Now, as Senator Javits said, I think quite accurately, your testimony this morning does that. It is very useful. It is very helpful, because for the first time we do have an administration that is subscribing in our judgment, or at least as I take your testimony, to the principles established in this resolution. I don't think that is useless. I think it is very helpful, not only for this administration but I think in the way and the attitudes in which future administrations may look upon us, because I think they are going—inevitably, to some degree—to be affected by how previous administrations have looked at it.

They are not going to be bound by it. There is not going to be any certainty. There are not going to be any absolutes, but I do think that it has some effect and some influence on the attitudes of future administrations and future courts.

Mr. HANSELL. We hear that, Senator. In fact, we think a much more important and effective restraint, if you will, and impact upon future administrations would be to develop a body of practice, of performances. What we think would be less significant, frankly,

is the academic and esoteric kind of debate over constitutional questions that we want to avoid. We do want to build a body of practice. We want to set up a consultation mechanism as indicated in my statement.

Senator CLARK. We appreciate that.

Mr. HANSELL. We want to develop a body of procedure and practice that we think could create a common law of operation in this arena, and we think that could be much more effective.

Senator CLARK. I don't see the two as being at all mutually exclusive. One of the things I jotted down here is to compliment you on is the willingness and forthrightness with which you have come prepared to do that, and the suggestions. I think it is excellent, I don't mean to demean that at all, but I don't think that developing that is mutually exclusive. It contributes to, but it is not mutually exclusive of, the question of constitutionality as the administration views the War Powers Resolution.

Mr. HANSELL. Well, they may not be mutually exclusive but our concern it that if we get into debates over constitutional issues, and press each other to define the limits of the powers of each other, that inevitably that leads to acrimony, that leads to devisiveness, that leads to taking sides within the community at large, and we then are not perceived as engaging in a cooperative joint venture. We are perceived as contesting with one another. So, while they are not necessarily mutually exclusive, our concern is that if we engage our energies and our emotions in defining positions against one another, we will have lost or at least have blunted the kind of momentum toward a joint cooperative endeavor that we hope to see created. We see it as potentially hostile, even if not necessarily so.

Senator CLARK. I think we have discussed this about far as we can. It comes to the question in my judgement of whether one would rather leave it, to use your language, as an elusive constitutional issue, or whether we try to clarify it in the coolness of the present, to make it less elusive, if that is possible. I think you have said you feel it may not be possible; I think we should try to deal with the question before we get into a really difficult crisis and have some real differences of opinion at a time when the Nation's welfare is very much at stake.

I gather from your testimony that you feel that even discussing in detail at this point and trying to be more specific about the limitations on the President's power and the congressional authority and so forth would not be productive, and that you would prefer to leave it as it is.

Mr. HANSELL. I do not mean to say it would be completely unproductive. I think, on a scale of priorities of what we think it would accomplish, it would be so much less productive and valuable than, for example, devoting the time and energy of this body and of the executive branch to conclude consultation mechanisms and other devices to build the kind of working relationship, we desire.

So, we won't say to you that we think it would be unproductive, but it certainly does not rank very high in our scale of priorities.

COMMENDATION OF WITNESSES

Senator CLARK. We thank you very much for your testimony and Mr. Bennet's. It has been a very, very useful and helpful discussion in terms of this committee and individual members making a determination as to what they feel we should perhaps do by way of amending or not amending the resolution. Again, I want to say that I think particularly your offer to try to become more specific and develop a mechanism in consultation can be very important.

I remember even on the occasion of the *Mayaguez,* I served on the committee, but certainly was not a central participant in that, but I remember very well the disagreements about whether in fact the Congress has been consulted, and in what manner they had been consulted. I remember the disagreement with the Senate Majority Leader, for example, as to whether he had or had not been consulted, and I think it is that kind of thing, again, that we could be more specific about and that we could develop not under the law but in our own practices, some agreement so that if something happens we immediately have a joint understanding of what it is that constitutes consultation, not just under the resolution, where obviously the speaker and the President pro tempore of the Senate are notified, but in terms of our own informal arrangements.

We welcome that offer, as Senator Javits has said, and we have already instructed the committee staff to work with you on trying to develop those methods, so we are very pleased that you came, and for the statements you have made in support of the Resolution. I think they are very helpful.

Before we adjourn, we would like to include in the record of yesterday's testimony a speech that President Ford made on the War Powers Resolution, striking a balance between the executive and legislative branches.

The hearing is adjourned.

[Whereupon, at 11:50 a.m., the committee adjourned, subject to the call of the Chair.]

APPENDIX

Public Law 93-148
93rd Congress, H. J. Res. 542
November 7, 1973

Joint Resolution

Concerning the war powers of Congress and the President.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

War Powers Resolution.

SHORT TITLE

SECTION 1. This joint resolution may be cited as the "War Powers Resolution".

PURPOSE AND POLICY

SEC. 2. (a) It is the purpose of this joint resolution 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.

(b) 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.

50 USC prec. title 1.

(c) 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 (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

SEC. 3. 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.

REPORTING

SEC. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; 87 STAT. 555

(2) 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; or 87 STAT. 556

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(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.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

CONGRESSIONAL ACTION

SEC. 5. (a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 per cent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), 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 as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), 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.

87 STAT. 556

87 STAT. 557

CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTION OR BILL.

SEC. 6. (a) Any joint resolution or bill introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 5(b). The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 5(b). In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

CONGRESSIONAL PRIORITY PROCEDURES FOR CONCURRENT RESOLUTION

SEC. 7. (a) Any concurrent resolution introduced pursuant to section 5(c) shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Any concurrent resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a concurrent resolution passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted upon within

three calendar days, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

INTERPRETATION OF JOINT RESOLUTION

SEC. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred

(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization 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.

59 Stat. 1031.

"Introduction of United States Armed Forces."

(c) For purposes of this joint resolution, the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Nothing in this joint resolution—

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

SEPARABILITY CLAUSE

SEC. 9. If any provision of this joint resolution or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby.

EFFECTIVE DATE

SEC. 10. This joint resolution shall take effect on the date of its enactment.

CARL ALBERT
Speaker of the House of Representatives.

JAMES O. EASTLAND
President of the Senate pro tempore.

IN THE HOUSE OF REPRESENTATIVES, U.S.,
November 7, 1973.

The House of Representatives having proceeded to reconsider the resolution (H. J. Res. 542) entitled "Joint resolution concerning the war powers of Congress and the President", returned by the President of the United States with his objections, to the House of Representatives, in which it originated, it was

Resolved, That the said resolution pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

W. PAT JENNINGS
Clerk.

I certify that this Joint Resolution originated in the House of Representatives.

W. PAT JENNINGS
Clerk.

IN THE SENATE OF THE UNITED STATES
November 7, 1973.

The Senate having proceeded to reconsider the joint resolution (H. J. Res. 542) entitled "Joint resolution concerning the war powers of Congress and the President", returned by the President of the United States with his objections to the House of Representatives, in which it originated, it was

Resolved, That the said joint resolution pass, two-thirds of the Senators present having voted in the affirmative.

Attest:

FRANCIS R. VALEO
Secretary.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 93-287 (Comm. on Foreign Affairs) and No. 93-547 (Comm. of Conference).
SENATE REPORT No. 93-220 accompanying S. 440 (Comm. on Foreign Relations).
CONGRESSIONAL RECORD, Vol. 119 (1973):
June 25, July 18, considered and passed House.
July 18 - 20, considered and passed Senate, amended, in lieu of S. 440.
Oct. 10, Senate agreed to conference report.
Oct. 12, House agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 9, No. 43:
Oct. 24, vetoed; Presidential message.
CONGRESSIONAL RECORD, Vol. 119 (1973):
Nov. 7, House and Senate overrode veto.

93D CONGRESS 1st Session } HOUSE OF REPRESENTATIVES { REPORT No. 93-547

WAR POWERS

OCTOBER 4, 1973.—Ordered to be printed

Mr. ZABLOCKI, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.J. Res. 542]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the joint resolution (H.J. Res. 542) concerning the war powers of Congress and the President, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

SHORT TITLE

SECTION 1. This joint resolution may be cited as the "War Powers Resolution".

PURPOSE AND POLICY

SEC. 2. (a) It is the purpose of this joint resolution 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.

(b) 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.

(c) 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 (1) a decla-

ration 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

SEC. 3. 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.

REPORTING

SEC. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) 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; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(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.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

CONGRESSIONAL ACTION

SEC. 5. (a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on

Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), 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 as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), 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.

CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTION OR BILL

SEC. 6. (a) Any joint resolution or bill introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 5(b). The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar

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days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 5(b). In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

CONGRESSIONAL PRIORITY PROCEDURES FOR CONCURRENT RESOLUTION

SEC. 7. (a) Any concurrent resolution introduced pursuant to section 5(c) shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Any concurrent resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a concurrent resolution passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted upon within three calendar days, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

INTERPRETATION OF JOINT RESOLUTION

SEC. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations where involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this resolution; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization 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.

(c) For purposes of this joint resolution, the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Nothing in this joint resolution—

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the abence of this joint resolution.

SEPARABILITY CLAUSE

SEC. 9. If any provision of this joint resolution or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby.

EFFECTIVE DATE

SEC. 10. This joint resolution shall take effect on the date of its enactment.

And the Senate agree to the same.

CLEMENT J. ZABLOCKI,
THOMAS E. MORGAN,
WAYNE L. HAYS,
DONALD FRASER,
DANTE B. FASCELL,
PAUL FINDLEY,
WM. BROOMFIELD,
Managers on the Part of the House.

J. W. FULBRIGHT,
MIKE MANSFIELD,
STUART SYMINGTON,
EDMUND S. MUSKIE,
G. AIKEN,
CLIFFORD P. CASE,
J. K. JAVITS,
Managers on the Part of the Senate

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the joint resolution (H.J. Res. 542) concerning the war powers of Congress and the President, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment to the joint resolution struck out all after the resolving clause and inserted a new text. Under the conference agreement the House recedes with an amendment which substitutes a new text explained below except for clerical corrections, incidental changes made necessary by reason of agreements reached by the conferees, and minor drafting and clarifying changes.

SHORT TITLE

Section 1 of the Senate amendment substituted "War Powers Act" as a short title in lieu of the short title "War Powers Resolution of 1973" in the House joint resolution. Section 1 of the conference substitute provides a short title of "War Powers Resolution".

PURPOSE AND POLICY

The Senate amendment contained a section entitled "Purpose and Policy" (section 2) and a section entitled "Emergency Use of the Armed Forces" (section 3) which defined the emergency powers of the President to introduce United States Armed Forces into hostilities or situations of imminent hostilities.

The House joint resolution did not contain similar provisions.

The conference report contains a section entitled "Purpose and Policy". The new section states that:

(*a*) the purpose of the joint resolution is 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;

(*b*) Article I, section 8 of the Constitution provides the basis for congressional action in this area; and

(*c*) 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 (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.

Section 2(c) is a statement of the authority of the Commander-in-Chief respecting the introduction of United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances. Subsequent sections of the joint resolution are not dependent upon the language of this subsection, as was the case with a similar provision of the Senate bill (section 3).

CONSULTATION

The House joint resolution provided for presidential consultation with the leadership and appropriate committees of Congress before and after the President introduces United States Armed Forces into hostilities or situations of imminent hostilities. The conferees modified the House provision, to provide for consultation with the Congress. Section 3 of the conference report is not a limitation upon or substitute for other provisions contained in the report. It is intended that consultation take place during hostilities even when advance consultation is not possible.

REPORTING

Section 4 of the conference report concerns reporting both the House joint resolution and the Senate amendment contained similar reporting provisions requiring the President to report to the Congress on specified actions. In the case of the House joint resolution, the reporting provisions triggered the subsequent congressional action provisions. In the Senate version, congressional action provisions were not triggered by the reporting provision, but were otherwise brought into play. Section 4 of the conference report draws on both the Senate and House versions. It requires that the President provide such other information as the Congress may request following his initial report on the introduction of United States Armed Forces, and further requires supplementary reports at least every six months so long as those forces are engaged. The initial presidential report is required to be submitted within 48 hours. The objective is 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.

CONGRESSIONAL ACTION

Both the House joint resolution and the Senate amendment provided for termination within a specified time of presidential use of United States Armed Forces without a declaration of war or specific prior statutory authorization. The termination period in the House joint resolution was 120 days; in the Senate amendment, 30 days.

The conferees agreed on a 60 day period following the forty-eight hour period in which the President is required to report under section 4. The 60-day period can be extended for up to 30 additional days if the President determines and certifies in writing to the Congress that unavoidable military necessity respecting the safety of the troops requires their continued use in bringing about a prompt disengagement from hostilities.

In section 5(a) the conferees accepted the provisions of the House joint resolution relating to the transmittal of the presidential report to Congress, with amendments which (1) provide for the possibility of reconvening of Congress in case of adjournment in order to consider such report, and (2) provide that 30 percent of the membership of the respective Houses may petition for such reconvening.

The House joint resolution provided that use of United States Armed Forces by the President without a declaration of war or specific statutory authorization could be terminated by Congress through the use of a concurrent resolution. The Senate amendment provided for such termination by a bill or joint resolution. The conference report contains the concurrent resolution provision.

The House joint resolution provided for termination of certain peacetime deployments of United States Armed Forces through the elapsing of a time period in which Congress failed to approve such deployments. The Senate amendment did not include such deployments in its congressional action provisions. The conference report requires presidential reporting on such deployments but section 5(b) does not require their termination.

CONGRESSIONAL PRIORITY PROCEDURES

Both the House joint resolution and the Senate amendment contained congressional priority procedures. They differed primarily in that the House language specifically stipulated resort to a procedure of committee consideration while in the Senate version any pertinent bill or joint resolution was to be considered as reported directly to the floor of the House in question unless otherwise decided by the yeas and nays. The language agreed to by the conference in sections 6 and 7 corresponds to the House version including separately stipulated priority procedures for consideration of concurrent resolutions requiring removal of forces. The following changes, however, were made:

(1) language was added at the end of sections 6(a) and 7(a) allowing each House to change the procedures by the yeas and nays;

(2) the various time frames in section 6 for full cycle consideration of a joint resolution or bill were shortened to conform to the change in section 5(b) from 120 days to 60 days;

(3) following the reporting of a joint resolution or bill or concurrent resolution by the appropriate committee it was stipulated that the time for debate in the Senate shall be equally divided between the proponents and the opponents; and

(4) section 6(d) and section 7(d) provide for expedited conference committee procedures in the consideration of pertinent legislation passed by both houses.

TERMINATION OF CONGRESS

Section 7 of the House joint resolution provided a mechanism to insure that the time period provided for under section 4 of the joint resolution would not expire while Congress was in adjournment. The Senate amendment had no similar provision. The conference report does not contain the House provision on the grounds that the language

of section 5 of the conference report had obviated the need of this section.

INTERPRETATION OF JOINT RESOLUTION

The Senate amendment contained definitions of certain terms. The House joint resolution, while incorporating some broad interpretations of the meaning of the joint resolution, did not contain such definitive language. The conferees agreed to combine both definitions and interpretations in a single section 8 with changes including:

(1) adoption of modified Senate language defining specific statutory authorization, and defining the phrase "introduction of United States Armed Forces" as used in the joint resolution;

(2) elimination of House language concerning the constitutional process requirement contained in mutual security treaties: and

(3) addition of Senate language which makes clear that the resolution does not prevent members of the United States Armed Forces from participating in certain joint military exercises with allied or friendly organizations or countries. The "high-level military commands" referred to in this section are understood to be those of NATO, the North American Air Defense command (NORAD) and the United Nations command in Korea (UNC).

SEPARABILITY CLAUSE

The Senate amendment contained a separability clause stipulating that, if any of its provisions or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to any other person or circumstance would not be affected. The House version did not contain a corresponding provision. The conferees accepted the language of the Senate amendment, with certain technical modifications.

EFFECTIVE DATE

Both the House joint resolution and the Senate amendment contained language providing that the legislation would take effect on the date of its enactment. This provision was not in disagreement.

CLEMENT J. ZABLOCKI,
THOMAS E. MORGAN,
WAYNE L. HAYS,
DONALD FRASER,
DANTE B. FASCELL,
PAUL FINDLEY,
WM. BROOMFIELD,
Managers on the Part of the House.

J. W. FULBRIGHT,
MIKE MANSFIELD,
STUART SYMINGTON,
EDMUND S. MUSKIE,
G. AIKEN,
CLIFFORD P. CASE,
J. K. JAVITS,
Managers on the Part of the Senate.

93D CONGRESS
1ST SESSION

S. 440

IN THE HOUSE OF REPRESENTATIVES

JULY 23, 1973

Referred to the Committee on Foreign Affairs

AN ACT

To make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "War Powers Act".

PURPOSE AND POLICY

SEC. 2. It is the purpose of this Act 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 the Armed

Forces of the United States in hostilities, or in 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 after they have been introduced in hostilities or in such situations. 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 this Constitution in the Government of the United States, or in any department or officer thereof. At the same time, this Act is not intended to encroach upon the recognized powers of the President, as Commander in Chief and Chief Executive, to conduct hostilities authorized by the Congress, to respond to attacks or the imminent threat of attacks upon the United States, including its territories and possessions, to repel attacks or forestall the imminent threat of attacks against the Armed Forces of the United States, and, under proper circumstances, to rescue endangered citizens and nationals of the United States located in foreign countries.

EMERGENCY USE OF THE ARMED FORCES

SEC. 3. In the absence of a declaration of war by the Congress, the Armed Forces of the United States may be introduced in hostilities, or in situations where imminent

involvement in hostilities is clearly indicated by the circumstances, only—

(1) to repel an armed attack upon the United States, its territories and possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack;

(2) to repel an armed attack against the Armed Forces of the United States located outside of the United States, its territories and possessions, and to forestall the direct and imminent threat of such an attack;

(3) to protect while evacuating citizens and nationals of the United States, as rapidly as possible, from (A) any situation on the high seas involving a direct and imminent threat to the lives of such citizens and nationals, or (B) any country in which such citizens and nationals are present with the express or tacit consent of the government of such country and are being subjected to a direct and imminent threat to their lives, either sponsored by such government or beyond the power of such government to control; but the President shall make every effort to terminate such a threat without using the Armed Forces of the United States, and shall, where possible, obtain the consent of the government of such

country before using the Armed Forces of the United States to protect citizens and nationals of the United States being evacuated from such country; or

(4) pursuant to specific statutory authorization, but authority to introduce the Armed Forces of the United States in hostilities or in any such situation shall not be inferred (A) from any provision of law hereafter enacted, including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of such Armed Forces in hostilities or in such situation and specifically exempts the introduction of such Armed Forces from compliance with the provisions of this Act, or (B) from any treaty hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of the Armed Forces of the United States in hostilities or in such situation and specifically exempting the introduction of such Armed Forces from compliance with the provisions of this Act. For purposes of this clause (4), "introduction of the Armed Forces of the United States" includes the assignment of members of the Armed Forces of the United States to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an

imminent threat that such forces will become engaged, in hostilities. No treaty in force at the time of the enactment of this Act shall be construed as specific statutory authorization for, or a specific exemption permitting, the introduction of the Armed Forces of the United States in hostilities or in any such situation, within the meaning of this clause (4); and no provision of law in force at the time of the enactment of this Act shall be so construed unless such provision specifically authorizes the introduction of such Armed Forces in hostilities or in any such situation.

REPORTS

SEC. 4. The introduction of the Armed Forces of the United States in hostilities, or in any situation where imminent involvement in hostilities is clearly indicated by the circumstances, under any of the conditions described in section 3 of this Act shall be reported promptly in writing by the President to the Speaker of the House of Representatives and the President of the Senate, together with a full account of the circumstances under which such Armed Forces were introduced in such hostilities or in such situation, the estimated scope of such hostilities or situation, and the consistency of the introduction of such forces in such hostilities or situation with the provisions of section 3 of this Act.

Whenever Armed Forces of the United States are engaged in hostilities or in any such situation outside of the United States, its territories and possessions, the President shall, so long as such Armed Forces continue to be engaged in such hostilities or in such situation, report to the Congress periodically on the status of such hostilities or situation as well as the scope and expected duration of such hostilities or situation, but in no event shall he report to the Congress less often than every six months.

THIRTY-DAY AUTHORIZATION PERIOD

SEC. 5. The use of the Armed Forces of the United States in hostilities, or in any situation where imminent involvement in hostilities is clearly indicated by the circumstances, under any of the conditions described in section 3 of this Act shall not be sustained beyond thiry days from the date of the introduction of such Armed Forces in hostilities or in any such situation unless (1) the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of the Armed Forces of the United States engaged pursuant to section 3 (1) or 3 (2) of this Act requires the continued use of such Armed Forces in the course of bringing about a prompt disengagement from such hostilities; or (2) Congress is physically unable to meet as a result of an armed attack upon the United States; or (3) the continued use of such Armed Forces in

such hostilities or in such situation has been authorized in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof.

TERMINATION WITHIN THIRTY-DAY PERIOD

SEC. 6. The use of the Armed Forces of the United States in hostilities, or in any situation where imminent involvement in hostilities is clearly indicated by the circumstances, under any of the conditions described in section 3 of this Act may be terminated prior to the thirty-day period specified in section 5 of this Act by an Act or joint resolution of Congress, except in a case where the President has determined and certified to the Congress in writing that unavoidable military necessity respecting the safety of Armed Forces of the United States engaged pursuant to section 3 (1) or 3 (2) of this Act requires the continued use of such Armed Forces in the course of bringing about a prompt disengagement from such hostilities.

CONGRESSIONAL PRIORITY PROVISIONS

SEC. 7. (a) Any bill or joint resolution authorizing a continuation of the use of the Armed Forces of the United States in hostilities, or in any situation where imminent involvement in hostilities is clearly indicated by the circumstances, under any of the conditions described in section 3 of this Act, or any bill or joint resolution terminating the use of Armed Forces of the United States in hostilities, as

provided in section 6 of this Act, shall, if sponsored or co-sponsored by one-third of the Members of the House of Congress in which it is introduced, be considered reported to the floor of such House no later than one day following its introduction unless the Members of such House otherwise determine by yeas and nays. Any such bill or joint resolution, after having been passed by the House of Congress in which it originated, shall be considered reported to the floor of the other House of Congress within one day after it has been passed by the House in which it originated and sent to the other House, unless the Members of the other House shall otherwise determine by yeas and nays.

(b) Any bill or joint resolution reported to the floor pursuant to subsection (a) or when placed directly on the calendar shall immediately become the pending business of the House in which such bill or joint resolution is reported or placed directly on the calendar, and shall be voted upon within three days after it has been reported or placed directly on the calendar, as the case may be, unless such House shall otherwise determine by yeas and nays.

SEPARABILITY CLAUSE

SEC. 8. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision

to any other person or circumstance shall not be affected thereby.

EFFECTIVE DATE AND APPLICABILITY

SEC. 9. This Act shall take effect on the date of its enactment. Nothing in section 3 (4) of this Act shall be construed to require any further specific statutory authorization to permit members of the Armed Forces of the United States 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 Act and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

Passed the Senate July 20, 1973.

Attest: FRANCIS R. VALEO,
Secretary.

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Calendar No. 209

93D CONGRESS
1st Session

SENATE

REPORT
No. 220

WAR POWERS

JUNE 14, 1973—Ordered to be printed

Mr. FULBRIGHT, from the Committee on Foreign Relations, submitted the following

REPORT

together with

SUPPLEMENTAL VIEWS

[To accompany S. 440]

The Committee on Foreign Relations, to which was referred the bill (S. 440), to make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress, having considered the same, reports favorably thereon and recommends that the bill do pass.

PREVIOUS SENATE ACTION

The bill, S. 440, is identical in text to S. 2956 which was passed by the Senate on Arpil 13, 1972 by a vote of 68 to 16. No agreement having been reached in conference in the 92nd Congress, S. 2596 was reintroduced as S. 440 on January 18, 1973 by Senator Javits and 57 cosponsors. S. 440 has a total of 61 cosponsors as it goes to the Senate floor.

PURPOSES OF THE BILL

A detailed explanation of all the bill's provisions is given at the end of the Committee Report, beginning on page 21.

The purpose of the war powers bill, as set forth in its statement of "purpose and policy," is to fulfill—not to alter, amend, or adjust—the intent of the framers of the United States Constitution in order to insure that the collective judgment of both the Congress and the President will be brought to bear in decisions involving the introduc-

tion of the Armed Forces of the United States in hostilities or in situations where imminent involvement in hostilities is indicated by circumstances. The constitutional basis for this bill is found in Article 1, Section 8, of the Constitution, which enumerates the war powers of Congress, including the power to declare war and to make rules for the Government and regulation of the Armed Forces, and further specifies 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, or in any Department or Officer thereof."

The essential purpose of the bill, therefore, is to reconfirm and to define with precision the constitutional authority of Congress to exercise its constitutional war powers with respect to "undeclared" wars and the way in which this authority relates to the constitutional responsibilities of the President as Commander-in-Chief.

Section 3 of the bill defines the emergency conditions in which, in the absence of a declaration of war by Congress, the Armed Forces of the United States may be introduced in hostilities, or in situations where imminent involvement in hostilities is indicated by circumstances.

The designation of conditions for the emergency use of the armed forces spelled out in Section 3 is the result of a concerted effort on the part of the Committee and the principal sponsors of the "War Powers Act" to make provision for the exigencies of modern warfare and international politics but to do so in such a way as to fulfill the intent of the Constitution, particularly with reference to war powers of Congress.

Senator Javits, the initial sponsor of war powers legislation, in testimony before the Committee in 1971 explained the rationale for the proposed legislation as follows:

> My cosponsors and I regard this bill as basic national legislation. It is legislation essential to our security and well being. It is legislation in the interest of the President as well as the Congress. . . . We live in an age of undeclared war, which has meant Presidential war. Prolonged engagement in undeclared, Presidential war has created a most dangerous imbalance in our Constitutional system of checks and balances. . . . [The bill] is rooted in the words and the spirit of the Constitution. It uses the clause of Article I, Section 8 to restore the balance which has been upset by the historical disenthronement of that power over war which the framers of the Constitution regarded as the keystone of the whole Article of Congressional power—the exclusive authority of Congress to "declare war"; the power to change the nation from a state of peace to a state of war.

In testimony before the Committee in 1971, Senator Stennis, Chairman of the Armed Services Committee, stated: ". . . I believe that all of the bills and resolutions so far introduced are important chiefly because they attempt to delineate between those circumstances in which the President can first act unilaterally and those in which prior authority by Congress is required before armed forces can be used."

Section 3 of the bill makes these crucial delineations. Subsections (1), (2) and (3) are codifications of the President's authority to "repel

sudden attacks" and protect U.S. nationals whose lives are endangered abroad—powers based on established precedent and the intention of the Constitutional Convention, as evidenced by Madison's notation about "leaving to the Executive the power to repel sudden attacks." Subsection (4) of Section 3 of the bill is a crucial provision of the legislation, requiring that all other use of the Armed Forces in hostilities, or situations where hostilities are clearly imminent, must be "pursuant to specific statutory authorization."

In allowing of emergency action to forestall the direct and imminent threat of an attack the majority of the Committee accepted the view expressed in testimony before the Committee by Alexander M. Bickel, Professor of Law, Yale University, that the authority involved is "a reactive not a self-starting affirmative power. . . ." As Professor Bickel put it in 1971:

> The "sudden attack" concept of the framers of the Constitution denotes a power to act in emergencies in order to guard against the threat of attack, as well as against the attack itself, when the threat arises, for example, in such circumstances as those of the Cuban missile crisis of 1962. So long as it is understood that this is a reactive, not a self-starting affirmative power, I have no trouble agreeing that it is vested in the President by the Constitution, that it provides flexibility, and that Congress cannot take it away.[1]

Again, in testimony before the Committee in 1973, Professor Bickel expressed his belief that:

> The actual draft of Section 3 of S. 440 is precise and is, on any fair reading, not only a full implementation of the constitutional grant to the President, but also more restrictive than many a claim of power that has in past years been made by Presidents, and indeed acted upon. Moreover, as a matter of effective drafting, it seems to me impossible to state with any clarity what is reserved to Congress without stating first what belongs to the President. The task is one of line-drawing, of separating one thing from another, and in doing so one must state what is on both sides of the line.[2]

With respect to the provisions of subsection (4) of section 3, Professor Bickel made the following point:

> The Constitution does not say that the President shall declare war subject to Congressional veto by failure to appropriate. It says that Congress shall declare war, and that must mean that Congress, whether by formal declaration or other legislation, must expressly authorize the initiation of hostilities, save only in the limited conditions in which the President may act on his own independent authority, and in which, indeed, his authority may be exclusive. To appropriate money in support of a war the President is already waging, it seems to me, is no more to ratify his action in responsible fashion than to appropriate for the payment of his salary.[3]

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[1] "War Powers Legislation." *Hearings Before the Committee on Foreign Relations*, U.S. Senate, 92d Congress, 1st Session. (Washington: U.S. Govt. Printing Office, 1972), p. 553.
[2] "War Powers Legislation," *Hearings Before the Committee on Foreign Relations*, U.S. Senate, 93rd Congress, 1st Session. (Washington: U.S. Govt. Printing Office, 1973), p. 21.
[3] "War Powers Legislation," (1973), p. 23.

In his testimony before the Committee in 1971, Senator Eagleton made the point forcefully concerning the need for reporting:

> For Congress to pay more than pious lip service to its war making role, it must not only pass a strong war powers bill, but also must be willing to demand, receive and act upon relevant information it needs to exercise the most solemn of its constitutional responsibilities—making the final decision that takes this country to war.

Section 5, which with Section 3 is the heart and core of the bill, provides that the use of the armed forces under any of the emergency conditions spelled out in Section 3 shall not be sustained for a period beyond thirty days unless Congress adopts legislation specifically authorizing the continued use of the armed forces. The intended effect of Section 5 is to impose a prior restriction on the emergency use of the armed forces by the President. Emergency use of the armed forces by the President—under Section 3—would be undertaken with full knowledge on his part that the operation could be continued beyond a thirty-day period only with the specific authorization of Congress. The President would thereby stand forewarned against any emergency use of the armed forces that did not conform with the law and that he did not feel confident would command the support of majorities of both Houses of Congress.

BACKGROUND AND COMMITTEE ACTION

On June 15, 1970, Senator Javits introduced the first war powers bill (S. 3964) with the cosponsorship of Senator Dole; and on February 10, 1971, he reintroduced a revised version as S. 731 with the cosponsorship of Senators Mathias, Pell and Spong. War powers bills were subsequently introduced on January 27, 1971 by Senator Taft: on March 1, 1971 by Senator Eagleton; on May 11, 1971 by Senator Stennis; and on May 15, 1971, by Senator Bentsen. All of these bills, except that introduced by Senator Taft, contained the requirement of advance Congressional authorization for the commitment of the armed forces to hostilities by the President, except in certain designated emergencies, in the event of which the President would be authorized to commit the armed forces to combat for a period not to exceed thirty days unless explicitly authorized by Congress.

The immediate legislative history of the war powers bill can be dated to the controversial Gulf of Tonkin Resolution of 1964 and the subsequent conduct of hostilities in Vietnam, Laos and Cambodia without valid Congressional authorization. In 1969, by a vote of 70 to 16, the Senate adopted the National Commitments Resolution, which expressed the sense of the Senate that "a national commitment by the United States to a foreign power necessarily and exclusively results from affirmative action taken by the executive and legislative branches of the United States Government...." This enactment has been ignored by the executive. Recent Presidents have relied upon dubious historical precedents and expansive interpretations of the President's authority as Commander-in-Chief to justify both the initiation and perpetuation of foreign military activities without the consent—in some instances without even the knowledge—of Congress. As Presi-

dent Johnson put it in a press conference, "We stated then, and we repeat now, we did not think the [Tonkin Gulf] resolution was necessary to do what we did and what we are doing."[4]

The purpose of the National Commitments Resolution, as the Committee commented in its Report of April 16, 1969, was "not to alter the Constitution but to restore it." The resolution was understood by the Committee as essentially ". . . an invitation to the executive to reconsider its excesses, and to the legislature to reconsider its omissions, in the making of foreign policy, and, in the light of such reconsideration, to bring their foreign policy practices back into compliance with that division of responsibilities envisoned by the Constitution and sanctioned by over a century of usage." The Committee also held the view at that time that no further legislative enactment was required, that, indeed, ". . . all that is required is the restoration of constitutional procedures which have been permitted to atrophy." Much to the Committee's disappointment, the executive has chosen not to accept the "invitation" conveyed in the National Commitments Resolution. The executive—not just the present Administration but its recent predecessors as well—has chosen to ignore Congressional expressions of constitutional principle which do not carry the force of law.

Following upon the adoption of the National Commitments Resolution it was hoped that the then newly installed Nixon Administration would take a view different from that of its predecessor. That hope has not been realized. The commitment of American military forces to Cambodia in 1970, and to Laos in 1971, without the consent or even the knowledge of Congress, showed that, like its predecessor, the present Administration believes the President may initiate foreign military actions without reference to the authority of the Congress.

Following upon extensive hearings before the Committee in 1971, Senators Javits, Stennis, Eagleton, and Spong joined in introducing a joint bill, S. 2956, on December 6, 1971 and were joined by Senators Taft and Bentsen. It was this bill, representing a synthesis of separate bills offered by the co-sponsors, which the Committee favorably reported and which the Senate subsequently adopted 68–16 on April 13, 1972, with three perfecting amendments, offered by the bill's sponsors, which were adopted unanimously.

Between March 8, 1971 and October 6, 1971, and again on April 11 and 12, 1973, the Foreign Relations Committee conducted public hearings on the war powers bills. The hearings began with testimony from a number of leading scholars and academic authorities on the formation of the Constitution and the early period of our nation's history. These early hearings, combined with the later testimony of eminent contemporary legal scholars, were important in establishing the constitutionality of the war powers legislation before the Committee. Several close advisors of the previous two Presidents testified as to the desirability and workability of the proposed legislation viewed from the perspective of their own experience as Presidential advisors. In this regard, the Committee takes particular note of the testimony in favor of S. 440 offered by Nicholas deB. Katzenbach, who as Under

[4] "Foreign Relations Committee on the National Commitments Resolution." *Reproduced in Documents Relating to the War Power of the Congress, the President's Authority as Commander-in-Chief, and the War in Indochina*, 91st Congress, 2nd Session, compiled by the Senate Foreign Relations Committee (Washington: Government Printing Office, 1970), p. 24.

Secretary of State in the Johnson Administration had testified forcefully against the National Commitments Resolution. In his testimony of April 11, 1973 Mr. Katzenbach expressed a new viewpoint: "I conclude that this legislation is constitutional and, if enacted, binding upon the President." With respect to the impact of the bill's provisions on crisis diplomacy, McGeorge Bundy, who served as President Kennedy's National Security Assistant during the Cuba missile crisis, while testifying in support of the legislation, stated: "I think the essential processes of the Cuban missile crisis would not have been sharply affected by this resolution or this bill or this kind of procedure."

In two years the Committee has heard testimony in public session by a total of 28 witnesses, including the Secretary of State speaking for the Administration, 10 Senators, 2 Congressmen, and a number of distinguished historians and legal scholars. Significant additional material and opinion were inserted in the record.

Speaking in favor either of specific bills or the general concept of war powers legislation were the following:

(1) Henry Steele Commager, Professor of History, Amherst College.
(2) Richard B. Morris, Professor of History, Columbia University.
(3) Alfred H. Kelly, Professor of History, Wayne State University.
(4) Claiborne Pell, U.S. Senator from Rhode Island.
(5) Jacob K. Javits, U.S. Senator from New York.
(6) Thomas F. Eagleton, U.S. Senator from Missouri.
(7) Alpheus T. Mason, Professor of Political Science, Princeton University.
(8) Robert Taft, Jr., U.S. Senator from Ohio.
(9) Charles McC. Mathias, U.S. Senator from Maryland.
(10) Paul Findley, U.S. Congressman from Ohio.
(11) Frank Horton, U.S. Congressman from New York.
(12) McGeorge Bundy, President, Ford Foundation.
(13) George Reedy, former Press Secretary to President Johnson.
(14) Alexander M. Bickel, Professor of Law, Yale University.
(15) Lloyd M. Bentsen, U.S. Senator from Texas.
(16) William D. Rogers, Arnold & Porter, Washington, D.C.
(17) William B. Spong, Jr., U.S. Senator from Virginia.
(18) John Stennis, U.S. Senator from Mississippi.
(19) Lawton Chiles, U.S. Senator from Florida.
(20) Arthur J. Goldberg, Esq., former U.S. Ambassador to the United Nations.
(21) Raoul Berger, Charles Warren Senior Fellow in American Legal History, Harvard Law School.
(22) Nicholas B. Katzenbach, Vice President and General Counsel, IBM Corporation.

Speaking in opposition to the war powers legislation were the following in chronological order:

(1) Barry Goldwater, U.S. Senator from Arizona.
(2) John Norton Moore, Professor of Law, University of Virginia.
(3) William P. Rogers, Secretary of State.
(4) George Ball, Lehman Bros. International, New York.
(5) Charles N. Brower, Acting Legal Adviser, Department of State.

(6) David R. Maxwell, member, Advisory Panel on International Law (Department of State).

Those supporting war powers legislation emphasized the intent of the framers of the Constitution and the importance of the Congressional war power for a system of government based on the separation of powers and checks and balances. Those testifying against the war powers legislation cited historical instances in which the President has used the armed forces without the consent of Congress and the necessity of rapid action under the conditions of the nuclear age. Meeting in executive session, the Committee marked up the War Powers Act December 7, 1971, adopting clarifying and perfecting amendments. On the same day, by unanimous vote, the Committee ordered the bill reported favorably to the Senate.

The bill was debated in the Senate from March 28 to April 13, 1972, on which date it was adopted by a vote of 68 to 16.

The war powers act of 1972 failed of enactment into law owing to the inability of the two houses to agree in conference. In 1972 the Senate and House bills were markedly different in content and scope, and the Senate-House conference, able to convene only once late at the end of the session, was unable to reconcile the two bills.

Following its reintroduction on January 10, 1973, the Committee again considered the war powers bill in executive session. During the Committee mark-up, Senator Fulbright proposed substitute language for section 3 of the bill. This proposed amendment was identical to the one offered by Senator Fulbright during the 1972 floor debate, which was defeated on April 12, 1972 by a vote of 10–68. Following extensive discussion, the Committee rejected the proposed substitute by a vote of 4–10. The Committee on May 16, 1973 then voted 15–0 (with one member voting "present") to report the war powers bill favorably to the Senate.

COMMITTEE COMMENTS

> The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.[5]

Justice Harlan observed:

> "We are accustomed to speak of the Bill of Rights and the Fourteenth Amendment as the principal guarantees of personal liberty. Yet it would surely be shallow not to recognize that the structure of our political system accounts no less for the free society we have. The Founding Fathers," said Justice Harlan, "staked their faith that liberty would prosper in the new nation not primarily upon declarations of individual rights but upon the kind of government the Union was to have." "No view of the Bill of Rights or interpretation of any of its provisions," the Justice warned, "which fails to take due account of [federalism and separation of powers] can be considered constitutionally sound." [6]

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[5] Justice Hugo Black in Reid v. Covert, 354 U.S. 5–6 (1957).

[6] Excerpts from remarks to the American Bar Center, Chicago, Illinois, August 13, 1913. In 49 A.B.A.J. 943 (1963).

The Committee concurs in the view expressed by Justice Harlan: when checks and balances are disrupted in one area of our public policy, all others are affected, and so also are the basic rights of the citizen. As Professor Alpheus Thomas Mason said in his testimony before the Committee, "Separation of powers in war making, constitutionally shared by Congress and the President, has all but vanished. The President is in complete, unqualified control." [7] In the Committee's view, as in the view of the framers of our Constitution, "complete, unqualified control" in one area poses the danger, if not indeed the inevitability, of "complete, unqualified control" over all other areas of our national life.

Advocates of Presidential power point out that the President is a responsible, elected official, the only official indeed who is elected by all the people. The President's accountability cannot be gainsaid, but of and by itself is dangerously insufficient. As Madison wrote in *Federalist 51*, "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." [8]

Despite instances of executive "usurpation" of power, more often unintentional than deliberate, and an even greater number of instances of failure on the part of the Congress to defend and exercise its prerogatives, the major cause of the unhinging of the checks and balances of our political system as to war making has been the impact of three decades of almost uninterrupted crisis in foreign policy. In time of emergency there is a natural, powerful tendency to fall in line behind the leadership of the President. When the nation is thought to be in danger, it seems to most people irresponsible, capricious, or even unpatriotic to question the President's word as to the need for action of one kind or another. Secretary of State Acheson summed up this state of mind cogently when he advised the Senate in 1951 that it ought not to quibble over President Truman's claim of authority to station American troops primarily in Europe. Acheson said, "We are in a position in the world today where the argument as to who has the power to do this, that, or the other thing, is not exactly what is called for from America in this very critical hour." [9]

Experience has shown that counsel of this nature is not meant to be taken quite literally: it is not meant to suggest that it does not matter where the power of decision lies, but rather that the power should be left with the President exclusively and Congress ought not to interfere. Similarly, executive branch lawyers have fallen into the habit of telling us that the Constitution is vague about the division of foreign policy and war powers and that questions as to "who has the power to do this, that, or the other thing" are best left to be resolved according to the requirements of the moment—according, as Under Secretary Katzenbach put it, to "the instinct of the nation and its leaders for political responsibility...." [10] Or, as Mr. Justice Rehnquist put it when he was Assistant Attorney General,

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[7] "War Powers," Hearings, p. 254.

[8] *The Federalist*, Henry Cabot Lodge, editor (New York and London: C. P. Putnam Sons, 1908), p. 323.

[9] "Assignment of Ground Forces of the United States to Duty in the European Area." *Hearing by Committees on Foreign Relations and Armed Services*, U.S. Senate, 82d Congress, 1st Session, on S. Con. Res. 8, Feb. 1–28, 1951 (Washington: U.S. Govt. Printing Office, 1951), pp. 92–93.

[10] "National Commitments" Hearings, pp. 72–73.

> The Framers here, as elsewhere in the Constitution, painted with a broad brush, and it has been left to nearly two hundred years of interpretation by each of the three coordinate branches of the National Government to define with somewhat more precision the line separating that which the President may do alone from that which he may do only with the assent of Congress.[11]

In practice, the advocates of the "broad brush" have something more precise in mind: they want the President to be left unencumbered to use the armed forces and contract foreign obligations essentially as he sees fit, drawing Congress into the decision-making process insofar as he finds it useful and convenient.

The Committee does not contest the need of "flexibility," nor of adaptability, in our political process in order to accommodate to modern conditions. The Committee does, however, contest the view which holds that the price of adaptability is the repudiation of constitutional precept. The notion of a "living" Constitution ceases to make sense when it is taken as license for nullifying the Constitution's intent—or at least some part of it. The real issue, in the Committee's view, to which the war powers bill purports to address itself, is whether our constitutional process can be reconciled with the requirements of the nuclear age. The Committee believes that it can, that indeed, even as written in 1787, the Constitution made adequate provision for response to a genuine emergency with whatever speed might be required. No responsible citizen questions the right—or even the duty—of the President to take immediate action against a sudden attack, or imminent threat of an attack, upon the United States or its armed forces. What the Committee does contest is that expansive view of Executive prerogative which holds that the President may use the armed forces at will, even in conditions falling short of a genuine national emergency, and that he may sustain that use for as long as he, and he alone, sees fit. Such unrestricted Presidential control of the armed forces is neither necessary or wise in our nuclear age, reconcilable with the Constitution, nor tolerable in a free society.

Far from having been made obsolete by the necessity for dealing with fast-moving events in the nuclear age, the checks and balances of our Constitution have become, in the Committee's view, more essential than ever. Disposing as he does of a vast arsenal of nuclear weapons, ballistic missiles and an enormous number and variety of lesser weapons, the President of the United States has acquired something close to absolute power over the life and death of hundreds of millions of people all over the world. As Alexander Hamilton, even though an advocate of strong executive authority, warned in *Federalist 75*:

> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of a magistrate created and circumstanced as would be the President of the United States.[12]

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[11] Statement by William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, on the "President's Constitutional Authority to Order the Attack on the Cambodian Sanctuaries," *Documents Relating to the War Power of Congress*, p. 176.

[12] The Federalist, pp. 467–468.

A. THE INTENT OF THE FRAMERS

Whatever else they may have painted with a "broad brush," the framers of the American Constitution were neither uncertain nor ambiguous about where they wished to vest the authority to initiate war. In his testimony before the Foreign Relations Committee, Professor Raoul Berger expressed astonishment that anyone should consider the matter of the division of war powers between Congress and the President as "murky": "The power to wage war, it may be categorically asserted, was vested by the Constitution in Congress, not the President. If this be so," said Professor Berger with reference to the current legislation, "your bill merely seeks to restore the original design. It cannot be unconstitutional to go back to the Constitution." [13] The Founding Fathers had been much dismayed by the power of the British Crown to commit Great Britain—and its American colonies—to war. They were also fearful of the danger of large standing armies and of the possible defiance of civilian authority by military leaders. In order to alleviate the threat of militarism and of the possible resurgence of monarchical tendencies in the new Republic, the Article I, Section 8 the framers vested the authority to initiate war in the legislature, and in the legislature alone, and established the framework for tight Congressional control over the military establishment.

The absence of extended debate over the war powers in the Constitutional Convention attests to the near unanimity of the Founding Fathers as to where that authority was meant to be placed. There was some discussion as to whether the war power should be vested in the Congress as a whole or only the Senate, but only one delegate, Pierce Butler of South Carolina, favored vesting the war power in the President.

The Constitutional Convention at first proposed to give Congress the power to "make" war but changed this to "declare" war, not, however, because it was desired to enlarge Presidential power but in order to permit the President to take action to repel sudden attacks. Madison's notes on the proceedings of the Convention report the change of wording as follows: "Mr. Madison and Mr. Gerry *moved* to insert 'declare' striking out '*make*' war; leaving to the executive the power to repel sudden attacks." [14] It is noteworthy that the delegates who spoke on this change of wording all expressed concern with the possible enlargement of Presidential power. Elbridge Gerry, for example, declared that he "never expected to hear in a republic a motion to empower the Executive talons to declare war." George Mason firmly expressed himself as "against giving the power of war to the executive," on the ground that he was "not to be trusted with it."

A closely related concern of the framers was to make it more difficult to start a war than to stop one. It was essentially for this reason that the power to authorize hostilities was vested in the Congress rather than in the President as successor to the British Crown. It was also for this reason that the war power was vested in the two Houses of the Congress rather than in the Senate alone. As Oliver Ellsworth told his fellow delegates, it "should be more easy to get out of war.

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[13] "War Powers" (1973) p. 14

[14] *The Records of the Federal Convention of 1787*, 4 volumes (Max Farrand, editor, New Haven and London: Yale University Press, 1966), vol. 2, p. 318.

than into it"; and as George Mason said, he was "for clogging rather than facilitating war; but for facilitating peace." [15].

The division of authority intended by the framers was explicit: the Congress was to "declare"—that is, to authorize the initiation of—war. The President, as Commander-in-Chief, was to respond to sudden attacks and to conduct a war once it had started and command the armed forces once they were committed to action. The powers of the President as Commander-in-Chief were explained by Alexander Hamilton in *Federalist 69*:

> The 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 Conferderacy, 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.[16]

Or as Jefferson put it in a letter to Madison 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.[17]

The Supreme Court has also declared that the power to initiate war is one which rests solely with the Congress. In the "Prize Cases" of 1862 the Supreme Court said:

> By the Constitution, Congress alone has the power to declare a national or foreign war . . . The Constitution confers on the President the whole Executive power. . . . He is Commander-in-Chief of the Army and Navy of the United States. . . . He has no power to initiate or declare a war either against a foreign nation or a domestic state.[18]

In the early years of the Republic, Presidents acknowledged and carefully respected the war power of Congress. President Madison, for example, who had been one of the principal framers of the Constitution and one of its principal interpreters through his writings in the *Federalist Papers*, sent a message to Congress on June 1, 1812, in which, after recounting the depredations of British ships on American commerce on the Atlantic, he referred the matter to Congress in these words:

> Whether the United States shall continue passive under these progressive usurpations and these accumulating wrongs, or opposing force to force in defense of their national rights, shall commit a just cause into the hands of the Almighty disposer of events, avoiding all connections

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[15] Summarized by Richard B. Morris, Gouverneur Morris Professor of History, Columbia University, in a statement before the Foreign Relations Committee, March 9, 1971.
[16] "War Powers" Hearings, p. 80.
[17] *The Papers of Thomas Jefferson*, 17 volumes (Julian P. Boyd, ed., Princeton: Princeton University Press, 1955), vol. 15, p 397.
[18] 67 USC 635 (1962).

> which might entangle it in the contests or views of other powers, and preserving a constant readiness to concur in an honorable reestablishment of peace and friendship, is a solemn question which the Constitution wisely confides to the legislative department of the Government.[19]

Madison summarized the issue in these unequivocal terms: "Every just view that can be taken of this subject, admonishes the public of the necessity of a rigid adherence to the simple, the received, the fundamental doctrine of the Constitution, that the power to declare war, including the power of judging the causes of war, is fully and exclusively vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war; that the right of convening and informing Congress, whenever such a question seems to call for a decision, is all the right which the Constitution has deemed requisite and proper." [20]

The Monroe Doctrine has been erroneously cited as an early precedent for use of the armed forces by the President acting on his own authority. In keeping with the intent of the framers of the Constitution, President Monroe made the appropriate distinction between a statement of policy and the authority to carry it out. When in 1824 the Government of Colombia inquired as to what action the United States might take under the Monroe Doctrine to repel certain European intervention in the Latin American Republics, Secretary of State John Quincy Adams replied,

> With respect to the question, "in what manner the Government of the United States intends to resist on its part any interference of the Holy Alliance for the purpose of subjugating the new republics or interfering in their political forms" you understand that by the Constitution of the United States, the ultimate decision of this question belongs to the Legislative Department of the Government.[21]

President Buchanan, to cite another example, acknowledged the war power of Congress quite explicitly in his message to Congress of December 6, 1858:

> The Executive government of this country in its intercourse with foreign nations is limited to the employment of diplomacy alone. When this fails it can proceed no further. It cannot legitimately resort to force without the direct authority of Congress, except in resisting and repelling hostile attacks.[22]

Daniel Webster, who served as Secretary of State during the early 1850's, was also a distinguished constitutional lawyer. On July 14, 1851, during his tenure as Secretary of State, he wrote as follows:

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[19] *A compilation of the Messages and Papers of the Presidents*, 10 volumes (James Richardson, ed., Washington: Govt. Printing Office, 1917), vol. 2, pp. 489–490.

[20] Quoted by Raoul Berger in "War-Making by the President," 121 University of Pennsylvania Law Review (1972), p. 48.

[21] John Quincy Adams to Don Jose Maria Salazar, August 6, 1824, quoted in *The Record of American Diplomacy*, third edition (Ruhl J. Bartlett, ed., New York: Alfred A. Knopf, 1954), p. 185.

[22] *A Compilation of the Messages and Papers of The Presidents* (New York: Bureau of National Literature, Inc., 1917), vol. 7, p. 3047.

> In the first place, I have to say that the war-making power in this Government rests entirely in Congress; and that the President can authorize belligerent operations only in the cases expressly provided for the Constitution and the laws.[23]

During the course of the nineteenth century it became accepted practice, if not strict constitutional doctrine, for Presidents acting on their own authority to use the armed forces for such limited purposes as the suppression of piracy and the slave trade, for "hot pursuit" of criminals across borders, and for the protection of American lives and property in places abroad where local government was not functioning effectively. An informal, operative distinction came to be accepted between the use of the armed forces for limited, minor or essentially non-political purposes and the use of the armed forces for "acts of war" in the sense of large-scale military operations against sovereign states. In the former category, custom and usage developed to give a certain informal sanction to unauthorized Presidential action; in the latter, involving full-scale warfare against a foreign power, no President was to claim the right to act without Congressional authorization until the twentieth century.

Nor indeed was it contended by any President until recent years that, because *declarations* of war might be obsolete, so also was the authority of Congress to authorize—or refuse to authorize—the initiation of war. Even if it be granted, as perhaps it must, that the former declaration of war is no longer a useful instrument in international politics, this is to say no more than that a particular form in which the Congress exercised its constitutional authority in the past is no longer appropriate. As Richard B. Morris, Gouveneur Morris Professor of History at Columbia University, said in his testimony before the Committee—after citing the provisions of the Constitution relating to Congress's power to declare war and "raise and support armies", the authority of the President as Commander-in-Chief, and the limitation of appropriations of money for the support of armies to a maximum of two years——

> * * * it is a fair inference from the debate on ratification and from the learned analysis offered by the *Federalist* papers that the war-making power of the President was little more than the power to defend against imminent invasion when Congress was not in session.[24]

It is also of great importance to note that the residual legislative authority over the entire domain of foreign policy—not just the war power—was placed in Congress by the Constitution. Members of Congress have themselves perhaps understimated the authority vested in them by the "necessary and proper" clause of Article I, Section 8, of the Constiution. That clause entrusts the Congress to make all laws "necessary and proper for carrying into execution" not only its own powers but "all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Strictly interpreted, the "necessary and proper" clause entrusts the Congress not only to "carry into execution" its own constitutional war

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[23] A letter from Daniel Webster to Mr. Severance, July 4, 1851, in *The Writings and Papers of Daniel Webster*, vol. 14, p. 440.
[24] "War Powers" Hearings, p. 81.

power, but also, should it be thought necessary, to define and codify the powers of the government as a whole, including those of the President as it principal officer.

B. THE GROWTH OF PRESIDENTIAL POWER

Prior to the Second World War Presidential use of the armed forces without Congressional authorization was confined for the most part to the Western Hemisphere, primarily to Mexico and the Caribbean. President McKinley's participation, in the Boxer expedition in China in 1900 was a noteworthy exception. Only since the Second World War have American Presidents claimed, and exercised, the power to commit the armed forces to full-scale and extend warfare overseas. The kind of foreign military intervention we have witnessed in the last quarter century is, in the words of Henry Steel Commager, Professor Emeritus of History. Almost College, "if not wholly unprecedented, clearly a departure from a long and deeply-rooted tradition." [25]

Professor Alexander Bickel of the Yale Law School made the same point in his testimony before the Committee:

> * * * the decisions discussed as early as 1964, made in the first half of 1965, and executed thereafter, to commit the moral and material resources of this Nation to full-scale war in Vietnam seem to me the mark the farthest, and really an unprecedented, extension of Presidential power. Certainly the power of the President in matters of war and peace has grown steadily for over a century. The decisions of 1965 may have differed only in degree from earlier stages in this process of growth. But there comes a point when a difference of degree achieves the magnitude of a difference in kind. The decisions of 1965 amounted to an all but explicit transfer of the power to declare war from Congress, where the Constitution lodged it, to the President, on whom the framers explicitly refused to confer it.[26]

The transfer from Congress to the executive of the actual power—as distinguished from the constitutional authority—to initiate war has been one of the most remarkable developments in the constitutional history of the United Sates. For this change Congress as well as the Executive bears a heavy burden of responsibility.

When President Truman committed the armed forces to Korea in 1950 without Congressional authorization, scarcely a voice of dissent was raised in Congress. Senator Watkins of Utah challenged the President's authority to commit the country to war without consulting the Congress, even in compliance with a resolution of the United Nations Security Council, and said that, if he were President, he ". . . would have sent a message to the Congress of the United States setting forth the situation and asking for authority to go ahead and do whatever was necessary to protect the situation." [27] Senator Taft also challenged President Truman's action but not until January 1951. "The President," he said, "simply usurped authority, in violation of the laws and

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[25] "War Powers" Hearings, p. 8.
[26] *Ibid.*, pp. 551–552.
[27] *Congressional Record*, 81st Congress, second session, vol. 96, pt. 7, Senate, June 27, 1950, pp. 9229–9233.

the Constitution, when he sent troops to Korea to carry out the resolution of the United Nations in an undeclared war." [28]

The isolated voices of Watkins and Taft were ineffectual against the accelerating tide of growing executive power. Secretary of State Acheson virtually threw down the gauntlet to Congress—although few at that time were disposed to pick it up—when he testified before the Committee on Foreign Relations and Armed Services Committee in 1951 in support of President Truman's plan to station six divisions of American soldiers in Europe. He said on that occasion:

> Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interefered with by the Congress in the exercise of powers which it has under the Constitution.[29]

In the course of the Vietnam war, the Johnson Administration reconfirmed the executive's claim to unilateral authority in the use of the armed forces. In his now famous testimony of August 1967, Under Secretary of State Katzenbach contended that the Gulf of Tonkin Resolution was "as broad an authorization for the use of armed forces for a purpose as any declaration of war so-called could be in terms of our internal constitutional process." [30] In fact, the Johnson Administration went farther.

Where as Mr. Katzenbach at least claimed the existence of legislative authority, the President himself contended that no such authority was required. Speaking of the Gulf of Tonkin Resolution in his news conference of August 18, 1967, President Johnson said,

> We stated then, and we repeat now, we did not think the resolution was necessary to do what we did and what we're doing. But we thought it was desirable and we thought if we were going to ask them [Congress] to stay the whole route and if we expected them to be there on the landing we ought to ask them to be there on the takeoff.[31]

Making the same claim in more formal language, the Legal Advisor to the Department of State had written in March 1966,

> There can be no question in present circumstances of the President's authority to commit U.S. forces to the defense of South Vietnam. The grant of authority to the President in Article II of the Constitution extends to the actions of the United States currently undertaken in Vietnam.[32]

The attitude of the present Administration will be explored in greater detail in Subsection C below. It suffices here to point out that the Nixon Administration has shown that its conception of the war power differs in no important respect from that of its predecessor. It could hardly be otherwise, one suspects, if only because the accumulation of precedents of unauthorized Presidential use of the armed

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[28] *Congressional Record*, 82d Congress, first session, vol. 97, pt. 1, Senate, January 5, 1951, p. 37.
[29] "Assignment of Ground Forces of the United States to Duty in the European Area," pp. 92–93.
[30] "National Commitments." Hearings, p. 24.
[31] *New York Times*, August 19, 1967, p. 10.
[32] Leonard C. Meeker, "The Legality of U.S. Participation in the Defense of Vietnam," *The Department of State Bulletin*, March 28, 1966, p. 484.

forces seems to have had a spurious self-legitimizing effect. A President can hardly be blamed if, coming into office, he supposes himself to be properly vested with all of the powers exercised by his predecessor, however improperly exercised. A President can hardly be blamed if, under such circumstances, he regards an effort by Congress to reassert powers which it has long neglected to exercise as an attempt to infringe upon his own powers.

All of which is by way of making the point that it is far more difficult to reassert a power which has been permitted to atrophy than to defend one which has been habitually used. The Congress accordingly bears a heavy responsibility for its passive acquiescence in the unwarranted expansion of Presidential power. As the late Justice Robert H. Jackson pointed out in his concurring opinion in *Youngstown* v. *Sawyer*, there is a "zone of twilight" between the discrete areas of Presidential and Congressional power. Politics, like nature, abhors a vacuum. When Congress created a vacuum by failing to defend and exercise its powers, the President inevitably hastened to fill it. As Justice Jackson commented, "Congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent Presidential responsibility...." [33]

To assert power is not, however, to legitimize it. As a Supreme Court Justice of the last century commented: "An unconstitutional act is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." [34] The same principle must apply to action by the executive.

In the pithy phrase of Professor Berger, "Illegality is not legitimated by repetition." [35]

C. THE EXECUTIVE VIEW

The Nixon Administration has shown that it shares the expansive view of the President's power as Commander-in-Chief held by preceding Administrations. The commitment of American military forces to Cambodia in 1970, and to Laos in 1971, demonstrated the present Administration's determination to initiate new foreign military actions solely on its own authority.

In its public statements as well as in its foreign military operations the Nixon Administration has indicated its belief that the President is at liberty to commit the armed forces substantially as he sees fit. In its comments of March 10, 1969, on the then-pending National Commitments Resolution, the Department of State made the following assertion:

> As Commander-in-Chief, the President has the sole authority to command our Armed Forces, whether they are within or outside the United States. And, although reasonable men may differ as to the circumstances in which he should do so, the President has the constitutional power to send U.S. military forces abroad without specific congressional approval.[36]

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[33] Justice Robert H. Jackson concurring in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).
[34] Justice Field in *Norton* v. *Shelby County*, 118 U.S. 425 (1886).
[35] Berger, "War-Making by the President," p. 60.
[36] "National Commitments" Hearings, p. 25.

The same assumptions of executive war-making authority were expressed in the Department of State's comments of March 12, 1970, regarding the proposal then before the Foreign Relations Committee for repeal of the Formosa, Cuba, Middle East, and Tonkin resolutions. Declining either to advocate or to oppose such action, the State Department took the position that ". . . the Administration is not depending on any of these resolutions as legal or constitutional authority for its present conduct of foreign relations, or its contingency plans." More specifically, as to the war in Indochina, the State Department asserted that ". . . this Administration has not relied on or referred to the Tonkin Gulf resolution of August 10, 1964, as support for its Vietnam policy."

On January 12, 1971, President Nixon signed into law a bill which, among other things, repealed the Gulf of Tonkin Resolution. The repeal of that Resolution quite naturally raised the question as to the authority the Administration believed it was acting under in its continued prosecution of the war in Indochina. The Administration, so far as is known to the Committee, has never addressed itself to that question except to assert that it was protecting the lives of American troops. Even this contention, however, ceased to be available as an explanation for the bombing of Cambodia after the signing of the Paris peace agreement of January 1973 and the subsequent withdrawal of American forces from Indochina.

President Nixon himself has said little on the subject. Asked in a press conference on April 29, 1971, for his opinion of the pending war powers bills, the President replied, ". . . I believe that limiting the President's war powers, whoever is President of the United States, would be a very great mistake." The President went on to say: "We live in times when situations can change so fast internationally that to wait until the Senate acts before a President can act might be that we acted too late." [37]

In Mr. Nixon's perspective there seems to be an association between the war power and the grandeur of the Presidential office itself. Speaking in Texas on April 30, 1972, President Nixon said:

> ". . . each of us in his way tries to leave that office with as much respect and with as much strength in the world as he possibly can—that is his responsibility—and to do it the best way that he possibly can. . . . But if the United States at this time leaves Vietnam and allows a Communist takeover, the office of President of the United States will lose respect and I am not going to let that happen."

In its official comments on the war powers bills the Administration placed primary emphasis on historical precedents and the need for speedy action as the basis of its opposition to the bills. As with the previous Administration, emphasis was also placed on what the Executive regards as the imprecision of the Constitution, the need of Presidential flexibility, and the desirability, as expressed in Assistant Secretary Abshire's letter of May 1971, of some sort of undefined "common perspective" between the two branches of Government.

In his definitive presentation of the Administration's views on war powers legislation, presented to the Committee on May 14, 1971, Sec-

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[37] *New York Times*, April 30, 1971, p. 18.

retary of State Rogers gave evidence of holding the impression that the war powers bills purported to alter the Constitution. "Any attempt to change it," he said, "should be subjected to long and full consideration of all aspects of the problem." [38]

This viewpoint was reiterated on April 12, 1973, by the State Department's Acting Legal Adviser, who averred that the war powers bill would "alter" the "fundamental constitutional scheme." [39] The notion that Congress was somehow undertaking to change the Constitution by asserting its own war powers is one also offered by the Johnson Administration. Now, as on previous occasions, the Committee reconfirms its own conviction that, far from purporting to alter the Constitution in any way, the bill herewith reported is designed to restore constitutional practices which have been permitted to atrophy and, as a matter of necessity and propriety under Article 1 of Section 8, "to carry into execution" both the war powers of Congress and those of the President in his capacity as an Officer of the Government of the United States. Professor Bickel commented: "Nothing in the Constitution does or can empower Congress to do something unconstitutional, but much in the Constitution needs to be clarified or implemented, and except in the limited number of instances where exclusive power is specifically vested elsewhere, the necessary and proper clause authorizes Congress to do so, with respect to its own functions as well as those of the other branches of the federal government." [40]

In his statement before the Committee, Secretary Rogers said he opposed war powers legislation because, in his view, it would attempt to fix in detail, or "freeze," the allocation of power between the President and Congress, and because such legislation would "narrow the power given the President by the Constitution." The exercise of the war powers, the Secretary emphasized, was consigned to the "political process" in a constitutional system "founded on the assumption of cooperation rather than conflict." [41]

The Committee is obliged to contest the Secretary's argument in all its major specifications. First of all, far from attempting to "freeze" the allocation of war powers between the President and Congress, the bill, through the emergency procedures spelled out in Section 3, allows of action by the President under almost any conceivable genuine national emergency, so much so, in fact, that some members of the Committee have expressed apprehension that Section 3 may go too far in the President's direction.

Second, as already noted, the bill would in no respect, "narrow the power given the President by the Constitution;" it does indeed purport to delineate Presidential power, but only because that power in recent practice has extended far beyond the confines of the Constitution.

Third, the Committee reiterates its view that the Constitution is not at all imprecise in allocating the war powers; on the contrary, the Constitution is quite specific—as the framers intended it to be—in giving Congress the authority to decide on going to war and in giving the President the authority, as Commander-in-Chief, to respond to an emergency and to command the armed forces once a conflict is under-

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[38] "War Powers" (1972), p. 486.
[39] "War Powers Legislation" (1973), p. 52.
[40] "War Powers Legislation" (1973), p. 20.
[41] "War Powers," (1972), p. 493.

way. In brief, the Constitution gave Congress the authority to take the nation into war, whether by formal declaration of war or by other legislative means, and the President the authority to conduct it.

There has grown up in recent decades a conception of what is required for a "strong Presidency" which the Committee finds disturbing. According to this school of thought, a "strong President" is not one who strengthens and upholds our constitutional system as a whole but one who accumulates and retains as much power as possible in the Presidential office itself. This outlook appears to have been an important factor in influencing recent Presidents to claim authority as Commander-in-Chief far exceeding the specifications and intent of the Constitution. It appears too to have been a factor in encouraging executive branch officials to invoke dubious past instances of foreign military operations undertaken by the President without Congressional approval—as if one act of usurpation legitimized another. A leading American historian, Thomas A. Bailey, has written:

> The bare fact that a President was a strong one, or a domineering one, does not necessarily mean that he was a great one or even a good one. The crucial questions arise: Was he strong in the right direction? Was he a dignified, fair, constitutional ruler, serving the ends of democracy in a democratic and ethical manner? [42]

CONCLUSION

In the perspective of American history since World War II, the war powers bill must be perceived as necessary legislation which should not have been necessary. It would not have been necessary if Congress had defended and exercised its responsibility in matters of war and peace and so prevented the Executive from expanding its power in that "zone of twilight" of which Justice Jackson spoke.

The framers of the Constitution vested the war power in the Congress not primarily because they felt confident that the legislature would necessarily exercise it more wisely but because they expected the legislature to exercise it more *sparingly* than it had been exercised by the Crown, or would be likely to be exercised by the President as successor to the Crown. The framers, it would appear, were concerned with the way in which war would be initiated in making certain that it would not be initiated easily, capriciously, or often.

In this regard, Abraham Lincoln once wrote:

> The provision of the Constitution giving the warmaking power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our Convention undertook to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us.

Whether and to what degree we might have avoided the war in Indochina is an issue outside of the scope of this Report. It is men-

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[42] Thomas A. Bailey, *Presidential Greatness* (New York: Appleton-Century, 1966), p. 227.

tioned here only in connection with the Committee's general belief that, in the long run, even the best conceived legislation for the reassertion of Congressional prerogative will not in and of itself prove sufficient to the maintenance of constitutional democracy in America. As Professor Kelly observed, war and peace in the American constitutional system and in the American value system are separate and distinct; and as Tocqueville observed, war breeds dictatorship. Strongly though it endorses the bill herewith reported, the Committee does not deceive itself that this bill, if enacted, will of itself restore checks and balances in matters of the war power. If the country is to be continually at war, or in crisis, or on the verge of war, or in small-scale, partial or surrogate war, the force of events must lead inevitably toward executive domination despite any legislative roadblocks that may be placed in the executive's way. During the Constitutional Convention, James Madison, often regarded as "father of the Constitution," at one point moved to authorize two-thirds of the Senate to make treaties of peace without the concurrence of the President. Although his motion was withdrawn, his argument for introducing it is instructive. "The President," he said, "would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace."

Congress, in the Committee's view, can take no more useful and needed step toward the restoration of constitutional balance than to enact legislation to confirm and codify the intent of the framers of the Constitution with respect to the war power. The President, as Professor Bickel and as Mr. George Reedy, formerly of the White House staff, pointed out in their testimony before the Committee in 1971, is in many respects a remote and almost royal figure, shielded from direct personal participation in the adversary politics of democracy. "Under the American system," as one political scientist points out, "the executive is virtually *prevented* from engaging in public debate on policy by the institutional setting of his office; under the British system he is expected and, in fact, *compelled* to engage continually in it." [a] The processes through which the President reaches decisions are largely personal and private, beyond the reach of direct institutional accountability.

Congress, on the other hand, makes its decisions almost entirely in the open and under public scrutiny. The President is subject to quadrennial plebiscite, but Congress provides the American people with points of access through which they can hold their Government to day-to-day account and thereby participate in it. Inefficient and shortsighted though it sometimes is, Congress provides the only feasible means under the American constitutional system of drawing the President, at least indirectly, into the adversary processes of democracy. The executive branch is endowed with organizational discipline and legions of experts, but Congressmen and Senators have a unique asset when it comes to playing an effective, democratic role in the making of foreign policy: the power to speak and act freely from an independent political base.

The point the Committee wishes to stress is not that the President—the one now in office or any other—is an untrustworthy person but that all men wielding power must, in the interest of freedom, be treated

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[a] Alexander J. Groth, "Britain and America: Some Requisites of Executive Leadership Compared," *Political Science Quarterly*, June 1970, p. 218.

with a certain mistrust. "Confidence," said Jefferson, "is everywhere the parent of despotism—free government is founded in jealousy; . . . it is jealously and not confidence which prescribes limited constitutions to bind down those we are obliged to trust with power . . . In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution. . . ."[4]

The Committee believes that the adoption of the war powers bill would help to restore the confidence of the American people in the processes of their government, particularly as they relate to the questions of war and peace. As Senator Stennis, a principal cosponsor of the bill, said in his testimony: ". . . I believe the overriding issue is that we must insure that this country never again go to war without the moral sanction of the American people. This is important both in principle and as practical politics. Vietnam has shown us that in trying to fight a war without the clear-cut prior support of the American people we not only risk military ineffectiveness but we also strain the very structure of the Republic.

EXPLANATION OF THE BILL

The provisions of this bill govern the use of the armed forces: "In the absence of a declaration of war by the Congress." In this bill we are dealing with *undeclared* wars—wars which have come to be called Presidential wars because the constitutional process of obtaining Congressional authorization has been short-circuited.

Section 1 of the bill contains its short title—the "War Powers Act.

Section 2 is a self-explanatory short statement of "Purposes and Policy," stressing the intention to ". . . insure that the collective judgment of both the Congress and the President will apply to the introduction of the Armed Forces of the United States in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances . . ."

Section 3 consists of four clauses which define the conditions or circumstances under which, in the absence of a Congressional declaration of war, the armed forces of the United States "may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances."

The first three categories are codifications of the emergency powers of the President, as intended by the Founding Fathers and as confirmed by subsequent historical practice and judicial precedent. Thus, subsecteions (1), (2), and (3) of section 3 delineate by statute the implied power of the President, in his concurrent role as Commander-in-Chief, with respect to emergency use of the armed forces.

The authority of Congress to make this statutory delineation is contained in the enumerated war powers of Congress in article I, section 8 of the Constitution, and especially in the final clause of article I, section 8, granting to Congress the authority:

> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

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[4] Quoted in A. T. Mason, *Free Government in the Making*. (New York: Oxford University Press, 1965), p. 371.

REPELLING ARMED ATTACK ON THE UNITED STATES

Subsection (1) of section 3 confirms the emergency authority of the Commander-in-Chief to: "repel an armed attack upon the United States, its territories and possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack;"

It should be noted that this subsection authorizes the President not only to repel an attack upon the United States and to retaliate but also "to forestall the direct and imminent threat of such an attack." The inclusion of these words grants a crucial element of judgment and discretion to the President. While it was thought by some that the power to "forestall" was inherent in the power to "repel," it was decided expressly to include the forestalling power to avoid any ambiguity domestically or in the eyes of any potential aggressor.[45]

While the President clearly must apply his discretion and judgment to the implementation of this authority, it is by no means a "blank check." For the President to take forestalling action, the threat of attack must be "direct and imminent." Moreover, he must justify his judgment on this point under the mandatory reporting provisions contained in section 4.

REPELLING ATTACK ON U.S. ARMED FORCES

Subsection (2) further defines the emergency power of the President: "to repel an armed attack against the Armed Forces of the United States located outside of the United States, its territories and possessions, and to forestall the direct and imminent threat of such an attack; . . ."

The authority contained in this subsection recognizes the right, and duty, of the Commander-in-Chief to protect armed forces deployed outside the United States. Just as the President would not have to wait until the bombs actually started landing on our soil to act against an attack upon the United States, similarly our forces would not have to wait until enemy bullets and mortars hit them before they could react.

Nonetheless, it will be noted that the power to repel attacks upon the armed forces located outside the United States is less comprehensive in one respect than the power to repel attacks upon the United States itself. While the subsection contains the authority to repel and forestall, it does not include the separate and broader power to retaliate.

The wording of this provision is meant to retain safeguards against wider embroilment resulting from incidental attacks upon U.S. forces, or attacks resulting from questionable actions by local U.S. commanders. Thus, for instance, an attack upon a Marine Guard at an Embassy would not trigger an authority to retaliate by seizing the country. Likewise, for instance, a sneak attack on security guards at one of our airbases would not trigger an authority to retaliate by launching search and destroy missions.

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[45] In *Martin* v. *Mott* (12 Wheat.) 18, 29 (1827), Justice Story speaking for the Supreme Court affirmed the constitutional authority of Congress to "provide for cases of imminent danger of invasion." He stated further: "In our opinion, there is no ground for a doubt on this point, . . . for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object."

PROTECTING U.S. CITIZENS ABROAD

Subsection (3) codifies the authority of the President to rescue United States citizens and nationals abroad and on the high seas. By defining the circumstances and procedures to be followed, this subsection is a conscious movement away from some of the excesses of nineteenth century gunboat diplomacy.

The tightly worded language of this provision grants the President the authority only to rescue endangered American citizens. He may not use the circumstance of their endangered position to pursue a policy objective beyond safe and expedient evacuation. Even before the President can take action under subsection (3) he must ascertain that the government of the country in question is either incapable of protecting Americans or is itself presenting a threat to them.

NATIONAL COMMITMENTS

Subsection (4) is perhaps the most significant part of the bill. For, while subsections (1), (2), and (3) codify emergency powers of the President as Commander-in-Chief, section 3 (4) deals with the delegation by the Congress of additional authorities which would accrue to the President as a result of statutory action by the Congress and which he does not, or would not, possess in the absence of such statutory action.

The key phrase in this subsection is contained in its initial five words: "pursuant to specific statutory authorization." The rest of the subsection is an explanation, elaboration and definition of the meaning (for the purposes of the bill) of the words "pursuant to specific statutory authorization." In an important sense, this subsection gives legislative effect to S. Res. 85, the National Commitments Resolution adopted by the Senate on June 25, 1969 by a vote of 70 to 16 which states: "that a national commitment by the United States to a foreign power necessarily and exclusively results from affirmative action taken by the executive and legislative branches of the United States Government through means of a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment."

The significance of subsection (4) is multiple. First, it establishes a mechanism by which the President and the Congress *together* can act to meet any contingency which the Nation might face.

There is no way to legislate national wisdom, but subsection (4) does provide important protection to the American people by requiring that the Congress as well as the President must participate in the critical decision to authorize the use of the Armed Forces of the United States in hostilities, other than hostilities arising from such "defensive" emergencies as an attack upon the United States, our armed forces abroad, or upon U.S. citizens abroad in defined circumstances. It provides as much flexibility in the national security field as the wit and ingenuity of the President and Congress may be jointly capable of constructing.

There is a clear precedent for the action anticipated in subsection (4)—the "area resolution." Over the past two decades, the Congress and the President have had considerable experience with area reso-

lutions—some of it good and some quite unsatisfactory. In its mark-up of the war powers bill, the Foreign Relations Committee considered this experience carefully in approving the language of subsection (4). The wording of the final clause of subsection (4) holds the validity of three area resolutions currently on the statute books. These are: the "Formosa Resolution" (H.J. Res. 159 of January 29, 1955); the "Middle East Resolution" (H.J. Res. 117 of March 9, 1957, as amended); and the "Cuban Resolution" (S.J. Res. 230 of October 3, 1962).

The question may be asked: What is to guard against the passage of another resolution of the Tonkin Gulf type? The answer is that any future area resolutions, to qualify under this bill as a grant of authority to introduce the armed forces in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, must meet certain carefully drawn criteria—as spelled out in the language of subsection (4). The pertinent language is:

> . . . unless such provision specifically authorizes the introduction of such Armed Forces in hostilities or in such situation and specifically exempts the introduction of such Armed Forces from compliance with the provisions of this Act . . .

In other words, any future area resolution must be a specific grant of authority which would contain a direct reference to the bill now under discussion. The phrase "exempts . . . from compliance with the provisions of this Act" is includede to insure that the precise intention of the grant of authority is clearly established with reference to the War Powers Act. The exemption could of course establish other procedures—or it could reaffirm all, or part, of the provsions of S. 440. The bill thus allows for as much flexibility with respect to handling of any developing crisis or suddent emergency as the Congress and the President may jointly deem prudent.

Following the passage of this bill, Congress would have to review closely the three area resolutions which are left standing by the provision of subsection (4), and the Administration should review the world situation carefully and take the initiative in coming to the Congress with recommendations respecting the existing area resolutions—as well as recommendations for any new ones which the President might feel are neded for our national securty.

Requests for new authority pursuant to subsection (4) do *not* qualify for the "Congressional Priority Provisions" contained in section 7. However, it is contemplated that Congressional consideration of new subsection (4) grants of authority can geenrally be undertaken in the absence of an imminent threat or emergency in a deliberative way, including Committee hearings. The point here is to obviate a repetition of the unfortunate experience of the Congress with the Tonkin Gulf Resolution, which it was later realized went through the Congress without enough inquiry in the respective Committees and in the related floor debate.

RENEWING CLOSE CONSULTATION

Last minute "crunches" can be avoided by a renewal of the earlier practice of continuing close consultation between the Executive branch and the relevant committees of Congress. The Executive would be obliged to make the Congress, again, its partner in shaping the broad,

basic national security and foreign policy of the Nation well in advance of the exercise of the war power.

CONGRESSIONAL AUTHORITY AND PRESIDENTIAL FLEXIBILITY

Some have argued that seeking Congressional authority to use the armed forces with respect to developing crisis situations would deprive the President of flexibility—or introduce ambiguity—in the conduct of foreign policy during crisis situations. It is said that the President would have to "telegraph his punches" and thus remove surprise from his diplomatic arsenal.

However, the President would not be compelled or obliged to use the armed forces just because the Congress granted him the authority to do so. Moreover, this legislation would not inhibit the President's capacity to deploy the armed forces, i.e., to move elements of the fleet in international waters. To give a specific example, there is nothing in the bill which would have affected the President's decision to move elements of the Sixth Fleet into the eastern Mediterrean during the 1970 Jordanian crisis. The right of United States naval forces to operate freely anywhere in international waters would not be abridged by this bill.

An important provision of subsection (4) is contained in its first qualifying clause (A). The purpose of this clause is to counteract the opinion in the *Orlando* v. *Laird* decision of the Second Circuit Court holding that passage of defense appropriations bills, and extension of the Selective Service Act, could be construed as implied Congressional authorization for the Vietnam war.[46]

TREATIES

One of the most far-reaching aspects of subsection (4) is its provisions respecting treaties. Throughout the past two decades there has been continuing confusion respecting a crucial phrase that is standard in our nation's collective and bilateral security treaties; to wit, that implementation of such treaties, as to involvement of U.S. forces in hostilities, will be in accordance with the "constitutional processes" of the signatories.[47]

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[46] Judicial opinion has shifted on this point. In *Mitchell* v. *Laird* (D.C. Cir. No. 71-1510 March 20, 1973) Judge Wyzanski speaking for the Court of Appeals stated: "This court cannot be unmindful of what every schoolboy knows: than in voting to appropriate money or to draft men a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war. A Congressman wholly opposed to the war's commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting. An honorable recent, compassionate act of aiding those already in peril is no proof of consent to the actions that placed and continued them in that dangerous posture. We should not construe votes cast in pity and piety as though they were votes freely given to express consent. Hence Chief Judge Bazelon and I believe that none of the legislation drawn to the court's attention may serve as a valid assent to the Vietnam war.

[47] In its Report on 1949 to the Senate recommending approval of the North Atlantic Treaty, the Foreign Relations Committee stated: "The committee wishes to emphasize the fact that the protective clause 'in accordance with their respective constitutional processes' was placed in article 11 in order to leave no doubt that it applies not only to article 5, for example, but to every provision in the treaty. The safeguard is thus all-inclusive.

"The treaty in no way affects the basic division of authority between the President and the Congress as defined in the Constitution. In no way does it alter the constitutional relationship between them. In particular, it does not increase, decrease, or change the power of the President as Commander-in-Chief of the armed forces or impair the full authority of Congress to declare war." (Senate Executive Report No. 8, 81st Congress, 1st Session, p. 18)

In an important sense, subsection (4) defines "constitutional processes" for the first time, as it relates to treaty implementation by the United States. The definition of "constitutional processes" respecting treaty implementation is both negative and positive.

Subsection (4) makes a finding in law that no U.S. security treaties can be considered self-executing in their own terms. With respect to existing treaties the bill states:

> No treaty in force at the time of the enactment of this Act shall be construed as specific statutory authorization for, or a specific exemption permitting, the introduction of the Armed Forces of the United States in hostilities or in any such situation . . .

Additionally, the subsection states that authorization for introducing the armed forces in hostilities shall not be inferred.

> . . . from any treaty hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of the Armed Forces of the United States in hostilities or in such situation and specifically exempting the introduction of such Armed Forces from compliance with the provisions of this Act.

It is important to bear in mind that these provisions with respect to treaties must be considered in conjunction with the authority of the President in subsections (1), (2), and (3). The authority contained in those subsections is in no way abridged or diminished by the provisions on treaties *per se*.

Moreover, as the language of the subsection makes clear, the bill envisages the adoption of treaty implementation legislation, as deemed appropriate and desirable by the Congress and the President. Such implementating legislation would constitute the authority "pursuant to specific statutory authorization" called for by subsection (4).

There are two principal reasons for including these provisions with respect to our collective and bilateral security treaties. First, is to ensure that both Houses of Congress must be affirmatively involved in any decision of the United States to engage in hostilities pursuant to a treaty. Treaties are ratified by and with the consent of the Senate. But the war powers of Congress in article I, section 8 of the Constitution are vested in both Houses of Congress and not in the Senate (and President) alone. A decision to make war must be a national decision. Consequently, to be truly a national decision, and, most importantly, to be consonant with the Constitution, it must be a decision involving the President and both Houses of Congress.

Second, the provisions with respect to treaties are important so as to remove the possibility of future contention such as arose with respect to the SEATO Treaty and the Vietnam war.

Treaties are not self-executing. They do not contain authority within the meaning of section 3(4) to go to war. Thus, by requiring statutory action, in the form of implementing legislation or an area resolution of the familiar type, the War Powers Act would perform the important function of defining that elusive and controversial phrase—"constitutional processes"—which is contained in our security treaties.

Subsection (4) contains one additional important provision. It states:

> Specific statutory authorization is required for the assignment of members of the Armed Forces of the United States to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

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.

REPORTING REQUIREMENT

Section 4 requires the President to report "promptly" in writing to both Houses of Congress any use of the armed forces covered by section 3 of the bill. The provisions of this section are clear and simple. In his report to Congress, the President is required to include "a full account of the circumstances under which . . . [he has acted] . . . the estimated scope of such hostilities or situation, and the consistency of the introduction of such forces in such hostilities or situation with the provision of section 3 of this Act."

In addition, the President is required to make periodic, additional reports so long as the armed forces are engaged in circumstances governed by section 3. Such additional reports shall be submitted at least every six months.

It will be noted that the President is required to report "promptly." This word has been used in preference to "immediately" or a possible specific time limit such as 24 hours. The important thing is that the report must be prompt but it must also be comprehensive. It might take a few days for the executive branch to assemble all the facts and reports from the field, as well as to assemble the various intelligence reports and, most importantly, to prepare an informed judgment on the "estimated scope of such hostilities."

What is intended is a full and accurate report of events, combined with an authoritative statement by the President of his judgment about the direction in which the situation is likely to develop. The Congress can act intelligently and responsibly only when it has the necessary information at hand.

The reporting requirements of the bill apply independently of the provisions of sections 5, 6, and 7. The President's mandatory report is not to be considered a request for an extension of authority as might be granted subsequently under section 5. Such a request can only be introduced by a member of Congress.

Moreover, it is entirely possible that even a majority of the actions taken under the President's direction pursuant to section 3 full will be short-lived, one-shot actions completed well within the thirty-day time period, and thus requiring no extension in time of the authority spelled out in section 3.

30-DAY AUTHORIZATION PERIOD

Section 5 (along with section 3) is the heart and core of the bill. It is the crucial embodiment of Congressional authority in the war powers field, based on the mandate of Congress enumerated so comprehensively in article I, section 8 of the Constitution. Section 5 rests squarely and securely on the words, meaning and intent of the Constitution and thus represents, in an historic sense, a restoration of the constitution balance which has been distorted by practice in our history and, climatically, in recent decades.

Section 5 provides that actions taken under the provisions of section 3: "shall not be sustained beyond thirty days from the date of the introduction of such Armed Forces in hostilities or in any such situation unless (1) the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of Armed Forces of the United States engaged pursuant to section 3(1) or 3(2) of this Act requires the continued use of such Armed Forces in the course of bringing about a prompt disengagement from such hostilities; or (2) Congress is physically unable to meet as a result of an armed attack upon the United States; or (3) the continued use of such Armed Forces in such hostilities or in such situation has been authorized in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof."

Section 5 resolves the modern dilemma of reconciling the need of speedy and emergency action by the President in this age of instantaneous communications and of intercontinental ballistic missiles with the urgent necessity for Congress to exercise its constitutional mandate and duty with respect to the great questions of war and peace.

The choice of thirty days, in a sense, is arbitrary. However, it clearly appears to be an optimal length in time with respect to balancing two vital considerations. First, it is an important objective of this bill to bring the Congress, in the exercise of its constitutional war powers, into any situation involving U.S. forces in hostilities at an early enough moment so that Congress's actions can be meaningful and decisive in terms of a national decision respecting the carrying on of war. Second, recognizing the need for emergency action, and the crucial need of Congress to act with sufficient deliberation and to act on the basis of full information, thirty days is a time period which strikes a balance enabling Congress to act meaningfully as well as independently.

It should be noted further, that the thirty-day provision can be extended as Congress sees fit—or it can be foreshortened under section 6. The way the bill is constructed, however, the burden for obtaining an extension under section 5 rests on the President. He must obtain specific, affirmative, statutory action by the Congress in this respect. On the other hand, the burden for any effort to foreshorten the thirty-day period rests with the Congress, which would have to pass an act or joint resolution to do so. Any such measures to foreshorten the thirty-day period would have to reckon with the possibility of a Presidential veto, as his signature is required, unless there is sufficient Congressional support to override a veto with a two-thirds majority.

The issue has been raised quite properly, as to what would happen if our forces were still engaged in hot combat at the end of the thirtieth day—and there had been no Congressional extension of the thirty-day time limit. The answer is that, as specified by clause (1), the

President would not be required or expected to order the troops to lay down their arms.

The President would, however, be under statutory compulsion to begin to disengage in good faith to meet the thirty-day time limit. He would be under the injunction placed upon him by the Constitution, which requires of the President that: "he shall take care that the laws be faithfully executed."

The wording of Section 5(1) is very specific and tightly drawn. It is to be emphasized that Section 5(1) is in no sense to be construed as a loophole giving the President discretionary authority with respect to the thirty-day disengagement requirement. It is addressed exclusively to the narrow issue of the security of our forces in the process of prompt disengagement. The criterion involved is the security of forces under fire and it does not extend to withdrawal in conformity with some broader strategy or policy objective. No expansion of the thirty-day time frame is conveyed other than a brief period which might be required for the most expeditious disengagement consistent with security of the personnnel engaged. Moreover, it requires the President's certification in writing that any such contingency had arisen from "unavoidable military necessity."

Section 5(2) provides for suspension of the thirty-day disengagement requirement in the event "Congress is physically unable to meet as a result of an armed attack upon the United States."

The question has been raised whether there can or should be any time limitation on the President's emergency authority to repel an attack upon the United States and take the related measures specified in Section 3(1). The bill rejects the hypothesis that the Congress, if it were physically able to meet, might not support fully all necessary measures to repel an attack upon the nation. Refusal to act affirmatively by the Congress within the specified time period respecting emergency action to repel an attack could only indicate the most serious questions about the bona fides of the allleged attack or imminent threat of an attack. In this context, the admonition articulated in 1848 by Abraham Lincoln is most pertinent.

> Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion, and you will allow him to do so, whenever he may choose to say he deems it necessary for such purpose—and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect . . . If, today, he should choose to say he thinks it necessary to invade Canada, to prevent the British from invading us, how could you stop him? You may say to him, I see no probability of the British invading us but he will say to you be silent; I see it, if you don't.

Section 5(3) provides for: "the continued use [beyond thirty days] of such armed forces in such hostilities or in such situation [provided it] has been authorized in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof." It is to be noted that authorization to continue using the Armed Forces is to come in the form of specific statutory action for this purpose. This is to avoid any ambiguities such as possible efforts to construe general appropriations or other such measures as constituting the necessary authorization for "continued use." Moreover, just as the Congress

under the Constitution is not intended to be under any obligation to declare war against its own better judgment, so under Section 5(3) of the war powers bill there is no presumption, or obligation, upon the Congress to enact legislation for the continued use of the armed forces, as covered by the bill, except as it is persuaded by the merits of the case presented to it, and consequent to appropriate reflection and due deliberation.

It is further to be noted that any "continued use" which might be authorized by the Congress must be "pursuant to the provisions" of such authorization. The Congress is not faced with an all or nothing situation in considering authorization for "continued use." It can establish new time limits, provisions for further review by the Congress, as well as other limits and stipulations within the ambit of the constitutional powers of the Congress.

TERMINATION PRIOR TO 30 DAYS

Section 6 provides that the Congress can, through statutory action, foreshorten the thirty-day provisions of Section 5. In such instances, the President is protected by his veto power regarding the basic thirty-day emergency period specified to him with respect to the authorities contained in section 3. Clearly, effective Congressional action under section 6 would be likely in extraordinary circumstances wherein two-thirds of both Houses of Congress were convinced that the President had acted against the national interest or with great improvidence. Just as the burden of proof lies with the President to persuade that his use of the armed forces under section 3 merits prolongation in the national interest beyond thirty days, the burden of proof, in effect, lies with the Congress to foreshorten the thirty-day period.

PRIORITY CONSIDERATION

Section 7 establishes procedures to assure priority action in Congress to consider legislation to extend under section 5, or to foreshorten under section 6, the thirty-day time limit. The provisions of section 7 are, thus, a safeguard against the possibility that Congressional action with respect to such measures could be obstructed or relayed through a filibuster or committee pigeonholing. Section 7 also provides that the respective Houses of Congress can modify the priority consideration provisions by majority vote. In this way, provision is made for a majority of either House to determine by yeas and nays an alternative procedure—for instance, directing a committee to hold hearings and report back by a certain date. Section 7 is shaped so as to assure that control of the consideration of legislation to extend or foreshorten the thirty-day period is in the hands of the majority and that a minority cannot obstruct the will of the majority in this respect through procedural means. It should be noted that requests for statutory authorization under section 3(4) do not qualify for the priority consideration provisions of section 7 as explained above.

SEPARABILITY CLAUSE

Section 8 contains a standard separability clause which simply provides that if any provisions of the bill should be held invalid, this would not effect the validity of the rest of the bill.

NOT EX POST FACTO

Section 9 has two parts. The first part makes clear that the bill is not ex post facto legislation respecting the Vietnam war. The second part makes clear that the provision of section 3(4) would not require, for instance, the withdrawal of U.S. military personnel from NATO command headquarters in the event that forces of other NATO nations became engaged in hostilities unrelated to NATO, or in hostilities in which the introduction of U.S. forces were not authorized under section 3(1), 3(2), or 3(3) of this Act or by other specific statutory action of the Congress. However, in the absence of specific statutory authorization members of the U.S. armed forces pursuant to section 3(4) could not by reason of the NATO Treaty "command, coordinate, participate in the movement of, or accompany" the regular or irregular forces of a NATO country engaged in hostilities.

The "high-level military commands" referred to in this section are understood to be those of NATO, the North American Air Defense command (NORAD) and the United Nations command in Korea (UNC).

The overall purposes of the War Powers Act are to codify the "emergency" powers of the Commander-in-Chief, in the absence of a declaration of war, to introduce the armed forces of the United States in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, and, very importantly, to establish a methodology to assure that Congress is not foreclosed by the practice of undeclared war from exercising its constitutional responsibilities respecting the awesome decision of putting the nation at war.

SUPPLEMENTAL VIEWS OF J. W. FULBRIGHT

Although the intent of the bill herewith reported is unexceptionable, it seems to me that the bill could be improved in several respects.

The first problem lies with Section 3, which catalogues the various conditions under which the President would be permitted to make emergency use of the armed forces. These conditions, in my view, go too far in the direction of executive prerogative, especially in allowing the President to take action not only to "repel an armed attack" but also to "forestall the direct and imminent threat of such an attack" on the United States or its armed forces abroad. The danger here is that these provisions could be construed as sanctioning a pre-emptive, or first strike, attack solely on the President's own judgment. Should the President initiate such a pre-emptive attack, the thirty-day limitation provided for in Sections 5 and 6 of the bill might prove to be ineffective, or indeed irrelevant, as a Congressional check on the President—all the more for the fact, which will be elaborated later that the 30-day limit on Presidential discretion is by no means absolute. The provisions authorizing the President to "forestall the direct and imminent threat" of an attack could also be used to justify actions such as the Cambodian intervention of 1970 and the Laos intervention of 1971, both of which were explained as being necessary to forestall attacks on American forces.

In their memorandum on war powers legislation the Lawyers Committee on American Policy Toward Vietnam reminded the Foreign Relations Committee that the classical language used to describe the basic power of the Commander-in-Chief to engage in hostilities in the absence of Congressional authorization is as follows: "to repel a sudden attack against the United States, its territories and possessions." This language is much more restrictive than that contained in paragraphs 1 and 2 of Section 3 of the Committee bill, which, in their extensiveness, may have the unintended effect of giving away more power than they withhold. In the view of the Lawyers Committee, the extension of the President's power to use the armed forces to "forestall" an attack before it takes place may well go beyond the President's constitutional authority. Besides a "sudden attack" on United States territory, the only other circumstances identified by the Lawyers Committee as warranting unauthorized Presidential use of the Armed Forces are an attack on the armed forces of the United States stationed outside of the country and an imminent threat to the lives of American citizens abroad, the latter of which would justify only a brief military operation for purposes of evacuation.

The bill appears to me to deal satisfactorily in paragraph (3) of Section 3 with the matter of protecting the lives of Americans abroad; it goes too far in paragraphs (1) and (2), however, in allowing of discretionary Presidential action to "forestall the direct and imminent threat" of an attack on the territory or armed forces of the United States.

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Rather than spell out what amounts to Presidential discretion to mount a pre-emptive attack, I am inclined toward a simple abbreviated provision allowing of emergency use of the armed forces by the President. Alternately, there may be merit in simply abstaining from the attempt to codify the President's emergency powers, which is the approach of Congressman Zablocki's bill, H.J. Res. 542, favorably reported by the House Foreign Affairs Committee on June 7. In practice, it is exceedingly difficult, as the Committee has found, to draw up a list of emergency conditions for Presidential use of the armed forces which does not become so long and extensive a catalogue as to constitute a *de facto* grant of expanded Presidential authority. The list of conditions spelled out in Section 3 of the bill is, in my opinion, about as precise and comprehensive a list as can be devised, and its purpose, I fully recognize, is not to expand Presidential power but to restrict it to the categories listed. Nevertheless, I am apprehensive that the very comprehensiveness and precision of the contingencies listed in Section 3 may be drawn upon by future Presidents to explain or justify military initiatives which would otherwise be difficult to explain or justify. A future President might, for instance, cite "secret" or "classified" data to justify almost any conceivable foreign military initiative as essential to "forestall the direct and imminent threat" of an attack on the United States or its armed forces abroad.

For these reasons I am much inclined either to say nothing about the President's emergency powers as in the Zablocki bill, or to include a simple substitute for paragraphs (1), (2) and (3) of Section 3 of the Committee bill. in which it would simply be recognized that the President, under certain emergency conditions, may find it absolutely essential to use the armed forces without or prior to Congressional authorization. This approach too has its dangers, allowing as it would of irresponsible or extravagant interpretation, but at least it would place the burden of accountability squarely upon the President, where it belongs, and it would also of course be restricted by the thirty-day limitation specified in Sections 5 and 6 of the bill.

Under the language of paragraphs (1), (2) and (3) of Section 3 of the bill the executive could cite fairly specific authority for the widest possible range of military initiatives. Under the simpler, more general approach I propose, the President would remain free to act but without the prop of specific authorization; he would have to act entirely on his own responsibility, with no advance assurance of Congressional support. A prudent and conscientious President, under these circumstances, would hesitate to take action that he did not feel confident he could defend to the Congress. He would remain accountable to Congress for his action to a greater extent than he would if he had specific authorizing language to fall back upon. Congress, for its part, would retain its uncompromised right to pass judgment upon any military initiative taken without its advance approval. Confronted with the need to explain and win approval for any use of the armed forces on the specific merits of the case at hand, a wise President would think carefully before acting; he might even go so far as to consult with members of Congress as well as with his personal advisers before committing the armed forces to emergency action. For these reasons, it appears to me that a general, unspecified authority for making emergency use of the armed forces, though superficially a broad grant

of power, would in practice be more restrictive and inhibiting than the specific grants of emergency power spelled out in paragraphs (1), (2) and (3) of Section 3 of the bill. Alternately, the same objective could be achieved by simply leaving out any attempt to codify the President's emergency powers, which is the approach of the House Committee bill.

A related consideration, called to the attention of the Committee by the Federation of American Scientists, is the danger of a President, on his own authority, escalating conventional hostilities into a nuclear war. The United States has not, like the People's Republic of China, announced that it will never make first use of nuclear weapons. Accordingly, the Federation of American Scientists proposes that Congress require the President to secure its consent before using nuclear weapons except in response to their use or irrevocable launch by an adversary. So enormous is the significance of nuclear war that the conversion of any conventional conflict into a nuclear conflict cannot realistically be considered a mere change of tactics in a continuing conflict. In effect, the introduction of nuclear weapons would constitute the beginning of a whole new war. This being the case, I concur wholly with the Federation of American Scientists that Congress must retain control over the conventional or nuclear character of a war.

Paragraph 4 of Section 3 of the Committee bill, spelling out the conditions for use of the Armed Forces "pursuant to specific statutory authorization," seems to me to be well and carefully drafted in its present form. I recommend its retention in Section 3 revised along one or the other of the lines suggested above. One feasible approach is that of the Zablocki bill, although that will not take account of the matter of first use of nuclear weapons. Another possible approach is the substitution of the following for the introductory clause and first three paragraphs of Section 3 of the Committee bill (page 2, line 22, through page 4, line 3):

> Section 3. In the absence of a declaration of war by the Congress, the Armed Forces of the United States may be employed by the President only—
>
> (1) to respond to any act or situation that endangers the United States, its territories or possessions, or its citizens or nationals when the necessity to respond to such act or situation in his judgment constitutes a national emergency of such a nature as does not permit advance congressional authorization to employ such forces; but, except in response to a nuclear attack or to an irrevocable launch of nuclear weapons, the President may not use nuclear weapons without the prior, explicit authorization of the Congress; or.

A most serious problem arises in connection with Section 5, which specifies a 30-day limitation for emergency use of the armed forces by the President. Under the Committee bill, this limitation allows of an exception which might in practice prove to be a loophole so gaping as to nullify the 30-day limitation entirely. The Committee bill states that the emergency use of the armed forces by the President may be sustained beyond the 30-day period, with or without Congressional authorization, if the President determines that "unavoidable military necessity respecting the safety of the armed forces" requires their con-

tinued use for purposes of "bringing about a prompt disengagement" from hostilities. In this connection, it will be recalled that President Nixon prolonged the Vietnam war for four years under the excuse of "unavoidable military necessity respecting the safety of the armed forces." This escape clause could reduce to meaninglessness the entire provision limiting the President's emergency power to 30 days. The approach taken by the House bill is in this respect much superior inasmuch as it allows of no such escape clause. Section 4 (b) of the bill approved by the House Foreign Affairs Committee states simply that, within the 120-day emergency period specified in the House bill, "the President shall terminate any commitment and remove any enlargement of United States armed forces . . . unless the Congress enacts a declaration of war or a specific authorization for the use of United States armed forces." Although I greatly prefer the 30-day emergency period of the Senate Foreign Relation Committee's bill to the 120 day emergency period of the House bill, the latter nonetheless provides more effectively for Congressional authority to decide whether or not any given military action may be continued beyond the emergency period.

Another, similar problem arises in connection with Section 6 of the Committee bill, under which Congress could require the termination of military action within the 30-day emergency period only by act or joint resolution, which of course would be subject to veto by the President. In addition, Section 6 of the Committee bill, like Section 5, makes a complete exception to the Congressional termination power in any case where the President judges that "unavoidable military necessity respecting the safety of the armed forces" requires their continued use in the course of bringing about a "prompt disengagement" from hostilities. The requirement of Presidential signature for an act of termination, combined with the exception of "unavoidable military necessity," reduce to meaninglessness the ostensible power to Congress to terminate hostilities within the 30-day emergency period. The approach taken by the Zablocki bill in this respect, as in the case of military action beyond the initial emergency period, seems much superior. Section 4(c) of Zablocki bill would authorize Congress to require the President to terminate military action within the emergency period simply by concurrent resolution. Since a concurrent resolution does not require the signature of the President, this approach would eliminate the possibility of Presidential veto of a Congressional act of termination. Furthermore, in the matter of terminating military action within the emergency period as well as allowing it to continue beyond the emergency period, the Zablocki bill contains no such gaping escape hole as the "unavoidable military necessity" spelled out in Section 5 and 6 of the Senate Committee bill. The Zablocki bill, therefore, provides not only for Congressional authority to decide whether military action will be sustained beyond the emergency period; it also provides more effectively for Congressional authority to terminate military action within the emergency period.

Still another problem arises with respect to Section 9 of the Senate Committee bill, which states that the bill would "not apply to hostilities in which the armed forces of the United States are involved on the effective date of this Act." The effect of this provision would be the exemptions of the lingering war in Indochina from the application

of the bill. As formulated, Section 9 of the Committee bill can even be read as giving negative or implicit sanction to the continuation of the war in Indochina. My own view is that the current bombing of Cambodia is unconstitutional as well as unwise, and this view seems now to represent a consensus in Congress, which may soon result in a legislative cutoff of the bombing. I would not wish, however, even by indirection, to have it suggested in a major piece of legislation that this war warrants exemption from rules of legality which would be applied to future wars. As the Committee Report correctly points out, the war powers bill is not an attempt to alter the Constitution but a reassertion and codification of the war powers provisions of the Constitution. To exempt any war from the bill's provisions is, in effect, to exempt it from the Constitution. In order to deal with this problem I recommend that the language exempting the Indochina conflict—this act "shall not apply to hostilities in which the armed forces of the United States are involved on the effective date of this Act"—be deleted from Section 9 of the Committee bill, making the Senate bill equivalent to the Zablocki bill, which states simply that the legislation "shall take effect on the date of its enactment." In addition, I recommend, most strongly, the inclusion in the bill of a provision equivalent to Section 9 of the bill reported by the House Foreign Affairs Committee, which states that "All commitments of United States armed forces to hostilities existing on the date of the enactment of this act shall be subject to the provisions hereof. . . ." The inclusion of such language would remove all doubt of the applicability of Congress's war power to the current hostilities in Indochina as well as to future possible wars.

A most important problem, closely related to the war powers, is the question of authority to deploy the armed forces outside of the United States in the absence of hostilities or the imminent threat of hostilities. In the section above entitled "Explanation of the bill" it is stated that "this legislation would not inhibit the President's capacity to deploy the armed forces, i.e., to move elements of the fleet in international waters." Professor Raoul Berger commented in his testimony before the Foreign Relations Committee on war powers: "Unless Congress establishes control over deployment by statute requiring Congressional authorization, the President will in the future as in the past station the armed forces in hot spots that invite attack, for example, the destroyer Maddox in the Tonkin Gulf. Once such an attack occurs, retaliation becomes almost impossible to resist." [1] I am reminded in this connection of a memorandum written in 1968 by General Wheeler, then Chairman of the Joint Chiefs of Staff, regarding the deployment of American forces in Spain in the absence of a security treaty: "By the presence of the United States forces in Spain the United States gives Spain a far more visible and credible security guarantee than any written document." Both experience and logic show that, to the extent the President controls deployment of the armed forces, he also has the *de facto* power of initiating war.

Either in connection with the war powers bill, or through separate legislation, it would seem appropriate, indeed urgent, to affirm by law the authority of Congress to regulate the deployment of the armed

[1] "War Powers Legislation." *Hearings Before the Committee on Foreign Relations*, U.S. Senate, 93rd Congress, 1st Session. (Washington: U.S. Govt. Printing Office, 1973), p. 17.

forces in the absence of hostilities or their imminent threat. Such authority derives directly from the Constitution, which specifies Congress's power to "make rules for the government and regulation of the land and naval forces." In addition, the general power of appropriation necessarily carries with it the power to specify how appropriated moneys shall and shall not be spent. Moreover, the authority of Congress to regulate the deployment of the armed forces in peacetime is scarcely separable from the war power itself, inasmuch as the power to deploy the armed forces is also the power to precipate hostilities or—to take the language of the war powers bill—to create "situations where imminent involvement in hostilities is clearly indicated. . . ." In the words of a Congressional Research Service memorandum on the subject, dated May 24, 1973, "Almost every substantive aspect of the armed forces is an appropriate subject for regulation by the Congress; and, since the President is entirely dependent on the Congress for the forces he commands, it follows that Congress can control, directly or indirectly, the objectives for which these forces are used, at least during times of peace."

J. W. FULBRIGHT.

Union Calendar No. 125

93D CONGRESS
1ST SESSION

H. J. RES. 542

[Report No. 93–287]

IN THE HOUSE OF REPRESENTATIVES

MAY 3, 1973

Mr. ZABLOCKI (for himself, Mr. FOUNTAIN, Mr. FRASER, Mr. BINGHAM, Mr. FASCELL, Mr. DAVIS of Georgia, Mr. CHARLES WILSON of Texas, Mr. FINDLEY, Mr. DU PONT, Mr. BIESTER, Mr. NIX, Mr. BROOMFIELD, Mr. PEPPER, Mr. HAYS, and Mr. HOLIFIELD) introduced the following joint resolution; which was referred to the Committee on Foreign Affairs

JUNE 15, 1973

Reported with amendments, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Omit the part struck through and insert the part printed in italic]

JOINT RESOLUTION

Concerning the war powers of Congress and the President.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This measure may be cited as the "War Powers Resolution of 1973".

CONSULTATION

SEC. 2. The President in every possible instance shall consult with the leadership and appropriate committees of the Congress before committing United States Armed Forces to hostilities or to situations where hostilities may be imminent,

and after every such commitment shall consult regularly with such Members and committees until such United States Armed Forces are no longer engaged in hostilities or have been removed from areas where hostilities may be imminent.

REPORTING

SEC. 3. In any case in which the President without a declaration of war by the Congress—

(1) commits United States Armed Forces to hostilities outside the territory of the United States, its possessions and territories;

(2) commits United States Armed Forces equipped for combat to the territory, airspace, or waters of a foreign nation, except for deployments which relate solely to supply, replacement, repair, or training of United States Armed Forces; or

(3) substantially enlarges United States Armed Forces equipped for combat already located in a foreign nation;

the President shall submit within ~~forty-eight~~ *seventy-two* hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(A) the circumstances necessitating his action;

(B) the constitutional and legislative provisions under the authority of which he took such action;

(C) the estimated scope of activities;

(D) the estimated financial cost of such commitment or such enlargement of forces; and

(E) such other information as the President may deem useful to the Congress in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

CONGRESSIONAL ACTION

SEC. 4. (a) Each report submitted pursuant to section 3 shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same day. If Congress is not in session when the report is transmitted, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable, shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Senate Foreign Relations Committee for appropriate action, and each such report shall be printed as a document for each House.

(b) Within one hundred and twenty calendar days after a report is submitted or is required to be submitted pursuant

to section 3, the President shall terminate any commitment and remove any enlargement of United States Armed Forces with respect to which such report was submitted, unless the Congress enacts a declaration of war or a specific authorization for the use of United States Armed Forces.

(c) Notwithstanding subsection (b), at any time that the 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 other specific authorization of the Congress, such forces shall be disengaged by the President if the Congress so directs by concurrent resolution.

CONGRESSIONAL PRIORITY PROCEDURE

SEC. 5. (a) Any resolution or bill introduced pursuant to section 4 (b) at least forty-five days before the expiration of the one hundred and twenty-day period specified in said section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Senate Foreign Relations Committee, and *one such resolution or bill* shall be reported out by such committee, together with its recommendations, not later than thirty days before the expiration of the one hundred and twenty-day period specified in said section.

(b) Any resolution or bill so reported shall become the pending business of the House in question and shall be voted

on within three legislative days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a resolution or bill passed by one House shall be referred to the appropriate committee of the other House and shall be reported out not later than fifteen days before the expiration of the one hundred and twenty-day period specified in said section. The resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three legislative days after it has been reported, unless such House shall otherwise determine by yeas and nays.

SEC. 6. (a) Any resolution introduced pursuant to section 4(c) shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Senate Foreign Relations Committee as the case may be, and *one such resolution* shall be reported out by such committee together with its recommendations within fifteen calendar days.

(b) Any resolution so reported shall become the pending business of the House in question and shall be voted on within three legislative days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a resolution passed by one House shall be referred to the appropriate committee of the other House and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall there-

upon become the pending business of such House and shall be voted upon within three legislative days, unless such House shall otherwise determine by yeas and nays.

TERMINATION OF CONGRESS

SEC. 7. For purposes of subsection (b) of section 4, in the event of the termination of a Congress before the expiration of the one hundred and twenty-day period specified in such subsection (b), without action having been taken by the Congress under such subsection, such one hundred and twenty-day period shall not expire sooner than forty-eight days after the convening of the next succeeding Congress, provided that a resolution or bill is introduced, pursuant to such subsection (b), within three days of the convening of such next succeeding Congress.

INTERPRETATION OF ACT

SEC. ~~7.~~ *8.* Nothing in this ~~resolution~~ *Act* (a) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties;

(b) Shall be construed to represent congressional acceptance of the proposition that Executive action alone can satisfy the constitutional process requirement contained in the provisions of mutual security treaties to which the United States is a party; or

(c) Shall be construed as granting any authority to the President with respect to the commitment of United States

Armed Forces to hostilities or to the territory, airspace, or waters of a foreign nation which he would not have had in the absence ~~hereof~~ *of this Act.*

APPLICABILITY TO CERTAIN EXISTING COMMITMENTS

SEC. 9. All commitments of United States Armed Forces to hostilities existing on the date of the enactment of this Act shall be subject to the provisions hereof, and the President shall file the report required by section 3 within seventy-two hours after the enactment of this Act.

EFFECTIVE DATE

SEC. ~~8.~~ *10.* This ~~resolution~~ *Act* shall take effect on the date of its enactment.

WAR POWERS RESOLUTION OF 1973

NOV. 15, 1963.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. ZABLOCKI, from the Committee on Foreign Affairs, submitted the following

REPORT

TOGETHER WITH MINORITY AND SUPPLEMENTAL VIEWS

[To accompany H.J. Res. 542]

The Committee on Foreign Affairs, to whom was referred the joint resolution (House Joint Resolution 542) concerning the war powers of Congress and the President, having considered the same, report favorably thereon with amendments and recommend that the joint resolution as amended do pass.

The amendments are as follows:

On page 2, line 19, strike out "forty-eight" and insert in lieu thereof "seventy-two".

On page 4, line 18, insert "one such resolution or bill" immediately after "and".

On page 5, line 13, insert "one such resolution" immediately after "and".

On page 6, immediately after line 2, insert the following:

TERMINATION OF CONGRESS

SEC. 7. For purposes of subsection (b) of section 4, in the event of the termination of a Congress before the expiration of the one hundred and twenty-day period specified in such subsection (b), without action having been taken by the Congress under such subsection, such one hundred and twenty-day period shall not expire sooner than forty-eight days after the convening of the next succeeding Congress, provided that a resolution or bill is introduced, pursuant to such subsection (b), within three days of the convening of such next succeeding Congress.

On page 6, line 4, strike out "7" and insert in lieu thereof "8".

On page 6, line 16, strike out "hereof" and insert in lieu thereof "of this Act".

On page 6, immediately after line 16, insert the following:

APPLICABILITY TO CERTAIN EXISTING COMMITMENTS

SEC. 9. All commitments of United States Armed Forces to hostilities existing on the date of the enactment of this Act shall be subject to the provisions hereof, and the President shall file the report required by section 3 within seventy-two hours after the enactment of this Act.

On page 6, line 18, strike out "8" and insert in lieu thereof "10".

On page 6, lines 4 and 18, strike out "resolution" and insert in lieu thereof "Act".

BACKGROUND

On three occasions in the past two sessions of Congress, the House of Representatives has passed war powers legislation. In the 91st Congress a joint resolution reported by unanimous vote from the Committee on Foreign Affairs was adopted under suspension of the rules in the House by a vote of 288 to 39. The House-passed measure was sent to the Senate where, because of that body's failure to act, it died with the end of the 91st Congress.

In the 92d Congress, the Committee on Foreign Affairs, again unanimously, reported House Joint Resolution 1 to the House. It was passed unanimously in the House by a voice vote under a suspension of the rules. The Senate, however, passed its own version of a war powers measure, and because of a parliamentary snarl which developed, it became necessary for the House to act once again. The Senate bill was amended with the language of House Joint Resolution 1 in the House—by a vote of 344 to 13—and sent to conference. The conferees met once near the end of the 92d Congress but could come to no agreement and the war powers resolution died once again.

ACTION IN THE 93D CONGRESS

Upon the opening of the 93d Congress the chairman of the Subcommittee on National Security Policy and Scientific Developments, and 11 cosponsors, introduced a new war powers resolution (House Joint Resolution 2), somewhat modified from those of prior years.

Six days of hearings were held by the subcommittee on that resolution and other war powers measures which had been referred to the Committee on Foreign Affairs. Among those proposals were:

Concerning the war powers of the Congress and the President.
H.J. Res. 96—Pepper
H.R. 2053—Matsunaga
H.R. 4378—Gude
H.J. Res. 498—du Pont

Governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress.
H.R. 317—Bingham
H.R. 4038—Nix
H.R. 5669—Bingham
H.R. 6424—Bingham et al.

Relating to the power of Congress to declare war.
H.J. Res. 315—Leggett
Relating to the war power of the Congress.
H.J. Res. 21—Danielson
H.J. Res. 71—Chappell et al.
H.J. Res. 72—Chappell et al.
H.J. Res. 89—Matsunaga
H.J. Res. 250—Dickinson
H.J. Res. 271—Fuqua
H.J. Res. 409—Chappell et al.
H.J. Res. 448—Cronin
Relative to the commitment of U.S. Armed Forces.
H. Res. 112—Rarick
To define the authority of the President of the United States to intervene abroad or to make war without the express consent of Congress.
H.R. 3722—Sisk
H.R. 4834—Nix
To make rules respecting military hostilities in the absense of a declaration of war.
H.R. 926—Quie
H.R. 2616—Railsback
H.R. 2740—Tiernan
To make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress.
H.R. 454—Dellenback
H.R. 1454—Ullman
H.R. 3130—Harrington
H.R. 3333—Charles H. Wilson of Calif.
H.R. 3408—Fish
H.R. 3832—Mazzoli
H.R. 4725—Sandman
H.R. 4858—Ruppe
H.R. 4966—Meeds
H.R. 5455—Zwach
H.R. 5594—Esch
To make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress of the United States or of a military attack upon the United States.
H.R. 3046—Dennis et al.
H.R. 4295—Rousselot
H.R. 6318—Dennis et al.

Testifying were seven Members of the House, two Senators, a spokesman for the Department of State, and five private experts. Four markup sessions followed at which new language was drafted. A revised war powers resolution was ordered reported to the full committee by a vote of 9 to 1 on May 2. The following day the measure, House Joint Resolution 542, was introduced by the subcommittee chairman with 14 cosponsors, including Mr. Fountain, Mr. Fraser, Mr. Bingham, Mr. Fascell, Mr. Davis of Georgia, Mr. Charles Wilson of Texas, Mr. Findley, Mr. du Pont, Mr. Biester, Mr. Nix, Mr. Broomfield, Mr. Pepper, Mr. Hays, and Mr. Holifield. The committee considered the bill in markup on May 22, May 31, and June 7. The resolution was reported with amendments on the latter date by a vote of 31 to 4, with one member answering "present."

CONSTITUTIONAL CONTEXT

The Cambodian incursion of May 1970 provided the initial impetus for a number of bills and resolutions on the war powers. Many Members of Congress, including those who supported the action, were disturbed by the lack of prior consultation with Congress and

the near crisis in relations between the executive and legislative branches which the incident occasioned.

The issue concerns the "twilight zone" of concurrent authority which the Founding Fathers gave the Congress and the President over the war powers of the National Government.

The term "war powers" may be taken to mean the authority inherent in national sovereignties to declare, conduct, and conclude armed hostilities with other states. In the U.S. Constitution the war powers which are expressly reserved to the Congress are found in article 1, section 8, of the Constitution:

> 1. The Congress shall have power * * *
>
> * * * * * * *
>
> 11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
>
> 12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than 2 years;
>
> 13. To provide and maintain a Navy;
>
> 14. To make rules for the government and regulation of the land and naval forces;
>
> 15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;
>
> 16. To provide for organizing, arming, and disciplining the militia and for governing such part of them as may be employed in the service of the United States;
>
> * * * * * * *
>
> 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers vested by this constitution in the Government of the United States, or in any department or officer thereof.

The war powers of the President are expressed in article II, section 2:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States * * *.

The interpretation and application of these constitutional grants have varied widely through our Nation's history. Testimony received during hearings held in the 91st, 92d, and 93d Congresses confirmed the view of many Members of Congress and outside observers that the constitutional "balance" of authority over warmaking has swung heavily to the President in modern times. To restore the balance provided for and mandated in the Constitution, Congress must now reassert its own prerogatives and responsibilities.

In shaping legislation to that purpose, the intention was not to reflect criticism on activities of Presidents, past or present, or to take punitive action. Rather, the focus of concern was the appropriate scope and substance of congressional and Presidential authority in the exercise of the power of war in order that the Congress might fulfill its responsibilities under the Constitution while permitting the President to exercise his responsibilities.

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The objective, throughout the consideration of war powers legislation, was to outline arrangements which would allow the President and Congress to work together in mutual respect and maximum harmony toward their ultimate, shared goal of maintaining the peace and security of the Nation.

THE INTENT AND EFFECT OF HOUSE JOINT RESOLUTION 542

The issue of the war powers is a complex and challenging one. The committee's objective was to reaffirm the constitutionally given authority of Congress to declare war. At the same time, the committee was sensitive to and cognizant of the President's right to defend the Nation against attack, without prior congressional authorization, in extreme circumstances such as a nuclear missile attack or direct invasion. On the basis of the deepened understanding generated over recent years, however, it became increasingly evident that the problem did not center on such extraordinary circumstances. Rather, the main difficulty involved the commitment of U.S. military forces exclusively by the President (purportedly under his authority as Commander in Chief) without congressional approval or adequate consultation with the Congress.

As a result of extensive hearings and the contributions made by many members of the House who have given thought to, and sponsored legislation on, war powers, it was possible to arrive at a consensus as to what legislation in this important area should encompass. House Joint Resolution 542 embodies that consensus. Briefly, the legislation does the following:

1. Directs the President in every possible instance to consult with the leadership and appropriate committees of Congress before, and regularly during, the commitment of United States Armed Forces to hostilities or situations where hostilities may be imminent;

2. Requires that the President make a formal report to Congress whenever, without a declaration of war or other prior specific congressional authorization, he takes significant action committing U.S. Armed Forces to hostilities abroad or the risk thereof, or places or substantially increases U.S. combat forces on foreign territory;

3. Provides for a specific procedure of consideration by Congress when a Presidential report is submitted;

4. Denies to the President the authority to commit U.S. Armed Forces for more than 120 days without specific congressional approval, while also allowing the Congress to order the President to disengage from combat operations at any time before the 120-day period ends through passage of a concurrent resolution.

5. Stipulates a specific congressional priority procedure for consideration of any relevant bill or resolution which may be introduced—in other words, an antifilibuster provision; and

6. Specifies that the measure is in no way intended to alter the constitutional authority of the Congress or the President, or the provisions of existing treaties.

COST ESTIMATE

Pursuant to clause 7, Rule XIII, of the House Rules, the committee believes that the adoption and implementation of this war powers resolution will result in little or no additional cost to the Government of the United States. If adopted, however, application of the legislation could result in substantial future savings to the Nation, both in blood and treasure, by preventing U.S. military combat involvements abroad which are found by Congress to be not in the national interest.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title and introductory clause

The introductory clause simply reads: "Concerning the war powers of Congress and the President." Sec. 1. the "Short Title," reads: "This measure may be cited as the 'War Powers Resolution of 1973'."

The word "concerning" was chosen because the resolution is merely intended to elaborate upon the application of the warmaking powers of the Congress and the President mentioned in the Constitution. By contrast with other war powers proposals, House Joint Resolution 542 does not attempt any itemized definition of the war powers.

Section 2. Consultation

This section directs that the President "*in every possible instance shall consult with the leadership and appropriate committees of the Congress before committing United States Armed Forces to hostilities or to situations where hostilities may be imminent.* * * *"

The use of the word "every" reflects the committee's belief that such consultation *prior* to the commitment of armed forces should be inclusive. In other words, it should apply in extraordinary and emergency circumstances—even when it is not possible to get formal congressional approval in the form of a declaration of war or other specific authorization.

At the same time, through use of the word "possible" it recognizes that a situation may be so dire, e.g. hostile missile attack underway, and require such instantaneous action that no prior consultation will be possible. It is therefore simultaneously *firm* in its expression of Congressional authority yet *flexible* in recognizing the possible need for swift action by the President which would not allow him time to consult first with Congress.

The second element of section 2 relates to situations *after* a commitment of forces has been made (with or without prior consultation). In that instance, it imposes upon the President, through use of the word "shall", the obligation to "*consult regularly with such Members and committees until such United States Armed Forces are no longer engaged in hostilities or have been removed from areas where hostilities may be imminent.*"

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 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. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available.

In the context of this and following sections of the resolution, a *commitment* of armed forces commences when the President makes the final decision to act and issues orders putting that decision into effect.

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 3. Reporting

This section contains a reporting requirement obligating the President to submit a written report to Congress when "*without a prior declaration of war by Congress*", he takes certain actions committing U.S. Armed Forces. The section stipulates the circumstances requiring such a report, prescribes its form, specifies the nature of its contents, and states the timing of its submission. A central purpose of the reporting requirement is to cause the President, in the process of decisionmaking, to take into account the legal and constitutional foundation for his actions, as well as the constitutional role of the Congress in warmaking.

Three sets of circumstances which would require a report are enumerated in the resolution as follows:

(1) When the President "*commits United States Armed Forces to hostilities outside the territory of the United States, its possessions and territories.*" This includes all commitments of U.S. Armed Forces abroad to situations in which hostilities already have begun and where there is reasonable expectation that American military personnel will be subject to hostile fire.

The language makes clear that the subsection applies to hostilities *outside* the territory of the United States, as opposed to attacks directly upon, or *within*, the territory of the United States. This language implicitly recognizes the President's right to protect the United States against attacks by all enemies, foreign and domestic. There is no implication whatsoever that the resolution is intended to impair the President's authority to provide such defense.

(2) Reporting is required when the President "*commits United States Armed Forces equipped for combat to the territory, airspace or waters of a foreign nation, except for deployments which relate solely to supply, replacement, repair or training of United States Armed Forces*". While subsection (1) refers to the commitment of U.S. troops to an area where armed conflict actually is in progress, subsection (2) covers 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.

(3) Reporting is required when the President "*substantially enlarges United States Armed Forces equipped for combat already located in a foreign nation.*" While the word "substantially" designates a flexible criterion, it is possible to arrive at a commonsense understanding of the numbers involved. A 100-percent 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 percent, 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.

The latter half of section 3 deals with the timing, form, and scope of the report submitted by the President.

(*1*) *Timing.*—Although prior war powers legislation had used the word "promptly" in designating the time period in which a Presidential report had to be submitted following an action specified under the resolution, the committee saw the need for more precision and adopted 72 hours as the time limit. This period is assumed to be sufficient for the President to assemble all the pertinent information necessary to make a full report to the Congress.

(*2*) *Form.*—The report by the President is stipulated to be in writing. Moreover, to the maximum extent possible, it is to be unclassified. If the President desires to make classified information available to the Congress as additional justification for his actions, he is free to do so. The procedure of submitting the report to the Speaker of the House and the President pro tempore of the Senate is a normal one for receiving such reports on behalf of Congress.

(*3*) *Scope.*—Five stipulations are made on the contents of the report. By prescriptive language in the resolution, the President is to include:

(*A*) *the circumstances necessitating his action;*

(*B*) *the constitutional and legislative provisions under the authority of which he took such action;*

(*C*) *the estimated scope of activities;*

(*D*) *the estimated financial cost of such commitment or such enlargement of forces; and*

(*E*) *such other information as the President may deem useful to the Congress in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.*

It is the belief of the committee that a report which fulfills the criteria set forth above will provide the Congress with adequate information on which to base its deliberations and possible action concerning the commitment of U.S. Armed Forces by the President.

Section 4. Congressional action

Section 4 has four basic purposes: first, to provide for a specific procedure of consideration by Congress when a report is submitted pursuant to section 3; second, to provide for the receiving of a report when Congress is not in session; third, to deny the President the authority to commit U.S. Armed Forces for more than 120 days without further specific congressional approval; fourth, to authorize both Houses of Congress to order the President to disengage any forces from hostilities outside the United States at any time during or after the 120-day period through passage of a concurrent resolution.

Subsection (*a*) of section 4 provides that each report submitted by the President pursuant to section 3 shall be transmitted to the Speaker of the House and President pro tempore of the Senate on the same day.

It further provides that if such a report is received when Congress is not in session the Speaker and President pro tempore, *if they deem it advisable, shall jointly* request the President to convene Congress to *provide for consideration* of it and allow the Congress to take *appropriate action* pursuant to this section. There are *three reasons* for this language:

By use of the phrase "* * * *if they deem it advisable* * * *" it is intended that the good judgment of these two officials would determine whether the report covered a situation of sufficient urgency, importance and severity to warrant the extraordinary measure of ordering the reconvening of Congress. There may be instances when a report is filed on a relatively minor action.

The language "* * * *shall jointly request*" makes clear that both the Speaker and President pro tempore would have to concur in the importance of and urgency of the situation covered in the report and in the desirability of asking the President to reconvene Congress. Yet, through use of the word "*shall*" the committee intended to convey its strong belief that reports dealing with situations of urgency and importance would obligate these two officials to request the President to reconvene Congress. In this connection the committee recognizes that the Constitution states clearly that only the President "may" reconvene Congress.

The language "* * * *that it may consider the report and take appropriate action* * * *" refers to the congressional action and procedures outlined in section 4 (b) and (c) as well as sections 5 and 6, "Congressional Priority Procedure."

The resolution further stipulates that following receipt of the report the Speaker and President pro tempore shall refer "*it to the Committee on Foreign Affairs of the House of Representatives and to the Senate Foreign Relations Committee.* * * *" The purpose of this language was to make clear that these two committees have proper jurisdiction over declarations of war and with foreign affairs generally. Further, in order to make the report available to all members of Congress the resolution stipulates that it "*be printed as a document for each House.*"

Subsection (*b*) of the resolution is one of its major provisions. It brief, it stipulates that "*within one hundred and twenty calendar days after a report is submitted or is required to be submitted* * * *" the President would be required to terminate the commitment referred to in the report and "*remove any enlargement of U.S. Armed Forces*" unless the Congress enacts a declaration of war or a specific authorization for the use of U.S. Armed Forces. Considerations which entered into this provision are as follows:

The language "* * * *within one hundred and twenty calendar days* * * *" was used as a means of providing an adequate but fixed limitation on the period of the Presidential action. The Congress recognizes that the President has, from time to time, assumed a power to act from provision of treaties, laws, and resolutions as well as from the Constitution itself which do not constitute an explicit or specific authorization. This provision enables Congress to consider the necessity or wisdom of a President's action and to require the President to abandon such action if Congress is not persuaded that the action is in the interest of the United States, or to endorse the action if Congress believes it to be in the national interest. As is made clear in section 8 of the resolution, this provision is not to be construed as a grant of authority to the President to act for 120 days. Rather, it should be considered a specific time limitation upon any power to act assumed by the President from sources other than a specific authorization by Congress.

Nor should this limitation and the power contained in subsection (c) be interpreted as limiting the means now available to Congress and citizens to challenge the authority of the President to act.

The language "* * * *or is required to be submitted* * * *" takes into account a situation in which the President for whatever reason may decide not to submit a report. In that case, the 120-day period would begin after the 72-hour period referred to in section 3.

The language "* * * *the President shall terminate any commitment* * * *" obligates the President explicitly to stop the commitment or enlargement and remove U.S. Armed Forces to which the report refers.

The phrase "* * * *unless the Congress enacts a declaration of war or a specific authorization for the use of United States Armed Forces*" spells out either of the two specific *affirmative actions* which the Congress would have to take in order for the President to continue his action, namely; a declaration of war *or* a specific authorization in the form of a joint resolution.

Subsection (*c*) is another of the resolution's major provisions. It provides for the termination of the President's action covered in the report through passage of a concurrent resolution by both Houses before the end of the 120-day period referred to in section 4(b) and notwithstanding section 4(b). It is, in other words, an option of congressional action. Considerations which entered into the legislative language here are as follows:

The phrase "*shall be disengaged*" has as its antecedent the President's action of committing U.S. Armed Forces. The intent

of the committee was simply that the President shall stop the action to which he has committed the forces by releasing the forces from the order which committed them, and removing them from the situation.

The language "* * * *if the Congress so directs by concurrent resolution*" is the heart of subsection (c). It authorizes the use of a concurrent resolution to "veto" or disapprove an action of the President committing United States Armed Forces to hostilities. In effect, the joint resolution "endows" this concurrent resolution with the binding force of statute. Since the language applies to a situation where there is no congressional authorization for the President's action it thereby avoids the possibility of a Presidential veto—and resulting impasse—which would be possible on a bill or a joint resolution. A discussion of the use of a concurrent resolution for this purpose may be found on pages 13–14.

Sections 5 and 6. Congressional priority procedure

Sections 5 and 6 stipulate a specific congressional priority procedure for consideration of a relevant bill or joint resolution which may be introduced pursuant to section 4(b) or a concurrent resolution introduced pursuant to section 4(c). Sections 5 and 6 are, in other words, the "antifilibuster" provisions of the resolution. While it was recognized that filibusters are primarily a problem of the Senate, it was felt that these provisions would protect the interests of the House. It would achieve that objective, for example, by allowing the House enough time to deal with any relevant bill or resolution sent by the Senate. Section 5 relates to section 4(b) and section 6 relates to section 4(c). In both cases, the language provides for referral to relevant bills or resolutions to the House Committee on Foreign Affairs and the Senate Foreign Relations Committee in accord with the traditional jurisdiction of those committees.

The intent of the committee in including sections 5 and 6 is to establish the status of relevant legislation as "privileged motions," approximate to the procedure followed when a discharge petition is filed for the consideration of a resolution.

TIMING OF SECTION 5

As prescribed in section 5 which relates to section 4(b), the timing of congressional procedures would be as follows:

Forty-five days before end of 120-day period.—Bill or joint resolution must be introduced to be guaranteed protection of committee consideration.

Thirty days before end of 120-day period.—One such resolution or bill must be reported out by committee.

Within 3 legislative days of being reported by committee.—Legislation becomes pending business of either House and shall be voted on and sent to the other body.

Fifteen days before end of 120-day period.—Legislation acted upon by one body and sent to the other body and referred to appropriate committee shall be reported out.

Within 3 legislative days of being reported by committee in other body.—Legislation so reported shall become pending busi-

ness and shall be voted on unless such body shall otherwise determine by yeas and nays.

End of 120-day period.—Presidential action must stop unless previously sanctioned by Congress.

TIMING OF SECTION 6

The timing for congressional consideration under section 6, which relates to section 4(c) is as follows:

Within 15 calendar days of introduction of concurrent resolution.—One such resolution shall be reported out by committee with recommendations and shall become pending business.

Within 3 legislative days of being reported out.—Shall be voted on unless otherwise determined by yeas and nays.

Within 15 calendar days of concurrent resolution passed by one House and referred to other body's appropriate committee.—Shall be reported out by committee and become pending business.

Within 3 legislative days of being reported out by committee.—Shall be voted on unless otherwise determined by yeas and nays.

Section 7. Termination of Congress

Section 7 deals with a situation in which a Congress terminates during the 120-day period specified in subsection 4(b) without having taken final action to approve or disapprove a commitment of armed forces.

The committee did not wish to force the President to cease a military action abroad simply because Congress was not in session at the expiration of 120 days and it had not been possible to take final action before adjournment.

Thus, section 7 provides that in such a case the 120-day period shall not expire *sooner than* 48 days after the convening of the next succeeding Congress, providing that a resolution or bill is introduced pursuant to subsection 4(b) within 3 days of the convening of the next succeeding Congress. This language is meant to insure that in any case in which the 120-day period is interrupted by statutory termination of Congress without congressional action, there would be an extension of the period. It also would allow the antifilibuster provisions to come into effect.

Section 8. Interpretation of act

Section 8 deals with the construction, intent, and effect of the resolution.

The intent of subsection (a) is to disclaim any intention of altering the constitutional grants of war powers to the legislative and executive branches. It thereby helps insure the constitutionality of the resolution by making it clear that nothing in it can be interpreted as changing in any way the powers delegated to each branch of government by the Constitution. In addition, it reassures U.S. allies that passage of the resolution will not affect U.S. obligations under mutual defense agreements and other treaties to which the United States is a party.

The intent of subsection (b) is to state explicitly that nothing in the resolution "*shall be construed to represent congressional accept-*

ance of the proposition that Executive action alone can satisfy the constitutional process requirement contained in the provisions of mutual security treaties to which the United States is a party."

This statement is aimed at rejecting those interpretations of the treaty obligations of the United States which hold that mutual security treaties such as NATO, SEATO, and ANZUS are "self-executing" and do not require congressional sanction of any kind for Presidential actions taken in pursuit of such obligations, including actions which involve the deployment of U.S. Armed Forces into hostilities.

The intent of subsection (c) is to emphasize that this resolution does not grant the President any new authority and, in connection with the 120-day period referred to in section 4(b), that the President would not have any freedom of action during the 120-day period which he does not already have.

Section 9. Applicability to certain existing commitments

This section provides that the resolution would apply to those commitments of U.S. Armed Forces to hostilities which are *in progress* on the date of its enactment into law. The section further provides that upon enactment of the resolution the President should proceed to file the report as required by section 3 and that the 120-day period called for by subsection 4(b) would begin on the date of the filing of the report.

Section 10. Effective date

This section states that the resolution, except to the extent otherwise provided in section 9, shall take effect on the date of its enactment.

USE OF A CONCURRENT RESOLUTION

Section 4(c) provides that an action by the President committing U.S. troops to hostilities or into areas or situations where hostilities are imminent could be terminated by both Houses of Congress acting through a concurrent resolution. Some question has been raised about the constitutionality of the use of a concurrent resolution for this purpose. After careful study of the issues involved the committee believes that there is ample precedent for the use of the concurrent resolution to "veto" or disapprove a future action of the President, which action was previously authorized by a joint resolution or bill.

There are many examples of legislative actions which have the effect of law without a Presidential signature. Perhaps the most notable is the ability of Congress to veto executive branch reorganization plans under the Executive Reorganization Act. Other examples are amendments to the Constitution of the United States and orders to spend money appropriated to the use of the Congress.

Further, most of the important legislation enacted for the prosecution of World War II provided that the powers granted to the President would come to an end upon adoption of concurrent resolutions to that purpose. Among those acts were:

The Lend-Lease Act;
First War Powers Act;
Emergency Price Control Act;
Stabilization Act of 1942;
War Labor Disputes Act.

In more recent times both the Middle East Resolution and the Gulf of Tonkin Resolution provided for their repeal by concurrent resolution.

This use of a concurrent resolution has been accepted by various authorities as a constitutionally valid practice. It might be noted that Senator Sam J. Ervin, a noted constitutional scholar, has authored a bill which would permit international executive agreements to be "vetoed" by the Congress through passage of a concurrent resolution. This proposal has been endorsed by many constitutional experts and a former Supreme Court justice.

The constitutional validity of such usage of a concurrent resolution is based on the capacity of Congress to limit or to terminate the authority it delegates to the Executive. In the case of the war powers, the Constitution is clear that the power to declare war, as well as the power to raise and maintain an army and a navy, belong to Congress. Under the Constitution, the President is designated as the Commander in Chief to prosecute wars authorized by Congress.

When the President commits U.S. Armed Forces to hostilities abroad on his own responsibility, he has, in effect, assumed congressional authority. Under this war powers resolution the Congress can rescind that authority as it sees fit by a concurrent resolution and thereby avoid the problem of a Presidential veto. The authority for the Congress to establish a legislative process for rescinding an assumed power to act on the part of the President can be found in Article I, Section 8, of the Constitution through the "necessary and proper" clause.

This authority of Congress was recognized as legitimate when Congress passed legislation permitting the President to prosecute World War II. This authority of Congress was recognized as legitimate in the passage of the Middle East Resolution and the Gulf of Tonkin Resolution. It is no less legitimate and constitutional today as embodied in this war powers resolution.

Supplemental Views of Representatives Maillard, Broomfield, Mathias, Guyer, and Vander Jagt

We voted in committee to report this resolution because we strongly support the reporting and consulting provisions of the legislation, although we have equally strong reservations over the operating provisions. In our opinion the House should have the opportunity to debate the resolution.

It is our hope that as the House works its will, the Members will carefully scrutinize section 4 (b) and (c). In our opinion, section 4(b) is dangerous and perhaps unconstitutional. It would unwisely put into law a provision whereby the failure of the Congress to act could force Presidential action with major national and international implications. Specifically, section 4(b) requires that within 120 calendar days after a report is submitted or required to be submitted pursuant to section 3, the President shall terminate any commitment and remove any enlargement of U.S. Armed Forces with respect to which such report was submitted, unless the Congress enacts a declaration of war or a specific authorization for the use of U.S. Armed Forces. In our opinion, the Congress ought to exercise its powers in a positive way and not have major consequences ensue from the inaction of the Congress.

There are several objections to terminating the President's authority in this manner. Recognizing that the war powers are shared by the President and the Congress, the President—to cite one example—obviously has the authority to commit U.S. Armed Forces stationed overseas to hostilities in order that they might protect themselves from attack or threat of imminent attack. We doubt that the Congress can consitutionally terminate the President's authority to protect the Armed Forces. We further doubt that the Congress can constitutionally terminate the President's authority by a failure to act, as provided for by section 4(b).

This section appears to be as unwise as it may be unconstitutional. Section 4(b) could require the disengagement of our Armed Forces even in the face of a continuing attack. It could destroy an adversary's incentive to reach an early settlement of a dispute, since he surely would hope that the Congress—by failure to act or otherwise—would compel the President to disengage U.S. Armed Forces.

We should also consider the constitutionality of section 4(c), which would permit the Congress by a concurrent resolution to require the President to disengage U.S. Armed Forces from hostilities. We have no problem with the policy envisioned in section 4(c): namely that in exercising a shared constitutional power a majority of both Houses

of Congress should have the power to require the disengagement of Armed Forces committed to hostilities by the President without congressional approval.

We would, however, call attention to the constitutional question of whether a concurrent resolution, not requiring the approval of the President, would be binding upon the President.

WILLIAM S. MAILLIARD,
WILLIAM S. BROOMFIELD,
ROBERT B. (BOB) MATHIAS,
TENNYSON GUYER,
GUY VANDER JAGT.

Supplemental Views of Representatives Buchanan and Whalen

We concur that there is great need for war powers legislation. Congress must possess the means by which it can act on the question of placing U.S. Armed Forces in combat. House Joint Resolution 542 goes a long way toward providing such a mechanism.

Nevertheless, the language in section 4(b) troubles us. It permits the exercise of congressional will through inaction. It is our opinion that in order to fulfill its constitutional responsibility, Congress must act, whether it be in a positive or negative manner.

Therefore, during the committee's markup of the resolution, we supported replacing the committee's language in section 4(b) with an amendment similar to the following:

> Not later than one hundred twenty days after the receipt of the report of the President provided for in section 3 of this Act, the Congress, by a declaration of war or by the enactment within such period of a bill or resolution appropriate to the purpose, shall either approve, ratify, confirm, and authorize the continuation of the action taken by the President and reported to the Congress, or shall disapprove, in which case the President shall terminate any commitment and remove any enlargements of the United States Armed Forces with respect to which such report was submitted.

We shall offer this amendment during floor debate on House Joint Resolution 542. On an issue which may involve the death of thousands of Americans, we cannot delude ourselves that no action at all is an appropriate response. Rather, each Member of Congress should declare his views—through a "yes" or "no" vote—when the President commits our Armed Forces to combat or substantially enlarges our military presence abroad. Passage of our amendment will afford this opportunity.

John Buchanan,
Charles W. Whalen, Jr.

Minority Views of Representatives Frelinghuysen, Derwinski, Thompson, and Burke

We are opposed to the enactment of House Joint Resolution 542. Its most important provisions are probably unconstitutional and certainly are unwise. We strongly doubt the wisdom of attempting to draw rigid lines between the President and Congress in the area of warmaking powers. Ironically, enactment of this resolution in some respects would expand considerably the constitutional authority of the President, and in other respects would severely restrict his authority. In our opinion, the only appropriate way to make such far-reaching changes would be by an amendment to the Constitution.

While we are in accord with the understandable desire of Members to assure Congress its proper role in national decisions of war and peace, we consider the severe restrictions which this resolution seeks to impose on the authority of the President to be dangerous. Should they become effective, they could affect adversely important national security interests of the United States.

Flexibility—not the exact delimitation of powers—is a basic characteristic of the Constitution. The framers of the Constitution clearly had that aim in mind when they refrained from closely defining the responsibilities of the executive and legislative branches in the areas of warmaking powers. Moreover, throughout our history, Presidents have employed the power which that flexibility has allowed them to encourage peaceful resolutions of potentially dangerous situations.

What is most ironic is that this joint resolution, constructed as it is with an eye to our unfortunate experiences during the mid-1960's, would not have prevented our steadily deepening involvement in Vietnam, had it been on the books 10 years ago. For example, there is no reason to believe that Congress after the Gulf of Tonkin incident would have refused to approve Presidential action through the mechanism provided in this measure. Congress at the time would have declared war, had that been requested, or we would have specifically authorized the use of our Armed Forces.

House Joint Resolution 542 cannot give Congress foresight or wisdom, and will not force an uncooperative Executive to be more forthcoming. In fact, it may achieve just the opposite effect. A President faced with a possible congressional veto of his actions might be tempted to circumvent Congress. He might, for example, appeal directly to the American people in order to force Congress to support him. If that were to happen, Congress could be virtually excluded from the decisionmaking process. Moreover, House Joint Resolution 542, which seeks to provide a "trip wire," invoking restrictions on Executive action, might well encourage a President to be less than candid when setting forth the circumstances and justifications for his actions.

Following are our views in more detail with respect to each section of the resolution.

Section 2, and most of section 3, seek to insure reasonable consultation with Congress, by requiring submission of reports to Congress by the President whenever he commits the U.S. forces to hostilities or potentially hostile situations, or when he enlarges our combat forces already located in foreign nations. Essentially the same provisions have been enacted previously by the House of Representatives in two preceding Congresses. Section 4(a), which seeks to insure prompt action by Congress on such reports, also is the same language as that already twice approved by the House. We consider these requirements to be entirely appropriate.

We have reservations, however, about the wisdom of the inclusion of section 3(d), language which was not contained in the resolutions previously approved by the House. Section 3(d) requires that the President communicate to Congress the estimated financial cost of any commitment of U.S. forces outside the United States. What point would there be in requiring the President to announce at the outset of a national security emergency his judgment as to the cost of committing of our forces? It may be argued that Congress needs a specific estimate of costs in order to help us make up our minds about whether or not to support the President. In our opinion, that information would be of no particular value to Congress but might be extremely revealing to an enemy. We believe that Congress would receive adequate information under the requirements of the other subsections of section 3, and that the advantages to be gained by hostile powers through the required financial disclosure would far outweigh any incremental benefit to Congress.

Section 4 (b) and (c) are at the heart of our objections to the resolutions. Section 4(b) provides that the President at the end of 120 days, without regard even to the immediate safety of our armed forces, must terminate any involvement of U.S. forces in hostilites outside the United States, and withdraw newly dispatched combat forces from the area of any foreign country (except for supply, replacement, repair or training deployments), unless the Congress by that time has enacted a declaration of war or "specifically" authorized the use of our Armed Forces.

This effort to limit the President's power—by the failure of Congress to take affirmative action—strikes us as highly dangerous. For example, suppose the President were to commit troops in Europe in order to defend our own country? That he has such power as Commander in Chief is not challenged, but the 120-day limitation might make it necessary for him to withdraw troops already fully committed to combat. At best, the limitation could only be construed as an effort to circumscribe sharply his ability to continue to exercise his power. To avoid such a reversal of national policy, a President might hurriedly escalate hostilities, to force Congress to support him, or in an effort to win the conflict within 120 days—or an enemy might seek to avoid negotiating a settlement in the belief that the President would soon be forced to withdraw our troops. Thus the 120-day provision might actually promote, rather than deter, our involvement in hostilities.

Proponents may argue that in such a situation Congress would recognize the necessity of declaring war, or of specifically authorizing the use of troops. As a practical matter, however, Congress does not

always move quickly and a legislative deadlock might develop. Moreover, in our opinion it is highly undesirable for Congress, through its own inaction, to be able to determine whether a course of Presidential action should be continued.

The manifold constitutional and national security problems created by the 120-day provision of section 4(b) are compounded by section 4(c). This section provides that hostilities and deployments may be terminated by Congress alone at any time within the 120-day period, by means of a concurrent resolution having no force of law.

If the Commander in Chief, acting within his constitutional authority, orders our forces to deploy or to engage in hostilities, Congress may affect such action if it wishes, but necessarily must do so through use of its constitutionally granted powers. By seeking to provide that a concurrent resolution shall have the force of law, we are embarking on an extremely dangerous, and probably unconstitutional course of action.

There may be cases in which Congress has specifically authorized hostilities or deployments by constitutional means other than a declaration of war. Under Article I, Section 7 of the Constitution, authority granted by any bill, order or resolution may be repealed or amended only through the same process; once Congress has given its consent to legislation it may not be withdrawn unilaterally by the Congress with less than a two-thirds vote.

Section 5 is another example of the difficulty of trying to establish rigid procedures where, in fact, flexibility is required. During committee consideration it was clear that the practical effects of the time requirements were not adequately explored. For example, the question was raised, if the beginning of the last 45 days of the 120-day period coincided with the end of a Congress, would be the 15 days for committee consideration be binding upon the next Congress? A related question was whether Congress would be able to organize quickly enough to meet the deadline. These questions, in our opinion, were not answered satisfactorily.

While sections 7 and 8 are generally helpful, given their context, we strongly oppose the requirement of section 9 that this resolution be applied retroactively to cover hostilities existing on the day of its enactment which were previously authorized and initiated.

The proper and most useful role for Congress to play, in decisions of war and peace, cannot be developed through confrontation with the Executive. To function effectively, particularly in times of national crisis, our system of government must exhibit a maximum amount of cooperation between the two branches—executive and legislative. In the past such cooperation has been the means by which we have achieved successful policy decisions. It is to this end that we should be striving. House Joint Resolution 542 will not help—indeed, we believe it will seriously impede—the achievement of this objective.

PETER H. B. FRELINGHUYSEN.
EDWARD J. DERWINSKI,
VERNON W. THOMSON,
J. HERBERT BURKE.

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PREPARED STATEMENT OF HON. CLEMENT J. ZABLOCKI

Mr. Chairman, I appreciate your kind invitation to testify on the War Powers Resolution, one of the most significant pieces of legislation enacted into law by Congress in recent times. May I also offer my sincere apologies for not being able to testify in person as originally planned. As you may know, personal circumstances precluded me from doing so.

As you know, my interest in the success of the War Powers Resolution stems from the fact that I was the chief sponsor of the legislation in the House. Further, I personally and my subcommittee have carefully followed every development regarding the resolution since it was enacted on November 7, 1973 by overriding a Presidential veto. Consequently, my feelings on the issue run deep and my views and recommendations are firm.

You and this committee are to be commended for undertaking this important review on the operation and effectiveness of the law. Your current efforts are similar in many respects to the hearings held in May and June of 1975 by the Subcommittee on International Security and Scientific Affairs of the House International Relations Committee which it is my privilege to chair. Published under the title "War Power: A Test of Compliance", those hearings evaluated the Executive Branch's relative compliance with the law on the four different occasions it was implemented, and then only partially.

What the Subcommittee attempted to do in its oversight hearings was to explore—in the most thorough, inpartial and dispassionate manner—all relevant circumstances surrounding the four incidents on which reports were filed under section 4 of the resolution. (Those incidents related to the Danang sealift, the evacuation of Phnom Pehn, the evacuation of Saigon, and the Mayaquez incident.)

The subcommittee's overriding interest of course, was to assure effective implementation of the Resolution. Thus, we concentrated on two key areas: first, the nature of the reporting, and second, the relative adequacy or inadequacy of the consultation effort provided for in section 3 of the Resolution.

Now, given the rather elementary and partial trial runs to which the Resolution has been subjected, it would be unwise to crystalize opinions too soon or to rush to rash judgments.

Even with those qualification, however, I still hold to the conclusions I reached at the close of our 1975 hearings. Those conclusion are summarized in the observation that those portions of the War Powere Resolution which have been exercised have worked reasonably well thus far. For example, the Executive Branch reports provided Congress with a basic grasp of the incidents to which they referred—a focal point around which to center informed debate. I also believe strongly that the potential for precipitous military action evidenced in the past has been mitigated. Those and other benefits are not to be taken lightly.

On the question of Executive Branch performance, I also still hold to the view based on the evidenced presented in the hearings. In short, the Administration which filed those reports gets only mixed marks on the adequacy of its compliance effort. On the one hand, response was prompt and seemingly complete in fulfilling the reporting requirement. However, in evaluating the Executive's compliance with the Congressional intent contained in the consultation provision, the record is considerably less adequate. In fact, it would appear that previous Administration's have evidenced a proclivity toward evasive and selective interpretation of the War Power Resolution's Section 3.

This is not to question motives, however. Indeed, honest men can and do differ, but one would hope that they do so honorably. As I have said so emphatically in the past, in one sure and final analysis, we all—legislative and executive—have the collective responsibility to uphold and abide by the law.

That in fact, is exactly what the current Adminstration—in the person of President Carter himself—has pledged itself to do to abide by the letter and spirit of the War Powers Resolution. As you know, in his March 5 phonethon Mr. Carter said that the War Powers Resolution "is a reduction obviously in the authority that the President has had prior to the Vietnam War, but I think it is an appropriate reduction. My own attitude toward goverment is that I would never see our nation approach a time of war with any sort of predictability about it without discussing it thoroughly and then letting the American people know what is going on."

That commitment by the President himself was appropriately reinforced by Secretary of State Cyrus Vance in his confirmation hearings before this very committee. The distinguished Senator from New York, the Honorable Jacob Javits, the chief Senate sponsor of the War Powers Resolution, engaged in the following exchange with Secretary Vance:

"Senator JAVITS. The end of foreign policy is to keep peace, and the failure of foreign policy is to resort to war. Therefore I call your attention to what you

already know, the War Powers Act, a totally new law since you were previously on the scene here.

"Mr. VANCE. Yes.

"Senator JAVITS. Section III reads as follows:

> The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until the United States Armed Forces are no longer engaged in hostilities, or have been removed from such situations.

"Do you or the new Administration see any problem with the good-faith observance of the law?

"Mr. VANCE. I do not.

"Senator JAVITS. Do you challenge it under the Constitution as to the President's power?

"Mr. VANCE. No.

"Senator JAVITS. Would you therefore undertake to confer with this committee as to what methodology and guidelines have already been worked out with the State Department and what the new Administration would like to work out in respect of the implementation of this generally regarded very critical aspect of the new policy of our country?

"Mr. VANCE. I will."

Mr. Chairman, I believe the statements of both President Carter and Secretary Vance evidence a sincere commitment on the part of this Administration to abide by the law—both in letter and in spirit. That to me is reassuring. It says clearly that the Executive Branch will comply with the law—that it will report and that it will consult. But, more importantly, it says to me that the Executive Branch will consult with Congress in such a way and under circumstances which will permit Congress a full participatory role in the process of decision-making.

That conclusion is totally in keeping with a consideration which has strongly influenced me from the outset of the War Powers debate, namely, that its effectiveness as law would depend as much on the good faith effort of the Executive Branch's compliance as on the determined and vigilant oversight of the Congress. I submit that both those elements are present. The law will work and it will work effectively.

Mr. Chairman, in view of that fact I believe it would be highly ill-advised to consider amendments to the statute at this time. As presently structured, the War Powers Resolution will continue to achieve its objective. In no way does it encroach on the legitimate authority of the President as Commander-in-Chief. At the same time, it is realistic in that it allows the President needed flexibility to meet the challenges of the nuclear age. Further, it has restored to Congress its proper and rightful Constitutional role to declare war. Finally, the law has restored the balance between the Executive Branch and the Congress; it has, in the words of the legislation itself, insured that "the collective judgment of both the Congress and the President will apply to the introduction of United States armed forces into hostilities. . ."

Until and unless further implementation of the law clearly proves a possible inadequacy, let us not tamper with a law that is prudent, balanced, and above all, workable.

Prepared Statement by Raoul Berger

I thank you for your invitation to comment on the proposed revision of the War Powers Resolution of 1973, and congratulate you on your attempt to remove some of the confusion it has engendered. Your invitation and Committee Print reached me only a few days ago so that the time at my disposal was very limited. You will therefore, I trust, be indulgent with my shortcomings.

Much of the confusion generated by the Resolution arises from the assumption that the President enjoys "independent" war-making power. So I deduce from the statement in the "Section by Section Analysis" of the revisory bill that "it expands the Congressionally recognized scope of his authority," and from your Chairman's request that I comment on whether there are "other situations in which the President has independent authority to introduce the armed forces into hostilities." On the basis of a study which I first published in 1972, and which my subsequent studies have repeatedly confirmed, I consider that the only "independent" war-making powers of the President are to conduct a war once declared by Congress or resulting from a "sudden attack" upon the United States. Until Congress makes up its mind whether it is delegating some of its own powers or is instead recognizing the allegedly "independent" powers of the President, it can not draft a statute that is effective and unconfused. Because that issue goes to the heart of your inquiries, I take leave to say a few words about the constitutional allocation of war powers.

Apart from designating him Commander-in-Chief, the text of the Constitution confers no war-making power on the President. That designation, Hamilton stated, "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral . . . ."[1] "Generals and admirals," Professor Louis Henkin reminds us, "even when they are 'first,' do not determine the political purposes for which troops are to be used; they command them in the execution of policy made by others."[2] As Commander-in-Chief, the Convention records show, the President is empowered "to repel sudden attacks."[3] This, I shall show, was limited to actual invasion of the United States. All of the other war powers were vested in Congress; to it was given the power to "declare" war and a sheaf of "other powers," in the words of James Wilson, "naturally connected with it."[4]

Elsewhere I have explained the shift in the Convention from "make" to "declare" war, largely designed to enable the Commander to conduct a war once declared.[5] Here let it suffice that Justice Story stated, "a power to declare war is a power to make and carry on war."[6] Story is confirmed by the records of the Convention; and he was anticipated in a remarkable, little-noticed opinion of Justice William Paterson, who had been a prominent member of the Constitutional Convention. "The "power of making war," he held, is "exclusively vested in Congress"; the President has a right

> to repel an invading foe . . .[T]he organ intrusted with the power to declare war, should first decide whether it is expedient to go to war, or to continue in peace; and until such a decision be made, no individual ought to assume an hostile attitude . . . [S]uch conduct is clearly indefensible, and may involve the

nation . . . in all the calamities of a long and expensive war.[7]

Documentation for these propositions is set forth in Chapter 4 of my book, "Executive Privilege."

The Executive branch, so far as I could find, has made no claim that broader claims are warranted by the "original intention" of the Framers. Instead it rests on a series of so-called "precedents" consisting of a succession of presidential acts, such as chasing cattle rustlers across the Mexican border and the like.[8] Assume that one can extrapolate from such insignificant incidents presidential power to commit half-a-million troops to war in Korea or Vietnam, it still lies beyond the power of the presidency to change the Constitution by reallocating to itself powers that were conferred on Congress alone. Hamilton, the great advocate of broad presidential powers, declared that "An agent can not new-model his commission."[9] The Executive branch needs to explain whence the President derives power to alter the Constitution by assuming powers granted to Congress, in the teeth of the Article V provision, the exclusive mode of amendment.

As I read §2(c) of your revisory bill, it delegates power to the President by the troops/"may be introduced" a phrase. But your "Section . . . Analysis" states "there seems to be little doubt that he has the constitutional authority both to forestall the direct and imminent threat of an attack upon the United States, and to protect endangered United States/citizens abroad." I beg to differ, and the difference is important because Congress may not control "independent" presidential power.

Recall that the constitutional history refers only to "repel

a sudden attack." The Legal Adviser of the State Department stated in 1966 that "In 1787 the world was a far larger place, and the Framers probably had in mind attacks upon the United States."[11] That is confirmed by the grant to the States in express terms of what was not given to the President. Article I,§10(3) provides, "No State shall, without the consent of Congress . . . engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." Under the "Expressio unius" maxim failure to make a similar grant to the President signifies that such power was withheld from him.[12] That inference is fortified by the studiously sparse enumeration of presidential powers --including the trivial power to require written opinions from members of his cabinet, and by the pervasive distrust of executive power.[13] That the draftsmen well understood the difference between actual invasion and imminent danger of invasion is again evidenced by the Act of 1795 which authorized the President to call forth the militia "whenever the United States shall be invaded or be in imminent danger of invasion."[14] It follows that the Framers limited the Presidential response to "actual invasion." The Congress can, as in the Act of 1795, delegate power to the President to react to "imminent danger"; but it would be a regretable mistake, in my opinion, to affirm that he possesses such "independent" power. He has needed no encouragement to assert ever more sweeping claims to power in derogation of Congressional powers.

The proposed §2(c)(2) authorization to "repel an armed attack against the Armed Forces . . . located outside the United States . . . and to forestall the direct and imminent danger of such an attack" troubles me. One need only recall the Gulf of Tonkin incident to appreciate the dangers that flow from deployment of troops in

inflamed areas. Minimally the provision should be accompanied by some Congressional control over such deployments. Elihu Root and Alexander Bickel considered that such control was vested in Congress, and you will find the constitutional materials in support of that view at pp. 111-115 of my book on "Executive Privilege."[14a] Even more dangerous, in my view, is the phrase "forestalling imminent threat of attack" on the armed forces. As Professor Arthur Schlesinger observed, such a provision "would offer a President blanket legal authority to send American troops into battle whenever he found in his own, personal, independent and unchecked judgment a 'direct and imminent' threat against the American forces. . . ." Such theories, he justly remarked, have often been "invoked in the past to justify presidential military adventures; the theory of preemptive war."[15]

Nor do I agree that there is "little doubt" that the President has authority "to protect endangered citizens abroad." The subject, in fact, has received little searching analysis, either by courts or commentators, as I found when I came to write an article in 1975, "Protection of Americans Abroad," ~~in 1975.~~[16] Because my remarks necessarily must be drastically compressed, I shall be pleased to furnish you with a copy of the article for the record. First let me call your attention to an existing statute which President Ford strangely overlooked at the time of the Mayaguez incident, the Act of July 27, 1868, now codified as 22 U.S.C. §1732. It directs the President to "use such means not amounting to acts of war as he may think necessary" to obtain the release of a wrongfully held American, and to communicate "all the acts and proceedings relative thereto . . .

as soon as practicable" to Congress. Thus Congress wisely reserved to itself the decision whether to go to war for the release of a captive American.

It is an alarming doctrine that by choosing to sojourn in foreign parts an American can commit the nation to war for his rescue in the sole discretion of the President. As a matter of fact we have engaged in such heroic adventures only against puny adversaries; we are unlikely to take such risks against Russia or even Czecho-Slovakia; we have ransomed fishing vessels from Ecuador. I commend to you the words of Justice Paterson: "A nation may be in such a situation as to render it more prudent to submit to certain acts of a hostile nature, and to trust to negotiations for redress, than to make an immediate appeal to arms."[17] That decision is for Congress, and for Congress alone, because as Justice Paterson held, "It is the exclusive province of congress to change a state of peace into a state of war."[18] The reason, as Justice Story stated, is that war is "so critical and calamitous, that it requires the utmost deliberation and the successive review of all the councils of the nation."[19] The fit motto for Congress, I suggest, is the statement of President Buchanan:

> Without the authority of Congress, the President cannot fire a hostile gun in any case, except to repel the attack of an enemy.[20]

Consequently I dissent from the proposition that the President may engage in hostilities for the protection of Americans abroad. Such power ought not to be delegated unless made contingent upon prior consultation with Congress, after the fashion of the Act of 1868. Rare indeed will be the occasion when such consultation will be

impossible.

The Chairman has inquired whether "the 60-day time limitation in section 5(b) as triggered under a report pursuant to section 4(a)(1) is constitutional." That turns on whether the §4 clauses are regarded as recognition of the President's "independent" constitutional power or as a Congressional delegation. For Congress may not encroach on the "independent" authority of another branch. Within its own province each branch is supreme, beyond the control of another branch.[21] It is such considerations that call on you to appreciate the limited scope of the President's war-making power. There is, however, no constitutional bar to a delegation that is conditioned on a 60-day provision.

Allow me to comment on a number of other provisions of the Resolution that raise similar problems. A Conference that considered "The Powers of the Presidency" in Cambridge, Mass, June, 1975, under the auspices of the Roscoe Pound--American Trial Lawyers Foundation, recommended that Congress "should amend the War Powers Resolution to give Section 2(c) operative effect." Your "Section by Section Analysis" of the revisory bill states that "The popular impression that the use of the armed forces was in each case 'allowed' by the War Powers Resolution is totally erroneous; the Resolution neither prohibits nor allows any use of the armed forces." As we read it at the 1975 Conference, it recognizes an "independent" presidential power to do so, in the absence of a declaration of war. That seems to be your current assumption as I stated at the outset of these remarks.

The "Purpose and Policy" of the Resolution is declared by §2(a), to fufill the intent of the framers of the Constitution . . . and insure that the collective judgment of both the Congress and the

and the President will apply to the introduction of United States Armed Forces into hostilities . . .

Under the same caption, §2(c) provides that

> The constitutional powers of the President as Commander-in-Chief is to introduce United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated. . . are exercised only pursuant to (1) declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possession, or its armed forces.

But for the words "armed forces," these three categories are merely declaratory of the "original intention" of the Framers; emphatically they do not represent limits newly-fashioned by Congress. If the President enjoys such "independent" powers, they cannot be limited by Congress.

But these categories are inconsistent with §4(a) of the Resolution which provides that "In the absence of a declaration of war, in any case in which" the Armed Forces "are introduced [by the President] into hostilties or into situations where imminent involvement in hostilities is clearly indicated . . .", the President is to report to Congress within 48 hours, among other things, on "the estimated scope and duration of the hostilities" and "periodically" thereafter. Since §8(d) disclaims the grant of any authority to the President which he does not already have, §4(a)cannot be regarded as a Congressional license, but rather as recognition of his independent war-making power. That inference is confirmed by the legislative history. Section 4 is patterned on the House Bill provision, of which a position memorandum of Senator Javits stated, "The House text appears to be predicated on the asuumption that the

President will continue unilaterally to commit the Armed Forces to hostilities . . . without a declaration of war or specific authorization of the Congress."[22] It is a reasonable inference that §4 recognizes presidential war-making beyond his constitutional confines--repelling an attack upon the United States.

While the stated purpose of a statute can prove decisive on the issue of Congressional intent, here it is vitiated, as Senator Thomas Eagleton pointed out, by a statement in the House-Senate Conference Report that "Subsequent sections of the joint resolution are not dependent upon the language of this subsection [2(c)], as was the case with a similar provision of the Senate Bill (section 3)."[23] It is difficult to disagree with Senator Eagleton's conclusion that the conferees "were explicitly divorcing the interpretive definition of the Presidents emergency authority in the 'Purpose and Policy' section from the legally binding portions of the bill." In other words, the statement of "purpose" was to have no application to the subsequent sections. The effect, as Professor Arthur Schlesinger stated, is to make §2(c) "purely hortatory . . . advisory language, not intended to bind Presidents," thus leaving them free to "introduce [the Armed Forces] into hostilities" in the "absence of a declaration of war."[25] So it was understood by the Cambridge Conference. It is to be hoped that recognition of an "independent" presidential power to make war will find no place in the revisory bill or its legislative history.

Given such recognition of "independent" presidential war-making power, on what theory can Congress by §5(b) require that in the absence of a declaration of war the hostilities shall be terminated within 60 days, or that the armed forces shall be removed if Congress so directs (§5(c)), particularly when it has stated in §8(d) that the Resolution

is not "intended to alter the "constitutional authority" of the President.

One may also question the wisdom of statutory permission to continue an undeclared war for a period of 60 days. Once war is thus begun it gives rise to a "rally round the flag" wave of national sentiment. Senator Richard Russell, who had counselled several Presidents against involvement in Vietnam, stated,

> Whatever misgivings I had . . . so long as our flag is committed and our troops have been sent, I have got to support those troops and I have to support the flag when the decision is made.[26]

It is unrealistic to assume that Congress can extricate the nation from war once it has been begun by the President; realism calls for Congressional review before it is begun.

The Chairman has also requested me to comment on the §5(c) provision that the Armed Forces engaged in Congressionally unauthorized hostilities "shall be removed by the President if the Congress so directs by concurrent resolution." Since World War II Congress has made a number of delegations subject to termination by concurrent resolution; and the House Report stated that "the constitutional validity of such usage of a concurrent resolution is based on the capacity of Congress to limit or terminate the authority it delegates to the Executive."[27] But §8 disclaims a grant of authority which the President "would not have in the absence of this joint resolution," so that it cannot be maintained that the §5(c) concurrent resolution would merely recover a delegated power.[28]

The problems presented by concurrent resolutions have not been passed upon by the courts. There is first the provision of Article I,§7(3):

> Every order, resolution, or vote to which the concurrence of the Senate and House may be necessary . . . shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him.[29]

Aware of this provision, Congress, but for the recent past, has employed concurrent resolutions only for internal house-keeping purposes on the justifiable assumption that such matters are of no concern to the President.[30] Commentators have said that concurrent resolutions "are not . . . of legal effect," that they "are not binding on the executive."[31] A carefully reasoned article by Robert Ginnane raised doubts whether concurrent resolutions which purport to repeal statutory delegations are constitutional.[32]

Nevertheless, I suggest that concurrent resolutions that seek to halt or terminate a war may stand on a different footing. Madison stated that it is for Congress to determine whether "a war ought to be commenced, continued or concluded."[33] It cannot be that a President may continue a war against the will of Congress. If a termination resolution must be submitted for his approval, he can veto it and put Congress to the often insuperable task, given party allegiance, of mustering a two-thirds vote to override his veto. If his war-making is without constitutional warrant and without congressional authorization, the courts would have scant sympathy with the argument that his unlawful conduct cannot be halted by concurrent resolution. The use of a concurrent resolution to halt a war does not seem to me so clearly unconstitutional as to counsel abandonment of §5(c). Rather I should retain 5(c) so that the courts may have the opportunity to consider the question.

In light of the foregoing, I would answer yes to the Chairman's

question whether the Resolution should be amended so as to allow the President to introduce the armed forces into hostilities "only in situations set forth in a revised section 2(c)." But for the power to "repel a sudden attack" on the United States, the President has only such power as Congress delegates to him, and I prefer to think of §2(c) in terms of such delegation ≠ rather than a "permission" which may imply "independent" presidential power. As to whether a revised §2(c) should also "prohibit" such introduction "under any other circumstances," the express enumeration implies that unnamed categories are excluded and therefore prohibited. Even so, an express prohibition would underscore the fact and emphasize that such prohibited acts invade powers exclusively confided to Congress.

The Chairman also inquired with regard to §8 of the Resolution, "would a treaty which automatically requires the United States to introduce its armed forces into hostilities under certain circumstances be constitutional." As you are aware, a treaty requires the consent of the Senate alone, whereas a declaration of war requires the concurrence of both Houses. The treaty power cannot be construed to deprive the House of its right to participate in a declaration of war or an authorization of hostilities. There has been testimony to this effect before Congress on prior occasions, but the time at my disposal does not permit me to search out the citations. Then too, as I recall, a statute may supersede a treaty, so I am of the opinion that no constitutional problem is presented by the suggested elision of the words "or the provisions of existing treaties" in §8(d)(1).

Finally, it has been objected that the restrictive enumeration of authorized presidential initiatives would have prevented President Franklin Roosevelt from taking some of his steps to keep Great

Britain afloat before Pearl Harbor, for example, his 1941 "shoot on sight" policy in order to protect the British lifeline.[34] But the nation was divided, as is indicated by the fact that renewal of the draft in 1941 was carried by only one vote in the House of Representatives.[35] Roosevelt, it needs to be remembered, stopped short of war, and turned to Congress for a decalration of war after Pearl Harbor had united the nation. This is not the place to assess the constitutionality of Roosevelt's pre-Pearl Harbor actions. On the assumption that they fell outside the powers of a "first General" prior to a declaration of war, we must not bend the Constitution to conform to our predilections. Those who approved of President Truman's intervention in Korea and later disapproved of the Johnson-Nixon involvement in Vietnam, came to perceive that judgment must not turn on disinterested search for constitutional meaning and even-handed application of that meaning, let the chips fall where they may.[36]

A nation which must be saved in spite of itself, whose salvation must depend upon the determination of a single man -- today Roosevelt, tomorrow Nixon --is in parlous straits. "Unhappy the land that needs a hero."[37] "Vietnam has shown us," said a Vietnam warhawk, Senator John Stennis, "that by trying to fight a war without the clear-cut prior support ot the American people . . . we strain and can shatter the very structure of the Republic."[38] On the whole, the hypothetical costs of insisting on prior Congressional approval, it seems to me, are outweighed by the actual costs of embarking on adventures such as Korea and Vietnam without Congressional debate. To be sure, there have been times when

Congress rather than the President has pressed for war; and there may again be instances when Congressional wisdom falls short. But if power is vested in Congress by the Constitution, the President may not reallocate it to himself on the ground that Congress may prove unwise. That can be done only by amendment. For me the paramount consideration is observance of constitutional limits. When we countenance the President's assumption of powers that were withheld from him, we give our sanction to subversion of the Constitution and violation of the rule of law.

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Footnotes

1. The Federalist, No.69 at 448 (Mod. Lib.ed.1937).

2. Louis Henkin, Foreign Affairs and the Constitution 50-51 (1972).

3. For citations and discussion, see Raoul Berger, "Executive Privilege: A Constitutional Myth 66-67(1974)

4. 1 James Wilson, Works 433 (R.G.McCloskey ed. 1967).

5. Supra n.3 at 64-69.

6. 1 Joseph Story, Commentaries on the Constitution of the United States §428 (5th ed. 1905).

7. United States v. Smith, 27 F. Cas. (No.16,342) 1192, 1230-1231 (C.C.N.Y. 1806).

8. For discussion of those"precedents" see supra n.3 at 75-88.

9. "Letters of Camillus," 6 Alexander Hamilton, Works 166 (H.C.Lodge ed. 1904).

10. Supra n.3 at 65-66.

11. "The Legality of the United States Participation in the Defense of Vietnam, reprinted in 75 Yale L.J.1085, 1101 (1966)

12. T.I.M.E. v. United States, 359 U.S. 464 (1959).

13. Hamilton deflated the several Executive functions in order to defend against attacks by those who, "calculating upon the aversion of the people to monarchy," portrayed the President "as the full-grown progeny of that detested parent." Federalist No.69 at 448.

14. Act of February 28, 1795, ch.36, §1, 1 Stat. 424.

14a. Alexander Bickel "believed that the power of Congress 'to govern international deployment of forces is really beyond question.'" Arthur Schlesinger, Jr., The Imperial Presidency 308 (1973). Senator Elihu Root, erstwhile Secretary of War and Secretary of State, conceded in 1912 that "Congress could by law forbid the troops being sent out of the country." Hearings on War Powers before the House Subcommittee on National Security Policy and Scientific Developmens 175 (93d Cong. 1st Sess, March 1973).

15. Schlesinger, supra n.14a at 302.

16. 44 U.Cin.L.Rev.741.

17. Supra n.7.

18. Id.

19. 2 Story, supra n.6 §1171 at 92.

20. 5 Messages and Papers of the Presidents, 1787-1897 at 570 (J.Richardson ed. 1897).

21. For example, Madison stated, "The Legislative powers are vested in Congress, and are to be exercised by them uncontrolled by any of the Departments, except the Constitution has qualified it otherwise." 1 Annals of Congress 463 (1789). Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169-170 (1803) held that the control of Executive discretion (within the bounds of its own powers) lies beyond judicial review. See also Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515 (1840).

On the premise that the President has "independent" war-mking power, the House Conferees understandably found it difficult to perceive whence Congress derived "the right to define the powers of the President." Thomas F. Eagleton, War and Presidential Power

200 (1974).

22. Id.

23. Id. 203.

24. Id.

25. Arthur Schlesinger, Jr. "What's Wrong with the President's War Powers" in Has the President Too Much Power 198,207 (C.Roberts ed. 1974). If the President has no such constitutional power, nothing said by Congress, short of a delegation, can enlarge it.

26. Quoted Eagleton, supra n.21 at 217.

27. House Report, in House Committee Hearings, supra n. 14a at 169.

28. The point was made by Arthur Schlesinger in 1974, supra n.25 at 208.

29. Bickel stated, "the Constitution pretty clearly says that anything you do that is to have the force of law has to be approved by both Chambers and submitted to the President for signature." House Committee Hearings, supra 14a at 206.

30. 4 A Hinds, Precedents of the House of Representatives §3483 at pp. 330,331 (1907)

31. F. Reddick, The United States Congress: Organization and Procedure 21 (1949); E. Griffith, Congress: Its Contemporary Role 60 (4th ed. 1967); see also G. Galloway, The Legislative Process in Congress 50 (1953).

32. "The Control of Federal Administration by Congressional Resolutions and Committees," 66 Harv. L.Rev. 569 (1953).

33. "Letters of Helvidius," 6 James Madison, Writings 148 (G.Hunt ed. 1900-1910).

34. House Committee Hearings, supra n.14a at 167.

35. Id.

36. Schlesinger, supra n.25 at 203.

37. Berthod Brecht, Galileo, quoted Edward Weisband & T.M.Franck, Resignation in Protest 177 (1975).

38. Hearings on War Powers Legislation before the Senate Committee on Foreign Relations 706 (92d Cong. 1st Sess.1971).

[Excerpt From The Congressional Record, June 30, 1977 p. S11318]

THE ADMINISTRATION'S POSITION ON THE WAR POWERS RESOLUTION

Mr. MCGOVERN. Mr. President, I rise today to express my serious concern that the Carter administration may be backing away from its previous acceptance of the war powers resolution.

Earlier, the administration indicated that it did not challenge the constitutionality of the resolution. During Secretary Vance's confirmation hearings before the Committee on Foreign Relations, he was asked by Senator Javits, "Do you or the new administration see any problem with the good-faith observance of that law?" Secretary Vance replied, "I do not." Senator Javits then asked, "Do you challenge it under the Constitution as to the President's power?" Secretary Vance responded, "No."

The President himself took essentially this same position. In his March 5 "telethon," he said that the war powers resolution—

Is a reduction obviously in the authority that the President has had prior to the Vietnam War, but I think it is an appropriate reduction. My own attitude toward government is that I would never see our nation approach a time of war with any sort of predictability about it without discussing it thoroughly and letting the American people know what is going on.

Many of us who were involved in the debate on the Vietnam war and the war powers resolution were encouraged by these comments. Previous administrations had claimed broad power to commit the U.S. Armed Forces into hostilities without congressional consent. Relying on a divine-right-of-kings interpretation of the Commander-in-Chief clause, they usurped the war power vested by the Constitution in the Congress.

The response to that dangerous trend was the war powers resolution. Its premises are identical to those underpinning the Constitution: That except for emergency operations necessary to protect U.S. territory or its Armed Forces. U.S. military actions should be approved by the Congress.

Based on the administration's previous remarks, some of us concluded that at long last Congress and the executive branch saw eye to eye on this issue. It was with this in mind that Senator Percy and I, as ranking member and chairman of the Subcommittee on International Operations, wrote to Secretary Vance on March 14 asking the administration to elaborate its views on the resolution. Because we assumed agreement on general principle, our goal was simply to insure that the executive branch clearly understood its responsibilities under the resolution, and to get that understanding in detail on the public record. Our questions and the Department's responses are as follows:

QUESTIONS AND ANSWERS

Please describe in detail—

(a) any constitutional objections the Administration may have to the War Powers Resolution:

The Department's Legal Adviser recently responded to a similar question from the Committee as follows:

The War Powers Resolution addresses certain difficulties arising from the respective constitutional responsibilities of the President and of the Congress in the sensitive area of use of the armed forces of the United States in hostilities. No legislation, of course, can alter constitutional powers, and the War Powers Resolution expressly disclaims any such intent.

The Resolution raises a few questions under the Constitution. For example, such questions are presented by Section 5(b), which prescribes limits on the time during the U.S. forces may be engaged in hostilities in the absence of a declaration of war, and by Section 5(c), which prescribes that U.S. forces be withdrawn from hostilities at any time that the Congress so directs by concurrent resolution. The issues involved are the compatibility of these provisions with the constitutional authority of the President as Commander-in-Chief, and the use of a concurrent resolution under Section 5(c) to take action assertedly having the effect of law.

However, these questions would become real issues only in the event of a confrontation between the President and the Congress in a given case—an event which is not anticipated. The Department looks forward to an atmosphere of cooperation in the implementation of the War Powers Resolution so that confrontations may be avoided.

(b) the procedural mechanism in effect for ensuring full compliance with 1) the consultation requirements of Section 3 thereof, and 2) the reporting requirement of Section 4(a) thereof:

Section 3 of the Resolution requires that the President consult with the Congress "in every possible instance" before U.S. forces are introduced into hostilities or

where imminent involvement is clearly indicated by the circumstances is clearly indicated by the circumstances, and periodically thereafter until those conditions cease. Section 4(a) requires that the President make certain reports to the Congress within 48 hours of the introduction of U.S. forces into specified situations in the absence of a declaration of war. The President's responsibilities under these sections have not been delegated, so that the final decision as to whether consultation is possible and as to the manner in which consultations be undertaken or reports submitted rests with the President. We have, however, previously informed the Congress of standing arrangements between the Secretaries of State and Defense whereby the Legal Adviser of the State Department and the General Counsel of the Defense Department are jointly responsible for bringing to the attention of their respective Secretaries those situations where it would be appropriate for the latter to recommend to the President that a Section 4(a) report be submitted.

(c) in what specific situations the Administration believes that the President may introduce the armed forces into hostilities without approval by law or declaration of war. Please provide any suggestions that the Department may have for modifying the Resolution so as to insure that its letter and intent may be carried out smoothly by the Executive Branch:

The only authority of the President as Commander-in-Chief to introduce troops into hostilities without approval by law or by declaration of war is that derived from the Constitution. Although the precise scope of that authority has never been fully delineated, there are situations in which the power of the President to employ the armed forces in the absence of a declaration of war or statutory authorization has been recognized. One example is the use of the armed forces to protect the lives of American nationals abroad in circumstances where their safety could not otherwise be ensured.

The Department does not at this time have any suggestions for modification of the War Powers Resolution. Procedurally, the Resolution seems to have been implemented in a positive manner in those few instances where it has come into play (all of which occurred during the prior Administration), and the Department looks forward to working with the Congress when future questions arise.

(d) whether study is being given to the feasibility of establishing a consultative procedure with the Congress in crisis situations:

We are actively considering ways in which mechanisms for consultations with the Congress might be improved.

Mr. President, for those who had hoped that the war powers question was essentially settled, this response was disconcerting. We all know that the resolution "raises a few questions under the Constitution"; it was the purpose of our letter to get the President's and Secretary Vance's reasons for having resolved those questions in the resolution's favor. My expectation was that the administration would respond to question (a) that it had no constitutional objection to the war powers resolution. But for the administration to state simply that the resolution raises constitutional questions—without indicating that it regards the resolution as constitutional—leads me to conclude that the administration questions its constitutionality.

This is regrettable, for it is reasonable to infer that the administration intends to act in accordance with that belief. Indeed, the administration virtually says as much when it states that the resolution was "implemented in a positive manner in those few instances in which it has come into play." Former President Ford—who now reveals that he never regarded the resolution as constitutional—may have thought that his administration implemented the resolution in a positive manner, but a number of us in Congress do not see it that way. Following the *Mayaguez* seizure, Senate Majority Leader Mike Mansfield said that he was "informed, not consulted"—as provided by the consultation requirement of section 3 of the resolution. Senator JAVITS, the chief Senate sponsor with Senator EAGLETON, stated his judgment that "advance consultation with the Congress by the President fell far short of the intentions of those who drafted" the resolution.

For my own part, as a cosponsor of the resolution. I can add that the four reports submitted by the Ford administration were cursory and uninformative, barely complying with the letter of the resolution and flouting its spirit. If this is how the new administration plans to implement the resolution, it is in for problems with the Congress.

While it is good to know that the administration looks forward to an atmosphere of cooperation, as we in Congress surely do. I am compelled to say that mere intent is not enough. Every recent administration has expressed its desire to avoid confrontation—through the Vietnam war, through the Cambodian invasion, through Watergate. We have heard the term "cooperation" used regularly over the last decade—along with "incursion," "protective reaction strike," and "executive privilege." I do

not question the administration's good faith when it says that it does not expect the questions we posed to "become real isues." Neither do many of us in Congress—but we cannot as a result ignore them, just as we cannot assume that they are moot because over the next 4 years it is men of good will who could be called upon to answer them. If the administration refuses to adhere to its previous endorsement of the resolution. Congress must assume that, should a need to comply with the resolution ever arise, the President will not feel obliged to do so. If on the other hand the administration truly intends to conduct its military activities so as to avoid confrontation, then it will be operating within the limits set by the war powers resolution and it will not hesitate to endorse the resolution wholeheartedly.

The Committee on Foreign Relations has scheduled hearings on the War Powers Resolution on July 13, 14, and 15. Secretary Vance has been requested to testify, and I sincerely hope that such an endorsement is forthcoming. If the administration is ambivalent about the resolution, the time to resolve that ambivalence is now, not in the heat of crisis.

This speech was delivered on April 11, 1977, by former President Gerald R. Ford, the distinguished fellow of the American Enterprise Institute. It was the first John Sherman Cooper Lecture at the University of Kentucky, Louisville.

The War Powers Resolution

Striking a Balance between the Executive and Legislative Branches

Gerald R. Ford

It is an honor and a very special privilege for me to deliver the first John Sherman Cooper Lecture at the University of Kentucky.

To know John Sherman Cooper is to know one of the finest statesmen this country and the Commonwealth of Kentucky have ever produced.

As a serious student of government, and as an able lawyer, Senator Cooper devoted much of his time and thought to the search for a proper balance of powers—particularly in foreign policy—between the executive and legislative branches of government.

How should the powers of the executive and legislative branches be coordinated, especially in the field of foreign policy?

I address this question tonight as one who has been honored to serve at both ends of Pennsylvania Avenue over the past thirty years.

In the years just following World War II, there was a remarkable degree of national consensus about the role America should play in the world.

We held the noble conviction that since we alone had emerged virtually unscathed by the destruction of war—since the war had in fact made us the most formidable military and economic power on earth—we had a special responsibility to build a new and better world from the ruins of the old.

This national consensus was made possible by such men as Senator Arthur Vandenberg, my own political mentor, who championed bipartisanship in foreign affairs and helped cement with President Truman a common bond of purpose between the legislative and executive branches of government.

Underlying every presidential initiative was a broad foundation of support in the United States Congress. Even in the case of Vietnam, the SEATO treaty was approved by the Senate 82 to 1 in 1955, and the Gulf of Tonkin Resolution was passed in the Senate 88 to 2, and in the House of Representatives 414 to 0, in 1964. But as that frustrating war went on year after year, our national unity was shat-

tered, and with it the essential foreign policy coordination between President and Congress.

Old assumptions were challenged. Longstanding commitments were called into question. Bipartisanship in foreign affairs gave way to deep divisions within the parties themselves.

Members of Congress who came to oppose the war would also come to oppose the Presidents who prosecuted the war.

In the end, they would argue that the presidency itself had grown too powerful, that a usurpation of powers by the President from the Congress was chiefly to blame for our disillusioning involvement in Vietnam.

These concerns found legislative expression in the War Powers Resolution of 1973.

This resolution claimed for the Congress unprecedented power in the conduct of foreign policy, at the same time holding the President in strict account for his own actions in international affairs.

The arrangements which the Constitution makes for the conduct of foreign policy involve a complex interplay between the legislative and executive branches.

Congress is given the power to declare war and to raise an army and navy. The Senate is given the additional power of advice and consent in the ratification of treaties and the appointment of ambassadors and other officials, including the secretaries of state and defense.

The President is made commander-in-chief and head of state. By fundamental definition, the chief executive is also given the power to execute American foreign policy.

It was not intended that these powers be consolidated in the interest of efficiency, but rather that they be separated in the interest of democracy.

Coordination between the two branches was obviously to be encouraged. The brilliant system of checks and balances which the Founding Fathers devised was not meant to breed constant, paralyzing confrontation between the President and Congress of the United States.

The War Powers bill seeks by simple legislation to codify the military powers of the President, spelling out exactly what he can and cannot do, and how, and under what circumstances, to defend the United States and its citizens from international danger.

The resolution also grants to the Congress powers which tend to make it superior to the executive branch, as in the provision that Congress may order the withdrawal of troops within 60 days by a concurrent resolution not subject to presidential veto.

Furthermore, the resolution requires consultation with Congress in military emergencies. No President with common sense would dream of neglecting this aspect of his obligation. But can it be mandated by law? And what does it mean? Finally, there is a question of how closely this resolution would involve the Congress in the actual execution, as opposed to the general direction, of foreign policy, particularly in times of crisis.

Does the consultation provision require the approval of the Congress before executive action is taken? What if the President and Congress disagree? Which of these separate but equal powers would prevail in such a confrontation?

These arguments of constitutionality can be more than matched by arguments of workability.

The United States was involved in six military crises during my presidency: the evacuation of U.S. citizens and refugees from Da-Nang, Phnom Penh, and Saigon in the spring of 1975, the rescue of the Mayaguez in May 1975, and the two evacuation operations in Lebanon in June 1976.

In none of those instances did I believe the War Powers Resolution applied, and many members of Congress also questioned its applicability in cases of protection and evacuation of American citizens.

Furthermore, I did not concede that the resolution itself was legally binding on the President on constitutional grounds.

Nevertheless, in each instance, I took note of its consultation and reporting provisions, and provided certain information on operations and strategies to key members of Congress.

It is my view that when the President as commander-in-chief undertakes such military operations, he would inevitably take the Congress into his confidence in order to receive its advice and, if possible, insure its support.

This type of consultation makes common sense and certainly strengthens trust between the executive and legislative branches. But it is to be distinguished from the detailed information and time limits imposed by the War Powers Resolution.

Once the consultation process began, the inherent weakness of the War Powers Resolution from a practical standpoint was conclusively demonstrated.

When the evacuation of DaNang was forced upon us during the Congress's Easter recess, not one of the key bipartisan leaders of the Congress was in Washington.

Without mentioning names, here is where we found the leaders of Congress: two were in Mexico, three were in Greece, one was in the Middle East, one was in Europe, and two were in the People's Republic of China. The rest we found in twelve widely scattered states of the Union.

This, one might say, is an unfair example, since the Congress was in recess. But it must be remembered that critical world events, especially military operations, seldom wait for the Congress to meet. In fact, most of what goes on in the world happens in the middle of the night, Washington time.

On June 18, 1976, we began the first evacuation of American citizens from the civil war in Lebanon. The Congress was not in recess, but it had adjourned for the day.

As telephone calls were made, we discovered, among other things, that one member of Congress had an unlisted number which his press secretary refused to divulge. After trying and failing to reach another member of Congress, we were told by his assistant that the congressman did not need to be reached.

We tried so hard to reach a third member of Congress that our resourceful White House operators had the local police leave a note on the congressman's beach cottage door: "Please call the White House."

When a crisis breaks, it is impossible to draw the Congress into the decision-making process in an effective way, for several reasons.

First, they have so many other concerns: legislation in committee and on the floor, constituents to serve, and a thousand other things. It is impractical to ask them to be as well-versed in fast-breaking developments as the President, the National Security Council, the Joint Chiefs of Staff, and others who deal with foreign policy and national security situations every hour of every day.

Second, it is also impossible to wait for a consensus to form among those congressional leaders as to the proper course of action, especially when they are scattered literally around the world and

when time is the one thing we cannot spare. Again, we should ask what the outcome would be if the leaders consulted do not agree among themselves or disagree collectively with the President on an action he considers essential.

Third, there is the risk of disclosure of sensitive information through insecure means of communication, particularly by telephone. Members of Congress with a great many things on their minds might also confuse what they hear on the radio news in this day of instant communication with what they are told on a highly classified basis by the White House.

Fourth, the potential legal consequences of taking executive action before mandated congressional consultation can be completed may cause a costly delay. The consequences to the President, if he does not wait for Congress, could be as severe as impeachment. But the consequences to the nation, if he does wait, could be much worse.

Fifth, there is a question of how consultations with a handful of congressional leaders can bind the entire Congress to support a course of action—especially when younger members of Congress are becoming increasingly independent.

A survey reported by Congressional Quarterly last November indicated that an overwhelming majority of the Congress believed the legislative branch had an inadequate role in the international crises I have mentioned.

Sixth, the Congress has little to gain and much to lose politically by involving itself deeply in crisis management.

If the crisis is successfully resolved, it is the President who will get credit for the success. If his efforts are not successful, if the objectives are not met or if casualties are too high, the Congress will have seriously compromised its right to criticize the decisions and actions of the President.

Finally, there is absolutely no way American foreign policy can be conducted or military operations commanded by 535 members of Congress on Capitol Hill, even if they all happen to be on Capitol Hill when they are needed.

Domestic policy—for housing, health, education or energy—can and should be advanced in the calm deliberation and spirited debate I loved so much as a congressman.

The broad outlines and goals of foreign policy also benefit im-

mensely from this kind of meticulous congressional consideration.

But in times of crisis, decisiveness is everything—and the Constitution plainly puts the responsibility for such decisions on the shoulders of the President of the United States.

There are institutional limitations on the Congress which cannot be legislated away.

Yet since the Mayaguez incident, there has been talk of putting more teeth into the War Powers Resolution, intensifying congressional participation in actual crisis management.

There have also been attempts to introduce the Congress into sensitive negotiations with foreign nations.

The Jackson-Vanik Amendment to the Trade Act of 1972, proposed to liberalize emigration from the Soviet Union by legislative decree, had precisely the opposite effect.

The congressional restrictions on military assistance to Turkey after the latest Cyprus crisis prove how determined—and how wrong—the Congress can be, and how cumbersome diplomacy by rigid legislative dictate can be.

Where, then, does the balance of powers lie?

It cannot lie in a constant rivalry for power. As Eugene Rostow has written, this "would tend to convert every crisis of foreign policy into a crisis of will, of pride and of precedence between Congress and the President."

The balance must lie, instead, in a frank recognition of the basic strengths and weaknesses of both the executive and legislative branches of government, in the institutional capabilities and limitations imposed by the Constitution and by common sense.

The bitter experiences of Vietnam and the national atmosphere in the last decade have encouraged, I believe, too much tampering with the basic machinery by which the United States government has run successfully for the past two hundred years.

We must not abandon the wisdom of the ages in the passion of a moment.

If we have disagreements of policy, let us resolve them as matters of policy, rather than escalating them into constitutional confrontations.

Tragically, in recent years, the bases of trust, cooperation and civility between the legislative and executive branches of our government have been eroded.

In their place, there has been an attempt to build new and permanent structures on the shaky ground of mutual suspicion.

This is no way for the government to serve the American people. It is, instead, the sure way to division at home and danger abroad.

We need to seek once again a common ground on which the President, the Congress and the American people can proudly and firmly stand through crisis and calm.

We must decide again, as a nation, what is important to us, what goals we will set, what dangers we will risk, what burdens we will bear, in our dealings with the wider world.

The Congress has the responsibility to do now what it does best—debate these great issues, openly, freely and thoroughly—and help us find a new path on which we all may travel together.

The new administration—free of the burden of war, unfettered by mistakes of the past—has an historic opportunity to lead America to a new age in foreign policy: an age in which the goals and commitments we hold precious as a nation may be fulfilled through the quiet, beneficent strength that commands respect and invites cooperation.

All this will not be easy. The world is very different now than it was thirty years ago. We are different, and our problems and aspirations more complex.

But we are still Americans who love our country, who cherish peace and freedom in the world.

Let us in the months ahead open a constructive dialogue among the American people, the Congress and the President, leaders past and present, so we can preserve the bulwark of our strength—the Constitution—and find the mechanisms and the spirit that have made America what it is today—free and dedicated to a better world for all peoples.

THE WHITE HOUSE

WASHINGTON

May 15, 1975

Dear Mr. President:

On 12 May 1975, I was advised that the SS Mayaguez, a merchant vessel of United States registry enroute from Hong Kong to Thailand with a U. S. citizen crew, was fired upon, stopped, boarded, and seized by Cambodian naval patrol boats of the Armed Forces of Cambodia in international waters in the vicinity of Poulo Wai Island. The seized vessel was then forced to proceed to Koh Tang Island where it was required to anchor. This hostile act was in clear violation of international law.

In view of this illegal and dangerous act, I ordered, as you have been previously advised, United States military forces to conduct the necessary reconnaissance and to be ready to respond if diplomatic efforts to secure the return of the vessel and its personnel were not successful. Two United States reconnaissance aircraft in the course of locating the Mayaguez sustained minimal damage from small firearms. Appropriate demands for the return of the Mayaguez and its crew were made, both publicly and privately, without success.

In accordance with my desire that the Congress be informed on this matter and taking note of Section 4(a)(1) of the War Powers Resolution, I wish to report to you that at about 6:20 A.M., 13 May, pursuant to my instructions to prevent the movement of the Mayaguez into a mainland port, U. S. aircraft fired warning shots across the bow of the ship and gave visual signals to small craft approaching the ship. Subsequently, in order to stabilize the situation and in an attempt to preclude removal of the American crew of the Mayaguez to the mainland, where their rescue would be more difficult, I directed the United States Armed Forces to isolate the island and interdict any movement between the ship or the island and the mainland, and to prevent movement of the ship itself, while still taking all possible care to prevent loss of life or injury to the U. S. captives. During the evening of 13 May, a Cambodian patrol boat attempting to leave the

island disregarded aircraft warnings and was sunk. Thereafter, two other Cambodian patrol craft were destroyed and four others were damaged and immobilized. One boat, suspected of having some U. S. captives aboard, succeeded in reaching Kompong Som after efforts to turn it around without injury to the passengers failed.

Our continued objective in this operation was the rescue of the captured American crew along with the retaking of the ship Mayaguez. For that purpose, I ordered late this afternoon an assault by United States Marines on the island of Koh Tang to search out and rescue such Americans as might still be held there, and I ordered retaking of the Mayaguez by other marines boarding from the destroyer escort HOLT. In addition to continued fighter and gunship coverage of the Koh Tang area, these marine activities were supported by tactical aircraft from the CORAL SEA, striking the military airfield at Ream and other military targets in the area of Kompong Som in order to prevent reinforcement or support from the mainland of the Cambodian forces detaining the American vessel and crew.

At approximately 9:00 P.M. EDT on 14 May, the Mayaguez was retaken by United States forces. At approximately 11:30 P.M., the entire crew of the Mayaguez was taken aboard the WILSON. U. S. forces have begun the process of disengagement and withdrawal.

This operation was ordered and conducted pursuant to the President's constitutional Executive power and his authority as Commander-in-Chief of the United States Armed Forces.

Sincerely,

Gerald R. Ford

The Honorable James O. Eastland
President Pro Tempore of the Senate
United States Senate
Washington, D. C. 20510

94-274 O - 77 - 22

COMMITTEE ON
MAY 2 1975
FOREIGN RELATIONS

THE WHITE HOUSE

WASHINGTON

April 30, 1975

Dear Mr. President:

On April 4, 1975, I reported that U.S. naval vessels had been ordered to participate in an international humanitarian relief effort to transport refugees and U.S. nationals to safety from Danang and other seaports in South Vietnam. This effort was undertaken in response to urgent appeals from the Government of South Vietnam and in recognition of the large-scale violations by the North Vietnamese of the Agreement Ending the War and Restoring the Peace in Vietnam.

In the days and weeks that followed, the massive North Vietnamese attacks continued. As the forces of the Government of South Vietnam were pushed further back toward Saigon, we began a progressive withdrawal of U.S. citizens and their dependents in South Vietnam, together with foreign nationals whose lives were in jeopardy.

On April 28, the defensive lines to the northwest and south of Saigon were breached. Tan Son Nhut Airfield and Saigon came under increased rocket attack and for the first time received artillery fire. NVA forces were approaching within mortar and anti-aircraft missile range. The situation at Tan Son Nhut Airfield deteriorated to the extent that it became unusable. Crowd control on the airfield was breaking down and the collapse of the Government forces within Saigon appeared imminent. The situation presented a direct and imminent threat to the remaining U.S. citizens and their dependents in and around Saigon.

On the recommendation of the American Ambassador there, I ordered U.S. military forces to proceed by means of rotary wing aircraft with an emergency final evacuation out of consideration for the safety of U.S. citizens.

In accordance with my desire to keep the Congress fully informed on this matter, and taking note of the provision of section 4 of the War Powers Resolution (Public Law 93-148), I wish to report to you that at about 1:00 A.M. EDT, April 29, 1975, U.S. forces entered South Vietnam airspace.

A force of 70 evacuation helicopters and 865 Marines evacuated about 1400 U.S. citizens, together with approximately 5500 third country nationals and South Vietnamese, from landing zones in the vicinity of the U.S. Embassy, Saigon, and the Defense Attache Office at Tan Son Nhut Airfield. The last elements of the ground security force departed Saigon at 7:46 P.M. EDT April 29, 1975. Two crew members of a Navy search and rescue helicopter are missing at sea. There are no other known U.S. casualties from this operation, although two U.S. Marines on regular duty in the compound of the Defense Attache Office at Tan Son Nhut Airfield had been killed on the afternoon (EDT) of April 28, 1975, by rocket attacks into a refugee staging area. U.S. fighter aircraft provided protective air cover for this operation, and for the withdrawal by water of a few Americans from Can Tho, and in one instance suppressed North Vietnamese anti-aircraft artillery firing upon evacuation helicopters as they departed. The ground security forces on occasion returned fire during the course of the evacuation operation.

The operation was ordered and conducted pursuant to the President's Constitutional executive power and his authority as Commander-in-Chief of U.S. Armed Forces.

The United States Armed Forces performed a very difficult mission most successfully. Their exemplary courage and discipline are deserving of the nation's highest gratitude.

Sincerely,

Gerald R. Ford

The Honorable James O. Eastland
President Pro Tempore of the Senate
United States Senate
Washington, D. C.

UNCLASSIFIED

WHITE HOUSE SITUATION ROOM,
April 4, 1975.

Message Annotations: No Message Annotations.

From The White House:

To Senator James Eastland, Doddsville, Miss.

HON. JAMES EASTLAND, *President pro tempore, U.S. Senate, Doddsville, Miss.*

As you know, last Saturday I directed United States participation in an International humanitarian relief effort to transport refugees from Danang and other seaports to safer areas farther south in Vietnam. The United States has been joined in this humanitarian effort by a number of other countries who are offering people, supplies and vessels to assist in this effort. This effort was undertaken in response to urgent appeals from the Government of the Republic of Vietnam because of the extremely grave nature of the circumstances involving the lives of hundreds of thousands of refugees. This situation has been brought about by large-scale violations of the agreement ending the war and restoring the peace in Vietnam by the North Vietnamese who have been conducting massive attacks on the northern and central provinces of South Vietnam.

In accordance with my desire to keep the Congress fully informed on this matter, and taking note of the provision of section 4(a)(2) of the War Powers Resolution (Public Law 93-148), I wish to report to you concerning one aspect of United States participation in the refugee evacuation effort. Because of the large number of refugees and the overwhelming dimensions of the task, I have ordered U.S. naval vessels to assist in this effort, including Amphibious Task Group 76.8 with 12 embarked helicopters and approximately 700 marines. These naval vessels have been authorized to approach the coast of South Vietnam to pick up refugees and U.S. nationals, and transport them to safety. Marines are being detailed to vessels participating in the rescue mission. The first vessel entered South Vietnam territorial waters at 0400 A.M. EDT on April 3, 1975.

Although these forces are equipped for combat within the meaning of section 4(a)(2) of Public Law 93-148, their sole mission is to assist in the evacuation including the maintenance of order on board the vessels engaged in that task.

As stated above, the purpose of the introduction of United States naval vessels into Vietnamese waters is to assist in an international humanitarian effort involving vessels of several nations, including both military and civilian craft. The United States' participation in this effort includes the charter of commercial vessels, the use of military sealift command vessels with civilian crews, as well as United States naval vessels with military crews. This effort is being undertaken pursuant to the President's constitutional authority as Commander in Chief and Chief Executive in the conduct of foreign relations and pursuant to the Foreign Assistance Act of 1961, as amended, which authorizes humanitarian assistance to refugees, civilian war casualties and other persons disadvantaged by hostilities or conditions relating to hostilities in South Vietnam.

You will appreciate, I am sure, my difficulty in telling you precisely how long United States forces may be needed in this effort. Our present estimate, however, is that this operation may involve the presence of United States naval vessels in Vietnamese waters for a period of at least several weeks.

GERALD R. FORD.

THE WHITE HOUSE
Washington, April 12, 1975.

HON. JAMES O. EASTLAND,
President Pro Tempore of the Senate,
U.S. Senate, Washington, D.C.

DEAR MR. PRESIDENT: As you and other members of Congress were advised, in view of circumstances in Cambodia, the United States had certain contingency plans to utilize United States Armed Forces to assure the safe evacuation of U.S. Nationals from that country. On Friday, 11 April 1975, the Khmer Communists forces had ruptured Government of the Khmer Republic (GKR) defensive lines to the north, northwest and east of Phnom Penh and were within mortar range of Pochentong Airfield and the outskirts of Phnom Penh. In view of this deteriorating military situation, and on the recommendations of the American Ambassador there, I ordered U.S. military forces to proceed with the planned evacuation out of consideration for the safety of U.S. citizens.

In accordance with my desire that the Congress be fully informed on this matter, and taking note of Section 4 of the War Powers Resolution (P.L. 93-148). I wish to report to you that the first elements of the U.S. forces entered Cambodian airspace at 8:34 P.M. EDT on 11 April. Military forces included 350 ground combat troops of the U.S. Marines, 36 helicopters, and supporting tactical air and command and control elements. The Marines were deployed from helicopters to assure the security of helicopter landing zone within the city of Phnom Penh. The first helicopter landed at approximately 10:00 P.M. EDT 11 April 1975, and the last evacuees and ground security force Marines departed the Cambodian landing zone at approximately 12:20 A.M. on 12 April 1975. The last elements of the force to leave received hostile recoiless rifle fire. There was no firing by U.S. forces at any time during the operation. No U.S. Armed Forces personnel were killed, wounded or missing, and there were no casualties among the American evacuation.

Although the forces were equipped for combat within the meaning of Section 4(a)(2) of Public Law 93-148, their mission was to effect the evacuation of U.S. Nationals. Present information indicates that a total of 82 U.S. citizens were evacuated and that the task force was also able to accomodate 35 third country nationals and 159 Cambodians including employees of the U.S. Government.

The operation was ordered and conducted pursuant to the President's Constitutional executive power and authority as Commander-in-Chief of U.S. Armed Forces.

I am sure you share with me my pride in the Armed Forces of the United States and my thankfulness that the operation was conducted without incident.

Sincerely,

GERALD R. FORD.

DEPARTMENT OF STATE
Washington, D.C., August 27, 1976.

Subject: *War Powers and Korean Deployments*

[Note: The following are the relevant, substantive portions of a memorandum sent to the Secretary by the Acting Legal Advisor on August 21, 1976, explaining why it was not recommended that the Secretary propose to the President a War Powers Report in connection with events in Korea and the augmentation of United States armed forces there.]

The War Powers Resolution requires that "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 . . ." Given what I know of the situation in Korea, I would not interpret this requirement as applicable to the strengthening of our armed forces there, even when accompanied by a heightened alert status. More difficult is the question whether the sending of reinforced patrols into the DMZ would qualify, but, so long as they are engaging merely in facts which we are entitled to take under the Armistice Agreement and which we have consistently taken, then I do not think the prospect of increased North Korean aggressiveness triggers the consultation requirement. In any event, consultation is only required where "possible;" and, to the extent that it is possible, it is clearly desirable in any case.

The Resolution requires reporting within 48 hours in three circumstances. The possibly relevant one with respect to the presently planned deployment is Sec. 4(a)(3)—"numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation." Whether the proposed additions are substantial enlargements depends upon an anlysis of what is already there and what is being added.

I believe it would be an undesirable precedent to construe the Resolution as requiring a report in a situation where a relative handful of people have been added to an existing force of some 41,000 men. Although in terms of tactical aircraft the increment is significant, I believe we should interpret 4(a)(3) as concerned primarily, if not entirely, with numbers of military personnel, rather than with items of equipment. Certainly the text speaks of "numbers," and the examples given in the legislative debates referred only to numbers of personnel. I am satisfied that this interpretation is reasonable and fully defensible and that a contrary interpretation would create a precedent that would haunt us in many future cases.

[COMMITTEE PRINT NO. 2]

JULY 1, 1977

95TH CONGRESS
1ST SESSION

S.

IN THE SENATE OF THE UNITED STATES

JULY , 1977

Mr. _____ introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend the War Powers Resolution.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) (1) the caption of section 2 of the War Powers Resolution is amended by adding at the end thereof a semicolon and the following: "EMERGENCY USE OF THE ARMED FORCES".

(2) Section 2(c) of the War Powers Resolution is amended to read as follows:

"(c) In the absence of a declaration of war by the Congress, the Armed Forces of the United States may be introduced into hostilities, or into situations where imminent

involvement in hostilities is clearly indicated by the circumstances, only—

"(1) to repel an armed attack upon the United States, its territories and possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack;

"(2) to repel an armed attack against the Armed Forces of the United States located outside of the United States, its territories and possessions, and to forestall the direct and imminent threat of such an attack;

"(3) to protect while evacuating citizens and nationals of the United States, as rapidly as possible, from (A) any situation on the high seas involving a direct and imminent threat to the lives of such citizens and nationals, or (B) any country in which such citizens and nationals are present with the express or tacit consent of the government of such country and are being subjected to a direct and imminent threat to their lives, either sponsored by such government or beyond the power of such government to control, but the President shall make every effort to terminate such a threat without using the Armed Forces of the United States, and shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the

United States to protect citizens and nationals of the United States being evacuated from such country; or

"(4) pursuant to specific statutory authorization. Any use of the Armed Forces pursuant to paragraph (1), (2), or (3) of this subsection shall be in a number and manner essential to and directly connected with the objective set forth in such paragraph.".

(b) Section 5 of the War Powers Resolution is amended by adding at the end thereof the following new subsection:

"(d) No funds made available under any law may be obligated or expended for any use of the United States Armed Forces which is prohibited by subsection (b) or (c) of this section or is not authorized by section 2(c).".

CONSULTATION

SEC. 2. Section 3 of the War Powers Resolution is amended by adding at the end thereof the following: "The President shall also in every possible instance consult with Congress before introducing United States Armed Forces as described in paragraphs (2) and (3) of section 4(a).".

REPORTING

SEC. 3. Section 4(a) of the War Powers Resolution is amended as follows:

(1) In clause (1) thereof, immediately before the semicolon insert "pursuant to section 2(c)".

(2) (A) At the end of clause (B) thereof, strike out "and".

(B) At the end of clause (C) thereof, strike out the period and insert in lieu thereof a semicolon and the word "and".

(C) At the end thereof add the following new clause:

"(D) the paragraph of this subsection pursuant to which such report is submitted.".

DETERMINATION OF DATE ON WHICH REPORT IS REQUIRED

SEC. 4. Section 5(b) of the War Powers Resolution is amended by adding at the end thereof the following new sentence: "For the purposes of this subsection, a report shall be deemed to have been required to be submitted pursuant to section 4(a)(1) on any date specified by the Congress by concurrent resolution.".

USE OF CONCURRENT RESOLUTION TERMINATION PROCEDURE FOLLOWING STATUTORY AUTHORIZATION

SEC. 5. Section 5 of the War Powers Resolution is amended as follows:

(1) In subsection (b)(1) thereof, strike out "or has enacted a specific authorization for such use of United States Armed Forces,".

(2) In subsection (c) thereof, strike out "or specific statutory authorization".

CONGRESSIONAL PRIORITY PROCEDURES FOR CONCURRENT RESOLUTION

SEC. 6. Section 7(d) of the War Powers Resolution is amended in the first sentence thereof by striking out "six calendar days" and inserting in lieu thereof "48 hours".

INTERPRETATION; CONCURRENT RESOLUTIONS AND EXECUTIVE AGREEMENTS

SEC. 7. Section 8(a) of the War Powers Resolution is amended as follows:

(1) In paragraph (1) thereof—

(A) immediately before "unless" insert "or from any concurrent resolution,"; and

(B) immediately after the semicolon strike out "or".

(2) Paragraph (2) thereof is amended by striking out the period at the end thereof and inserting in lieu thereof a semicolon and the word "or".

(3) At the end thereof add the following new paragraph:

"(3) from any executive agreement heretofore or hereafter entered into .".

INTERPRETATION; MEANING OF "INTRODUCTION" INTO "HOSTILITIES"

SEC. 8. Section 8(c) of the War Powers Resolution is amended to read as follows:

"(c) For the purposes of this joint resolution, United States Armed Forces shall be considered to have been 'introduced into hostilities' in circumstances that include—

"(1) the commitment, engagement, and involvement of such Armed Forces in hostilities, including aerial bombardment, and

"(2) the assignment of members of such Armed Forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.".

CLARIFICATION WITH RESPECT TO EXISTING TREATIES

SEC. 9. Section 8(d)(1) of the War Powers Resolution is amended by striking out the comma and the words "or the provisions of existing treaties".

SECTION-BY-SECTION ANALYSIS OF

COMMITTEE PRINT NO. 2

Summary of the War Powers Resolution

The War Powers Resolution might be summarized, crudely, as follows:

(1) It contains a sense of the Congress statement in section 2(c), setting forth the Congressional understanding of the scope of the President's independent war-making power.

(2) It requires that the President consult with the Congress before introducing the armed forces into hostilities.

(3) It sets a 60-(or 90-) day time limit after such introduction is made.

(4) It allows the Congress by concurrent resolution to require that the armed forces be removed from hostiliites.

(5) It purports to address the question of whether authority to introduce the armed forces into hostilities may be inferred from treaties.

* * * * * *

A number of deficiencies have been discerned in the Resolution, which are met in the draft bill as follows:

Section 1

The first section does four things:

(1) it makes mandatory the non-operative sense of the Congress statement now contained in section 2(c);

(2) it expands the Congressionally-recognized scope of his authority to include (a) the protection of endangered U. S. nationals located abroad and (b) the forestalling of a direct and imminent threat of an attack upon the United States;

(3) it addresses the question of how extensive the use of the armed forces may be, assuming that their use is constitutionally justified at the outset, by limiting that use to a "number and manner essential to and directly connected with" the constitutionally authorized purpose; and

(4) it prohibits the use of funds for uses of the armed forces prohibited by the Resolution.

The need for these amendments is as follows:

(1) Mandatory "Prior Restraints." The revision of section 2(c) of the War Powers Resolution (which is amended by subsection (a)(2) of the first section of this bill) reinserts the "prior restraints" language which was contained in the Senate-passed version of the Resolution but dropped in conference in favor of the non-operative sense of the Congress statement. The wisdom of the Senate version has been amply demonstrated in the four tests which have occurred since the Resolution was enacted. In neither the evacuations of Saigon or Phnom Penh nor during the Mayaguez operations did the Resolution pose any bar against unwanted Presidential military excursions. The popular impression that the use of the armed forces was in each case "allowed" by the War Powers Resolution is totally erroneous; the Resolution neither prohibits nor allows any use of the armed forces, and the impression that such use is authorized by the Resolution seems to be created in the public -- and the Congressional -- mind merely by submission of a report required by the Resolution. Moreover, it may be, as Senator Eagleton and others have argued, that the Resolution implicitly authorizes otherwise unwanted uses of the armed forces by placing a 60/90-day time limitation on that use. But it is not necessary to reach this question since the amendment is justified by the same public policy reasons that led the Senate to include this exact language in the version it passed in 1973.

(2) Expansion of Scope. As section 2(c) now exists, it does not recognize the authority of the President to do what he did during the Cuban missile crisis, or the Saigon and Phnom Penh evacuations, or the Mayaguez incident. While the scope of the military activities may be questioned in the latter instance, there seems little doubt that he has the constitutional authority both to forestall the direct and immiment threat of an attack on the United States, and to protect endangered United States citizens abroad. By failing to recognize those authorities, section 2(c) of the Resolution has come to be ignored. If Congress wants the law to be taken seriously, and if the section is to be made mandatory, it must accurately reflect the scope of Presidential authority -- as the Senate version did.

(3) "Number and Manner" Provision. This section also repeats the exact language contained in the Vietnam Contingency Act which limits the scope of military operations to a "number and manner essential to and directly connected with" their objective. It therefore remedies a defect in the original Senate version, which failed to place limits upon uses of the armed forces which it recognized as permissible

(4) Funding Prohibition. This amendment prohibits the use of funds wherever the use of the armed forces would be prohibited under the Resolution. The purpose of this provision is to bolster its constitutionality: while it is arguable whether the Congressional share of the war-making power extends as far as the Resolution asserts, it cannot be questioned that Congress has the authority to deny funds

even for constitutionally permissible uses of the armed forces -- as it did in ending the Vietnam War. A statute grounded constitutionally on a plenary Congressional power is more likely to be upheld by the courts than one grounded on a power shared by the Congress and the Executive. And as a matter of public policy, it makes little sense to have public funds available for activities which the law prohibits.

Section 2

Section 2 of the bill amends section 3 of the War Powers Resolution to require Presidential consultation with the Congress when the armed forces are introduced into the territory, air space, or waters of a foreign nation while equipped for combat, or when they are introduced in numbers which substantially enlarge the size of U. S. forces already located in a foreign nation.

The need for this amendment lies in what is thought by the executive branch to be an oversight in the drafting of section 3: namely, the fact that it requires consultation only in "4(a)(1) situations" -- where the armed forces are introduced into hostilities or likely hostilities -- and not in "4(a)(2) and (3) situations," which are those described above. The executive branch, as a result, construes section 3 as though it applied to all three situations. This application should be made explicit.

Section 3

Section 3 requires the President to designate the paragraph of section 4(a) of the War Powers Resolution under which a report is submitted. President Ford did not do so in the second and third reports, submitted during the evacuations of Cambodia and Vietnam. Had the hostilities gradually increased, serious disagreement could have arisen as to whether the 60-day time period had been triggered by the report.

Section 4

Section 4 amends section 5(b) of the Resolution to allow the Congress -- if the President fails to submit a required "4(a)(1) report" -- to set the date on which it was required to be submitted, thereby triggering the 60-day time limit. The time limit now begins to run when a report is "required" to be submitted, but the Resolution provides no procedure to determine what date that is. Here again, a gradual increase in hostilities could lead to disagreement as to when the 60-day period began to run.

Section 5

Section 5 amends section 5 of the War Powers Resolution to apply the concurrent resolution termination procedure and the time limitations to situations in which the armed forces are used pursuant to specific statutory authority.

The need for this amendment was demonstrated during the Vietnam evacuation, when it was necessary for Congress to provide, in the Vietnam Contingency Act, that the concurrent resolution withdrawal procedure contained in the War Powers Resolution remained applicable notwithstanding its inapplicability as a result of the Vietnam Contingency Act. The need to recite that paradoxical provision will likely recur in any future similar authorization to use the armed forces, and it should be eliminated. Likewise, the time limitations should be applicable even where specific statutory authorization is enacted, unless that authorization provides otherwise.

Section 6

Section 6 of the bill amends section 7(d) of the Resolution to correct a contradiction contained on the expedited procedure for a concurrent resolution. As subsection (d) now stands, the first sentence allows a conference committee six days to report, whereas the last sentence in effect allows only 48 hours. The amendment resolves the conflict in favor of the 48-hour provision, which is the time period applicable (under section 6 of the Resolution) to a conference committee meeting on a proposal for specific statutory authorization.

Section 7

Section 7 of the bill amends section 8(a) of the Resolution to prohibit the inference from any executive agreement or concurrent resolution of Presidential authority to introduce the armed forces into hostilities.

As currently drafted, the Resolution prohibits such inference only in the case of a treaty or "provision of law," thereby excluding such instruments as the September 1, 1975 Memorandum of Agreement between the governments of Israel and the United States (an executive agreement), and the Berlin Resolution (a concurrent resolution).

Section 8

Section 8, which amends section 8(c) of the War Powers Resolution, does two things: (1) it defines "introduction" to include "commitment, engagement, and involvement," and (2) it defines "hostilities" to include "aerial bombardment."

The need for the first part of the amendment was revealed during an incident of Tan Son Nhut Airfield during the evacuation of Saigon. Although U. S. Armed Forces became involved in hostilities, arguably they were not "introduced" into hostilities because the hostilities came to them; they were attacked. This amendment would make it clear that the time limit applies even if the President argues the action is defensive, as he did in the case of the alleged attacks on the Maddox and the Turner Joy.

Second, the section would make it clear that the concurrent resolution termination procedure may be used to halt bombing operations. As currently drafted, it applies only where the armed forces can be "removed" from hostilities; arguably, no "removal" is called for if the forces are not continuously present in hostilities. The 60-day time limit would similarly be made applicable to bombing operations.

Section 9

Section 9 of the bill amends section 8(d)(1) of the War Powers Resolution to make applicable the prohibition against an inference of authority from "existing treaties."

The need for this arises in the nonsensical way in which section 8 currently is drafted. Section 8(a)(2) prohibits the inference of such authority "from any treaty heretofore or hereafter ratified," whereas section 8(d)(1) provides that nothing in the Resolution "is intended to alter . . . the provisions of existing treaties." Section 8(d)(2) therefore seems to imply that existing treaties may somehow contain the authority which section 8(a)(2) purports to curtail. Adoption of this amendment would resolve the inconsistency in favor of section 8(a)(2) and would mean, specifically, that no President could have claimed authority from the SEATO Treaty to conduct combat operations in Southeast Asia. This is entirely consistent with the declaration-of-war clause, which grants the authority to declare war to both houses of Congress and not to the President and two-thirds of the Senate. It is also consistent with the legislative histories of United States mutual security treaties, which use the term "constitutional processes" to make clear that the allocation of constitutional authority between executive and legislative branches in the respective parties is not altered.

UNITED STATES SENATE
COMMITTEE ON FOREIGN RELATIONS

Staff Memorandum

OPERATION AND EFFECTIVENESS OF THE WAR POWERS RESOLUTION
July 13, 14 and 15, 1977

A. Summary of Provisions

Key provisions of the War Powers Resolution (which is a joint resolution, having the force and effect of law) are as follows:

1. It states the sense of the Congress, in section 2(c), that the President's independent powers to introduce the armed forces into hostilities extend only to "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by an attack upon the United States, its territories or possessions, or its armed forces."

2. It requires the President, in section 3, to consult with the Congress "in every possible instance" before introducing the armed forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.

3. It requires the President, in section 4(a)(1), to report any such introduction and it requires the President, in section 5(b), to remove the armed forces from hostilities within 60 days after the report is submitted (or 90 days in the case of "unavoidable military necessity" respecting their safety).

4. It allows the Congress, in section 5(c), to require by concurrent resolution that the armed forces be removed from hostilities.

5. It purports, in section 8(a)(2), to address the question of whether authority to introduce the armed forces into hostilities may be inferred from treaties.

B. Background

1. Enactment. The War Powers Resolution was enacted on November 7, 1973, over President Nixon's veto. The conference report -- the current version of the Resolution -- represents a compromise between different approaches taken by the two Houses. The Senate-passed bill, contained "prior restraints"; i.e., it defined the President's independent authority to introduce the armed forces into hostilities. It provided (in section 3) that

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> [i]n the absence of a declaration of war by the Congress, the Armed Forces of the United States may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, only—
>
> (1) to repel an armed attack upon the United States, its territories and possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack;
>
> (2) to repel an armed attack against the Armed Forces of the United States located outside of the United States, its territories and possessions, and to forestall the direct and imminent threat of such an attack;
>
> (3) to protect while evacuating citizens and nationals of the United States, as rapidly as possible, from (A) any situation on the high seas involving a direct and imminent threat to the lives of such citizens and nationals, or (B) any country in which such citizens and nationals are present with the express or tacit consent of the government of such country and are being subjected to a direct and imminent threat to their lives, either sponsored by such government or beyond the power of such government to control; but the President shall make every effort to terminate such a threat without using the Armed Forces of the United States, and shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States to protect citizens and nationals of the United States being evacuated from such country; or
>
> (4) pursuant to specific statutory authorization . . . .

The House-passed bill, on the other hand, contained no "prior restraints." Section 2(c) of the Resolution represents the conference committee's reconciliation of the two approaches. In addition to having defined the President's authority in operative terms, the Senate version differed from section 2(c) of the Resolution in two other important respects: it would have explicitly recognized the President's authority to introduce the armed forces to evacuate U.S. citizens and nationals abroad in certain emergency situations -- as he arguably did during the Vietnam and Cambodian evacuation and the Mayaguez incident -- and it would have allowed him to so introduce the armed forces to forestall the direct and imminent threat of an attack upon the United States -- as he arguably did at the time of the Cuban missile crisis. Also, the Senate version required mandatroy withdrawal in the event of the adoption of a joint resolution, rather than a concurrent resolution as provided by the House bill.

2. Operation. To date, four reports have been submitted to the Congress under the resolution: two at the time of the Cambodian evacuation, one at the time of the Vietnam evacuation, and one at the time of the Mayaguez incident.

The first report was submitted on April 4, 1975. Three days earlier Cambodian Premier Lon Nol had left the capital, Phnom Penh, as Khmer Rouge insurgents closed in on the city. South Vietnamese forces had abandoned more than two-thirds of their country to the North Vietnamese. President Ford, "taking note of the provision of section 4(a)(2) of the War Powers Resolution," reported that he had ordered United States naval vessels carrying some 700 marines, equipped for combat, into the territorial waters of South Vietnam. Their "sole mission," the President said, was to "assist in the evacuation /of "refugees and U.S. nationals,"/ including the maintenance of order on board the vessels engaged in that task."

The second report was submitted two days later. The President, "taking note of section 4 of the War Powers Resolution," reported that Khmer Rouge forces had reached the outskirts of Phnom Penh and were within mortar range of Pochentong Airfield, and that he had therefore "ordered U.S. military forces to proceed with the planned evacuation." These forces included 350 marines, 36 helicopters, and supporting tactical aircraft. A total of 82 United States citizens, 159 Cambodians, and 35 third-country nationals were evacuated during the four-hour operation. Although hostile recoilless rifle fire was encountered by the last forces to leave, the fire was not returned. No casualties were incurred.

The third report was submitted on April 30, 1975. Again "taking note of provision of section 4 of the War Powers Resolution," President Ford reported that the evacuation of Saigon involved 70 helicopters, figher aircraft, and 865 marines. The fighters "suppressed" anti-aircraft fire, and ground forces occasionally returned fire. Four members of the armed forces were killed, including two marines "on regular duty" at Tan Son Nhut airfield. Approximately 19 hours elapsed from the time the United States forces entered South Vietnamese air space until the last elements of the ground security forces departed Saigon.

The fourth report was submitted May 15, 1975. Early in the morning hours of Monday, May 12, 1975, the Mayaguez, a merchant vessel of United States registry with a crew of United States citizens, was seized by a Cambodian motor torpedo boat six and one-half miles southeast of Poulo Wai Island and taken to Kho Tang Island. That afternoon, 1,100 marines were ordered flown from Okinawa and the Philippines to Utapao Air Base in Thailand. At 1:00 a.m. Wednesday, May 14, United States aircraft sank a Cambodian patrol craft that had attempted to leave Kho Tang Island. Thereafter two other Cambodian patrol craft were destroyed and four immobilized. Several hours later the Mayaguez crew members were put in a fishing vessel and taken to Kompong Som on the Cambodian mainland. At 7:00 p.m. Phnom Penh radio was overhead in Bangkok announcing that the Cambodian Government would release the Mayaguez. Afterwards, at 7:20 p.m., about 135 marines landed on Koh Tang Island under heavy fire. At 9:00 p.m. marines, boarding the U.S.S.Holt, took possession of the Mayaguez. At 10:45 p.m. the destroyer U.S.S. Wilson reported a small boat approaching, flying a white flag; at 10:53 p.m. the Wilson sent word to the Pentagon that at least 30 caucasians were aboard the boat. (After the incident, Secretary Schlesinger stated that the crewmen "arrived at the Wilson as a result of what is presumed to be the decision of the Cambodians to deliver them up in order to terminate combat activities directed primarily at the mainland.") At 11:00 p.m. United States aircraft struck the airfield at Ream and an oil storage depot on the Cambodian mainland. The Pentagon said that 17 enemy planes had been destroyed on the ground, a hangar smashed, and the runways cratered. By the conclusion of hostilities 41 members of the United States armed forces had been killed. The 39 members of the crew survived unharmed.

Although "taking note of section 4(a)(1) of the War Powers Resolution," it ignored section 4(a)(3) in neglecting to mention the enlargement of United States forces in Thailand. Nor did it report any fatalities.

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United States Senate

COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, D.C. 20510

July 11, 1977

MEMORANDUM

TO: Members, Committee on Foreign Relations

FROM: Michael J. Glennon mjg
Legal Counsel

SUBJECT: "Non-Automaticity" of U. S. Mutual Security Treaties

This memorandum discusses the extent of the United States' commitment under mutual security treaties by addressing the question, "Does any treaty to which the United States is a party authorize the President to introduce the Armed Forces into hostilities or require the United States to do so, automatically, if another party to any such treaty is attacked?"

The two issues posed are actually one: if a treaty requires the United States to introduce its armed forces into hostilities upon the happening of certain events and thus precludes a decision by the United States not to do so, then it is fair to construe that treaty as authorizing the President to introduce the Armed Forces into hostilities. Conversely, if a treaty allows the United States to decide in each situation whether to introduce its Armed Forces into hostilities, it is not necessary to construe it as conferring upon the President the authority to introduce the armed forces into hostilities.

The memorandum concludes that the answer to the question posed is no, for two reasons: (A) the wording of the treaties and their legislative histories make clear that they were not intended to be so construed; and (B) such a construction would be constitutionally dubious.

A. Text and Intent of the Treaties. An analysis of the texts of the United States mutual security treaties indicates no intent to bind parties to introduce their armed forces into hostilities. Indeed, each treaty explicitly recognizes that a decision to do so must be made by each party as specific situations arise. Each of the treaties provides that it will be carried out by the United States in accordance with its "constitutional processes" or it contains other language to make clear that the United States' commitment is a qualified one -- that the distribution of power within the United States Government is precisely what it would be in the absence of the treaty, and that the United States reserves the right to determine for itself what military action, if any, is appropriate.

In short, each treaty contains an international requirement with a domestic escape clause; each requires that under certain circumstances the parties will consult with one another, but none requires that the parties act in any predetermined way. The legislative histories of the treaties bear out this analysis, and it has been the consistent position of legal authorities and of the executive branch.

B. Constitutionality. Because the Constitution vests the power to declare war in the Congress rather than the Senate, a strong argument can be made from its text that approval for United States entry into war must involve the House of Representatives and therefore cannot be accomplished by treaty. It can, of course, be pointed out by way of rebuttal that certain other enumerated Congressional powers, such as taxation and the regulation of commerce and copyright, have long been regarded as proper subjects for treaty-making. However, a review of the statements and actions of the Framers suggests a specific intent to include the House in the decision to go to war. Moreover, it is doubtful whether the authority to make that decision could constitutionally be delegated to the President, whether by treaty or by law. Serious constitutional questions would thus be raised by any treaty purporting to place the United States automatically at war; those problems can be avoided only by construing the treaties as not doing so.

Conclusion

United States mutual security treaties represent affirmations of a general intent to render assistance in good faith to another party if that party is attacked. However, no treaty to which the United States is a party authorizes the President to introduce the Armed Forces into hostilities or requires the United States to do so, automatically, if another party is attacked. Any treaty purporting to do so would be constitutionally dubious and should be construed as not doing so.

MG:cc

[The Washington Post—March 6, 1977]

The War Powers Flop

CONGRESS STILL CAN'T RESTRAIN PRESIDENTS

By W. Stuart Darling and D. Craig Mense

Three years have passed since Congress enacted the War Powers Resolution over President Nixon's veto. Since then, there has been relatively little discussion about this law which purports to ensure that the United States will never again become involved in another unpopular war like that in Vietnam.

In essence, the law seeks to ensure that American armed forces will not be committed to hostilities by the President without prior congressional authorization except in "emergency" situations. In the event that such an emergency does arise, the President can, on his own, commit forces to combat provided that they must be withdrawn after 60 days unless Congress has enacted a measure specifically endorsing his action. The statute grants the President authority to extend this 60-day period for an additional 30 days if, in his opinion, "unavoidable military necessity" so requires. Thus, the President can wage war on his own for 90 days before Congress really enters the picture.

The present act has seemingly been been forgotten since the resignation of Richard Nixon. But whether, as is claimed, the law will compel future Presidents to allow for congressional participation in any decisions to commit U.S. troops to hostilities overseas is questionable. And as we enter a new era, there is a clear need to analyze the law's practical effects on the nation's foreign policy.

It is not difficult to envision, drawing from the current world situation, a crisis which might precipitate the introduction of U.S. troops overseas to protect our real or imagined interests. The death of Marshal Tito, now 85, could tempt the Soviets to grab for power in strategic Yugoslavia, probably by a variety of subtle means, conceivably by overt military action, and should that occur President Carter would not necessarily be bound by the comment of candidate Carter dimissing a military response. The potentialities for trouble in the Middle East are not limited to the Arab-Israel conflict but cover as well the volatile Persian gulf into which has flowed in recent years large quantities of American weapons and thousands of American military instructors.

One can go on identifying potential trouble spots, evoking Cassandra-like images of the future in southern Africa or Korea.

PROBLEMS CREATED

The question which must be asked is this: Would an American President, faced with what he saw as an unavoidable conflict and aware of the military advantages of quick action, be restricted by the current war powers law from initiating U.S. military actions until he could acquire congressional approval? We think not. In fact, the existing statute creates more problems than it solves. As Yale Law Professor Charles L. Black characterize it: "Presented as a limitation on presidential power, [it] can hardly be read as other than a very nearly explicit authorization of any presidential action whatever, with Congress exercising supervisory power later along, after the commitment has been made."

The failure of the law stems from a decision made in 1973 in a conference committee formed to reconcile the differences between the bill's House and Senate versions.

The Senate had acknowledged the necessity of the President's acting without prior congressional approval in certain emergency situations, but spelled out what those "emergencies" were: (1) responding to or preempting an attack on the United States itself (2) responding to or preempting an attack on U.S. armed forces stationed abroad (3) and rescuing American citizens abroad from circumstances which endangered their lives.

The House, on the other hand, had allowed the President unilateral emergency power without specifying what would constitute an emergency. The conference committee placed the Senate codifications of emergencies under the "Purpose and Policy" section of the compromise bill. The conference report explained that the "Purpose and Policy" section was "a statement of the authority of the commander-in-chief respecting the introduction of armed forces into hostilities" and went on to say "subsequent sections . . . are not dependent upon the language of this subsection, as was the case with a similar provision of the Senate bill."

By delaying the congressional imprimatur for 90 days, one of the bill's main goals was compromised. The authors of the Senate bill felt it crucially important that Congress share in the decision to use force before an actual commitment had been

made. Otherwise, Congress would have to make the very difficult choice of compelling a withdrawal or evacuation of forces already engaged in hostilities. For these reasons, Sen. Thomas Eagleton (D-Mo.) voted against adoption of the conference report, though he had helped draft and guide the legislation through the Senate.

Most other supporters of the Senate bill, even though they shared many of Eagleton's reservations, chose to accept the conference version. They did so to a significant and unfortunate degree because of unrelated political events. Remember the atmosphere at the time: President Nixon, under mounting criticism from all sides because of Watergate, had recently fired special prosecutor Archibald Cox in the "Saturday Night Massacre."

Nixon vetoed the conference bill, claiming that it was both unconstitutional and an unwise inhibition on the President's conduct of foreign policy. By this time, however, Congress seemed to have tired of arguments for or against the bill itself. Nixon's veto tended to transfer the issue from the bill's provisions to a question of congressional capability to stand up to an increasingly discredited President. In its 10-month existence, the 93d Congress had not overridden any of Nixon's vetoes. In the House, the vote to override was very close. Eight House liberals who had fomerly opposed the conference bill switched sides to make the override possible. The margin was only four votes above the necessary two-thirds majority. In the Senate, the override margin was 13, and on Nov. 7, 1973, in Public Law 92-148, the country at last had a war powers act.

But is this law worth having? Does it do more harm than good?

DeTocqueville observed that "foreign politics demand scarcely any of those qualities which are peculiar to a democracy; they require, on the contrary, the perfect use of almost all those in which it is deficient."

It is difficult for democracies to compete in world politics against totalitarian states. Democracies are suspicious of secrecy and not very good at it. Yet successful foreign policies sometimes require secrecy, as well as intimidation, threats, alignments with undemocratic states and, too often, the application of force to obtain desired ends. When a democracy must resort to violence, however, it is imperative both for the success of the foreign policy leading to the use of force, and for the military operation itself, that the people understand why they are fighting and accept the sacrifices necessary for victory. Without this element of consent and a willingness to bear the burdens of war, a democracy is wise to keep out of combat situations.

In effect, by deciding not to require prior congressional consent for presidential warmaking in other than designated emergency situations, the conference committee awarded the President carte blanche to undertake any sort of military operation subject only to ex post facto congressional review. A situation in which Congress felt compelled to force a withdrawal of forces already engaged in hostilities would be a nightmare for all concerned, not least to the military personnel, officers and men, doing the actual fighting. The effects on service morale would be lamentable and frightening.

More likely, however, Congress would never steal itself to make such a decision unless a military venture had proved utterly calamitous, either on the battlefield or at home, or both. Additionally, if for some reason (albeit an unlikely one) Congress became too zealous in compelling withdrawals after 60 days, the world could bear witness to a succession of American Dunkirks that would be unredeemed and unredeemable.

Sen. Barry Goldwater (R-Ariz.) and others have expressed the view that the President must not be deprived of his ability to defend and protect U.S. lives and interests throughout the world. True. It is the price we pay for living in a world where force, and not law, is oftentimes the arbiter of the future. It would be a foolish mistake to deprive the President of the ability to wage a defensive war.

WHAT IS DEFENSIVE WAR?

However, there remains the problem of determining what a defensive war is. Nearly all belligerents call their half of any war "defensive," it is the other side who's waging an aggressive, "offensive" war. Hitler claimed his invasion of Poland was a defensive war justified by a fabricated "seizure" of a German redio station, actually carried out by SS troops masquerading in Polish uniforms.

In 1848, Congressman Abraham Lincoln addressed himself to this point:

"Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion, and you will allow him to do so whenever he may choose to say he deems it necessary for such purpose—and you allow him to make war at his pleasure. Study to see if you can fix any limit to his power in this respect . . . If today he should choose to say he thinks it necessary to invade Canada to prevent the British from invading us, how could you stop him? You may

say to him, I see no probability of the British invading us but he will say to you be silent: I see it if you don't."

The Senate bill presented as workable a definition of defensive war as can likely be written. In that section, the President was empowered to "forestall," or preempt, the "direct and imminent threat" of attacks on the United States itself and on American armed forces abroad without a declaration of war. In the event of attacks on the United States, he could take "retaliatory" action as well. He could use the armed forces to rescue American citizens abroad, but with provisions that prevent such an operation from being used as a guise to cloak ulterior motives. In any other situation, the President would first have had to secure the approval of Congress before resorting to the use of armed forces.

The present law, however, took one step forward and two steps backward. Certainly, this War Powers Resolution is not without some valuable ideas. It makes clear, for example, that our treaty commitments are not self-executing. Apparently, this surprised several of our allies and caused them to worry aloud about American credibility as a world power. In reality, however, the mere fact that a given nation's signature appears on a treaty proclaiming a military alliance is not what matters. Alliances are based on a shared perception of a common threat. Alliances are little more than verbal expressions of a common view of potential danger. This common perception can change as the danger mellows or if it is mistakenly thought to mellow. In this way treaties can become only "scraps of paper."

History offers few examples of nations risking their security for "scraps of paper" that did not represent a much deeper concern that keeping promises. In 1914, Britain went to war ostensibly to honor its treaty commitment to Belgian neutrality, but the fundamental reason was that the British would not accept the jeopardization of their security which a German defeat of France would cause. The NATO treaty will become only a scrap of paper if, for whatever reason, the United States, or the West Europeans, come to feel that Soviet domination of Europe is not something worth fighting to prevent.

THE NEED FOR CLARITY

The congressional record in foreign affairs since the adoption of the present war powers law has not been impressive. The failure of the bill to involve Congress in the decision-making processes surrounding the evacuation from Vietnam or the Mayaguex affair illustrates both the weaknesses of the statute and congressonal reservations about accepting the constititional responsibility that some claimed the President has usurped. If Congress continues to evoke its constitutional authority in as haphazard a manner as it has in the last two years, becoming involved in the Angolan and Cypriot situations but not in the evacuation from Vietnam or the Mayaguez affair, Congress will justifiably be subject to charges of meddling in presidential concerns and the formula for democratic participation in decisions to use force will remain cloudy.

The cuurent period of relative domestic and international tranquility offers the opportunity to reopen the issue for further consideration. Now is a good time for a reasoned and dispassionate analysis of the existing law. A better opportunity may not be forthcoming.It is bitter to contemplate the effects of a renewed war powers debate imstigated by a future military conflict involving U.S. troops. Common sense should beckon the Congress to settle the issue beforehand.

A return to the original Senate bill would clarify the situations in which the President's emergency powers do allow him to act unilaterally and would specify the situations in which the President can act only with prior authorization.

Some flexibility would be lost to the President in his conduct of diplomacy. This weakness is inherent in our democracy and we would be better off recognizing our limitations. However, that loss of flexibility would be more than compensated by the gain of a truly democratic dialogue on the issues of foreign policy. The President, too often shielded from adversary politics, would be obliged to engage in public debate. He would be forced to state his proposal and to persuade Congress and the American people to accept it.

The adoption of such a bill would demonstrate to any future President that the judgment to send this nation to war is not his alone and that, while unforeseen circumstances may compel him to abandon the rule in favor of an exception, as Arthur Schlesinger has written, "he should not pretend — as Jefferson, Lincoln and Roosevelt declined to pretend and as Johnson and Nixon have pretended—that the exception is the rule."

The Senate bill is not perfect, but then we do not claim to know what a perfect war powers law would be. As the spokesmen for the Nixon administration pointed out throughout the war powers debate, the world has probably seen the last formal declaration of war. Future wars will either be conventional wars limited in scope, or

total, nuclear wars which could be over within hours, if not minutes. For the former, declarations of war are undesirable; for the latter, impossible.

Nevertheless, Congress must have a part beforehand in any decision that involves armed forces in combat situations. A good war powers law would help ensure that the President will not commit the nation to policies it will not accept. If the President does perceive dangers which this countrymen are too slow to recognize, then his task is to educate them, and not compel them to do what they do not want to do.

[Washington Post—March 12, 1977]

LETTERS TO THE EDITOR

THE TROUBLE WITH THE WAR POWERS RESOLUTION

By Barry Goldwater

W. Stuart Darling and D. Craig Mense's call for a strenghtening of the already dangerous War Powers Resolution (Outlook, March 6) misreads that law and its potential for disaster. They fail to observe that the law applies not only to forces actually engaged in combat, but to situations where hostilities appear imminent. In a crisis situation, even though U.S. troops are not engaged in battle, they must be pulled back within 60 days. The President may possibly have another 30 days solely for purposes of bringing about their prompt removal.

Another provision of the law, left unmentioned by the writers, allows Congress unilaterally to order a withdrawal of forces engaged in hostilities at any time by approving a resolution that is not subject to presidential veto.

If the law had been in effect during the Cuban missile crisis, Congress could have directed the return of all U.S. naval and air forces engaged in the blockade by President Kennedy. Had the crisis lasted beyond 60 days without specific congressional approval, the blockade would have been automatically terminated. At the least, the law would have forced Congress to debate legislation on the crisis when events were at their emotional peak. In this atmosphere, congressional action may well have disrupted the military operation and confused diplomatic contacts.

Or, the law may have had an opposite result. The same theory of congressional dominance of the war powers that permits Congress to provide for the withdrawal of American forces contrary to the judgment of the Executive also permits Congress to order accelerated activity by U.S. forces.

Thus, the dangers of having 535 Secretaries of State in Congress come both from the direction of too much weakness or too strong a reaction. The same Congress that extended the military draft by a single vote would hardly have given its approval to the occupation of Greenland and Iceland by armed troops and the use of warships to protect the British lifeline in the Atlantic, as ordered by President Roosevelt prior to our official entry into World War II. The same Congress whose leadership pressed for an invasion of Cuba may have pushed the world closer to the abyss of a nuclear holocaust than the more moderate step of a blockade did.

The limit to the President's war powers are in his accountability to the people and to Congress. He must come to Congress for funds to maintain and equip the armed forces. He must answer directly to the public every four years and is constantly subject to the scrutiny of a free press with its influence upon public opinion. If an outrageous abuse of power occurs, there is the check of impeachment.

There is a need for clarity, as the writers suggest. But it is for the courts to say what the law is. Congress may not assume to itself authority to define the boundaries between the powers of the President and the legislature. Thus, I hope to bring the war powers issue to the courts. In this way, questions about the ability of the nation to protect its people and its freedoms will be removed.

[New York Times—May 21, 1975]

IN PRAISE OF CONGRESS

By Clark Clifford

WASHINGTON—I never cease to marvel at the wisdom and prescience of the unique group of men who met in Philadelphia in 1787 to write the Constitution. The system of checks and balances created at that time has once again proved how invaluable it is.

Although this article is not directed toward the Mayaguez affair, the dangerous and precipitate resort to force by the Administration in that incident dramatizes the conclusion reached in this article.

The decision of the Congress, in August, 1973, to limit the President's discretion to take further military steps in Vietnam has produced the most vital results. In substance, the Congress decreed that the United States could no longer send troops to Vietnam, bomb the area or shell it from offshore. It appears clear that were it not for this action by the Congress, the war in Vietnam would still be in progress, in all likelihood we would be bombing targets there, and perhaps our troops would have been recommitted.

We are all familiar with the attitude of the Administration in supporting the Government of President Nguyen Van Thieu to the bitter end. As the South Vietnamese military force was collapsing, and when the fall of Saigon appeared inescapable, the President still called upon Congress to appropriate $720 million in added military aid.

But the most revealing of all are two statements made by President Ford as the military situation worsened for the South Vietnamese Army.

In his news conference of April 3, 1975, President Ford commented strongly on the fact that the North Vietnamese had repeatedly violated the Paris peace accords. He then stated that he was frustrated by the action of Congress in not responding to his requests for additional assistance to South Vietnamese.

Then came the following words, "And I am frustrated by the limitations that were placed on the Chief Executive over the last two years."

What were those limitations?

The answer is simple. They were the limitations placed by the Congress in August, 1973, "over the last two years," which prevented the President from bombing from the air, shelling from the sea and from sending American troops back to Vietnam.

On April 21, he returned to the subject, and went even further. On this occasion, he was interviewed by CBS News correspondents.

He told about the commitments the United States had made to the Thieu Government. Then he said, "Now, unfortunately, the Congress in August of 1973 removed the latter—took away from the President the power to agreements that were signed in Paris."

Could it be any clearer? President Ford was telling the American people that, had it not been for the action of Congress, he would have moved "in a military way" to assist the Thieu Government.

In the same interview, President Ford specifically referred to a secret "commitment" that President Nixon had made to enforce the January, 1973, agreement. He said that he had "personally read" this commitment but that he did not intend to release it.

However, an ex-Saigon official has now released it, and we find the language of the commitment is that the United States "will respond with full force should the settlement be violated by North Vietnam."

Mr. Ford obviously meant what he said. He was telling us that it was "unfortuate" that he had been deprived of the power to move in a military way "to respond with full force." The expression "full force" has a clear military meaning. It means that we would attack by land, sea and air. This is what Mr. Ford did in the Mayaguez incident when he felt he was not restrained by Congress.

If President Ford had been free to adopt the policies he desired, the Theiu Government might have been kept in power a while longer, but the South Vietnamese people would have suffered more grievously than ever. These long-suffering people would do well to include the Congress in their evening prayers. I know I shall.

[The New York Times, May 6, 1975]

Congress's 'Inaction' On War

By Thomas F. Eagleton

Washington—On Jan. 5, 1957, President Dwight D. Eisenhower, concerned about possible Communist advances in the Middle East, addressed a joint session of Congress to request authority to use military force, if needed, in the region.

Congressional liberals, feeling that the United States was best served by a strong and flexible President, were suspicious of the request. They moved in the Senate to strike the word "authorized" from the draft of the White House resolution and,

when the resolution passed, it read in part "if the President determines the necessity thereof, the United States is prepared to use armed forces."

The Middle East resolution was considered a great liberal victory in 1957. It also represented a virtual renunciation of Congress's constitutional duty to authorize—and proscribe—the use of American forces in a war.

In the Congressional handling of the recent Vietnam evacuation, hostory has repeated itself.

On April 10, 1975, President Ford requested "clarification" of his legal authority to use United States forces in South Vietnam to rescue American and foreign nationals. Clarification was indeed needed.

I share the view of many constitutional scholars that the President, as Commander in Chief, possesses an inherent right to rescue endangered Americans. However, there is no precedent to support an inherent right to use United States forces to rescue foreigh nationals.

The President's request presented an important opportunity to proscribe by law the use of force for the Vietman evacuation. More important, Congress had the chance to resurrect the concept, advanced by the Founding Fathers, that the executive and Congress would participate together in decisions potentially involving war.

But Congress fumbled the ball. When the President was forced by events to order the evacuation from South Vietnam on April 29, the House of Representatives had not yet completed the final stage in enacting the necessary legislation. Two days later, when the House finally had the opportunity to express Congressional will and intent, the House voted overwhelmingly not to act.

This unfortunate decision raised grave questions about the willingness of Congress to fulfill its constitutional responsibilities. The President obviously had no authority to use the United States forces to rescue foreign nationals in Vietnam. Yet our forces evacuated thousands of Vietnamese. Asked to explain, President Ford tried to justify his action on "moral" rather than legal grounds. Yet Congress let the precedent stand. Future Presidents might now conclude that the Commander in Chief has an inherent right to do what Mr. Ford did.

The failure of the war-powers resolution to specify those emergency situations wherein the President may unilaterally commit United States forces to battle has left the war powers of Congress and the President as vague as ever.

Lacking such a statutory definition, power accrues to the branch that invokes it. And, once again, in rescuing foreign nationals from Vietnam the President has invoked powers the Founders did not grant the Presidency.

The President can move all too quickly to usurp Congressional powers. He has only to order troops into battle. Congress, on the other hand, can only impose its will through the legislative process.

That is the tragedy of the House's recent action. On the verge of reimposing itself in the decision-making process, Congress rejected the opportunity to legislate.

From the beginning the debate over the President's request for "clarification" was marked by distrust of the executive branch, fear of military reinvolvement in Vietnam, and a conspicuous lack of confidence that a law, however tightly drafted, would be faithfully executed. In the end, liberals, long disenchanted by the imperial Presidency they helped create, unintentionally threw their considerable weight in the direction of Presidential omnipotence.

To avoid the remotest of possibilities—that President Ford would send forces back into Vietnam despite his written promise not to—Congress chose to leave a precedent for unilateral and unrestricted Presidential rescue authority.

White House references to "moral" justification and the pleasure Congress seems to derive in abrogating its constitutional responsibilities should alarm those who see the rule of law as America's primary source of strength.

Congress has again failed to act in a forthright and timely manner to proscribe a Presidential war-making initiative. By its inaction, and by its refusal even to provide ex post facto authorization for the Vietnam evacuation, Congress has once again shirked its constitutional duty.

[The Washington Star-News, May 21, 1975]

War Power Revisions Proposed

By Martha Angle, Washington Star Staff Writer

Sen. Thomas F. Eagleton, D-Mo., today introduced a trio of proposed amendments to the 1973 War Power Resolution aimed at clarifying key provisions of the law in the wake of the Indochina evacuation and the Mayaguez incident.

At the same time, the Senator sharply questioned President Ford's decision to bomb the Cambodian mainland as part of the military operation to recover the Mayaguez and rescue its crew.

Press accounts, he said, have raised the possibility that the bombing amounted to "punitive action" since one of the raids occurred after the Mayaguez crew was safely aboard a U.S. destroyer.

Eagleton said he, has asked the General Accounting Office to investigate the possibility that Ford may have exceeded his authority and violated specific legal prohibitions against U.S. combat in Indochina.

In proposing amendments to the War Powers Resolution, Eagleton said recent experiences have demonstrated the need to clarify the scope of the president's authority and to insure more meaningful consultation with Congress before U.S. troops are committed to hostilities abroad.

"It is clear now that little if any real consultation took place prior to the Mayaguez military operation," the Senator said, echoing complaints voiced earlier by a number of his colleagues on Capitol Hill.

He urged an amendment to the law that would require the President to "seek the advice and counsel of Congress" before—not after—deciding to use the armed forces in potential hostilities abroad.

Eagleton noted the existing law does not specifically authorize a President to commit U.S. troops to rescue endangered American citizens, even though Congress has traditionally recognized the chief executive's power in this respect.

The Washington Post—6 May 1965

Art Buchwald at Home

THE LAST AMERICAN

WASHINGTON.—When the story of the Dominican Republic's revolution unfolds, you may hear about a great unsung hero whose name is Sidney.

Nobody knows Sidney's last name but the whole course of the revolution would have been changed if it hadn't been for him.

Sidney was an American tourist visiting Santo Domingo when the fighting broke out. As you may remember, President Johnson sent in Marines to protect Americans who could possibly be hurt. Unfortunately, the evacuation went off so fast that in 24 hours there wasn't an American left in the capital except Sidney.

When Sidney showed up at the pier to be taken on board ship. He was stopped by a Marine colonel who said, "I'm sorry, you can't leave, sir."

"Why not?" Sidney wanted to know.

"Because" we've been sent here to protect Americans and you're the only American left. If you leave, we'll have to pull out."

"Nuts to that," said Sidney. "I want to get out of here. They got a bunch of crazy people in this town."

"My orders are to keep you here, sir. We made a mistake in evacuating the Americans too fast and now we need you more than you need us."

"That's not my problem." Sidney said. "I want to go on that ship out there."

Two Marine Sergeants raised their guns. "It's not possible, Sidney," the Colonel replied.

"If the OAS arrived and found no American here for us to protect we would be in a very sticky position. But you'll be perfectly safe. President Johnson is sending in 10,000 more troops to protect you."

"To protect me?"

Yes sir. We're going to build a nine-mile perimeter around you so nobody can get near you. I assure you nothing can go wrong."

Sidney took his bags and went back to the hotel.

The next morning he was visited by the general in charge of the paratroopers. "Are you okay, Sidney?"

"Yeah I'm okay. But I want to go home."

"Just be patient and everything will be all right."

While the general was talking a platoon set up a machine gun on the balcony. Two tanks were parked in front of the hotel and an anti-aircraft gun was placed on the roof.

"What's all that for?" Sidney wanted to know.

"Just to see that no one hurts you. You're very precious to us."

"Yeah, well, if I'm so precious why don't you get me the hell out of here?"

"We will as soon as we feel it's reasonably safe. For the moment you're the only humanitarian reason for our being here."

"I don't know what's going on, but all I know is I'm being held as a hostage."

"Sidney, have you ever heard of the Monroe Doctrine?"

"Yeah, I guess so."

"Well, you're part of it. Your name will go down in history books with Teddy Roosevelt and Adm. Dewey. When schoolteachers ask their pupils who saved the Dominican Republic from going Communist, the children are going to have to answer, 'Sidney.' "

Just then the phone rang. The general picked it up.

"It's the President, Sidney. He wants to speak to you."

"Yes, sir, Mr. President. No, I'm just fine. I'll stay here as long as you want me to. That's nice of you to say. You're a good American too."

[Excerpt from University of Cincinnati Law Review, Vol. 44, No. 4, 1975, p. 741]

PROTECTION OF AMERICANS ABROAD

*Raoul Berger**

Is the President empowered single handedly to launch hostilities for the protection of Americans abroad? The recent bombing of Cambodian territory by the Armed Forces in order to recapture the *Mayaguez* and its crew, which had been seized by Cambodian forces near an island claimed by Cambodia 60 miles off its shore,[1] is illustrative. Although such protective strikes thus far have been limited to helpless groups or weak, underdeveloped countries, these "precedents" raise the question whether a trigger-happy commander[2] or a headstrong President may undertake with equal alacrity the rescue of Americans taken in tow, for example, by a Russian gunboat. Is the nation entitled to a second look before it is plunged into an adventure so likely to propel it into war? The hosannas that greeted President Ford's vindication of our "manhood"[3] do not dispense with the need to examine the constitutional warrant for a course so fraught with disastrous possibilities.

Very flimsy scaffolding is afforded by the authorities generally cited by the executive branch. Secretary of State William P. Rogers, testifying before the Senate in 1971, stated that: "The origin of the notion, [first] set forth in the *Durand* case, that citizens have a right to protection abroad is unclear."[4] Certainly *Durand v. Hollins*[5] did not make it clear. That was a circuit court case decided by Justice Nelson in 1860; the suit was brought by an American citizen for damages arising from the bombardment of Greytown in Nicaragua by an American naval vessel. It was alleged that the

> community at Greytown had forcibly usurped the possession of the place, and erected an independent government, not recognized by the United States, and had perpetrated acts of violence against the citizens of the United States and their property, and had, on demand for redress, refused it . . . .

Acting under presidential orders, the commander "cause[d] the place to be bombarded and set on fire." Plaintiff's property loss by virtue

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* Charles Warren Senior Fellow in American Legal History, Harvard Law School; A.B., 1932, University of Cincinnati; J.D., 1935, Northwestern; LL.M., 1938, Harvard; LL.D., 1975, University of Cincinnati.

1. New York Times, May 15, 1975, at 1, col. 8.

2. *See* note 15 *infra* and accompanying text.

3. *See* Lewis, *Barbarous Piracy*, New York Times, May 15, 1975, at 43, col. 5.

4. *Hearings Before the Senate Committee on Foreign Relations on War Powers Legislation*, 92d Cong., 1st Sess., at 488 n.13 (1973). [hereinafter cited as *Hearings*].

5. 8 Fed. Cas. 111 (No. 4,186) (C.C.S.D.N.Y. 1860).

of the "protective" bombardment was held uncompensable, a result that would have delighted the soul of Jonathan Swift. Arthur Schlesinger relates that:

> The action roused a storm of protest. The *New York Times* condemned it as a violation of the congressional war-making power; Congress demanded a full report; and James Buchanan, the Minister to the Court of St. James's, told the British that the United States would disavow the action. But in the end the administration, though embarrassed and unhappy, felt it could not back down. Pierce finally defended the destruction of Greytown on the ground that it was "a pretended community, a heterogeneous assemblage gathered from various countries . . . not standing before the world in the attitude of an organized political society," and therefore to be treated as "a piratical resort of outlaws or a camp of savages."[6]

With good reason Schlesinger labeled this as a "privately disapproved and generally wretched episode";[7] it has not been cited in the cases since and is a malodorous precedent best forgotten.

Justice Nelson invoked the Executive power, that of the Commander in Chief, and the President's duty to "take care that the laws be faithfully executed," merely listing them without explaining how he derived the "protective" power. He cited no "law," *i.e.*, statute that authorized such hostile acts, but reasoned that the President alone can "carry on correspondence or negotiations with foreign nations."[8] "Negotiation" for the release of an American hardly extends to authority for bombardment to effectuate the release. No such authority is to be found in the words "Executive power" which, as will appear, merely comprehend the powers enumerated thereunder. Nor does the power of Commander in Chief authorize initiation of hostilities, for as President Buchanan observed (perhaps mindful of the earlier Greytown embarrassment): "Without the authority of Congress, the President cannot fire a hostile gun in any case except to repel the attacks of an enemy,"[9] thereby explaining the distribution of war powers in a nutshell.

Nelson too easily assumed that "the citizen abroad is as much entitled to protection as the citizen at home."[10] It is an alarming doctrine that an American, by choosing to sojourn or by venturing his property in foreign parts, can commit the nation to war for his rescue. The "general rule"

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6. A. SCHLESINGER, THE IMPERIAL PRESIDENCY 55-56 (1973).
7. *Id.* at 65.
8. 8 Fed. Cas. at 112.
9. 5 MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897 at 570 (J. Richardson ed. 1897). [hereinafter cited as MESSAGES AND PAPERS].
10. 8 Fed. Cas. at 112. The "same Justice Nelson who had so ardently defended executive power when the Pierce administration had destroyed Greytown," dissented from the Court's affirmance in the *Prize Cases* of Lincoln's blockade, on the ground that "Congress alone can determine whether war exists or should be declared." SCHLESINGER, *supra* note 6, at 65.

has been to the contrary.[11] The ransom of American fishing vessels seized on the high seas by Ecuadorian navy ships not long since testifies that where "organized political societies" are involved discretion has been the better part of valor. Britain's painstaking and successful negotiations with Uganda for the release of a British scientist under sentence of death on trumped up charges illustrate the value of keeping a diplomatic "cool."[12] If the American people are minded to go to war for the "protection" of citizens abroad, let the decision be made by the body to whom that determination is delegated—the Congress.

For all its shortcomings, *Durand* is at least a definite holding, whereas the other Rogers' citations represent the sheerest dicta about the right to protection without touching on whether that power is lodged in the President. Thus *The Slaughter House Cases*,[13] in order to repel the charge that the "privileges and immunities" clause of the fourteenth amendment would be made meaningless if state-granted privileges and immunities were excluded from the amendment's coverage, stated illustratively that a citizen

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11. Edwin Borchard stated:

> Many writers consider diplomatic protection a duty of the state, as well as a right. If it is a duty internationally, it is only a moral and not a legal duty . . . . Inasmuch as the state may determine in its discretion whether the injury to the citizen is sufficiently serious to warrant or whether political expediency justifies the exercise of the protective forces of the collectivity in his behalf, it is clear that by international law there is no legal duty incumbent upon the state to extend diplomatic protection. Whether such a duty exists toward the citizen is a matter of municipal law of his own country, the general rule being that even under municipal law the state is under no legal duty to extend diplomatic protection.

E. Borchard, The Diplomatic Protection of Citizens Abroad §15, at 29 (1915). These pages were cited by Rogers, *Hearings*, *supra* note 4, but they do not support his position. Later, however, Borchard, states that:

> Inasmuch as the Constitution vests in Congress authority "to declare war," and does not empower Congress to direct the President to perform his constitutional duties of protecting American citizens on foreign soil, it is believed that the Executive has unlimited authority to use the armed forces . . . for protective purposes abroad in any manner . . . .

Borchard, *supra*, § 195, at 452. Given that by his own testimony the "general rule" is to the contrary, we are entitled to be told where he derives contrary constitutional duties. Moreover, the power to "declare war," as will appear, is a power "to make and carry on war." That dispenses with the need of an authorization to Congress to limit presidential "protection" that amounts to war-making. Cognizant of such factors, Quincy Wright adds a qualification to Borchard's statement: "'[T]he manner' must not amount to a making of war." Q. Wright, The Control of American Foreign Relations 307 (1922).

12. The scientist was denied legal representation at his "trial"; General Amin escalated his demands as each not pacific response, at length insisting that the reply must be handed to him personally by the British Foreign Secretary himself. The Uganda radio reported Amin as saying, ". . . I want these people to kneel down to my feet." Nevertheless, Prime Minister Harold Wilson persisted in "a delicate diplomatic struggle" to save the Briton's life. New York Times, June 15, 1975, at 10, col. 3.

13. 83 U.S. (16 Wall.) 36, 79 (1873).

may "demand the care and protection of the Federal government" abroad, citing neither *Durand* nor any other authority. In another case, *In re Neagle*,[14] an officer appointed by the President to guard Justice Field against threats of injury by David Terry killed Terry in defense of Field. The Court, in search of authority, cited the 1853 Koszta incident. Martin Koszta, an expatriate Hungarian, who had filed a declaration of intention to become an American citizen, was taken on board an Austrian vessel at Smyrna by order of the Austrian consul general. Most European nations adhere to the doctrine of dual nationality, whereunder an expatriate remains a subject despite the acquisition of other citizenship. Acting entirely on his own, the commander of an American naval vessel trained his guns on the Austrians. To prevent bloodshed they agreed to deliver Koszta to the French consul general, subject to negotiations between the United States and Austria, which resulted in his release. A gold medal was voted to the naval officer by Congress; and it was against this background that the Court asked: "Upon what act of Congress . . . can any one lay his finger in support of the action of our government . . . ?"[15]

Thus the Court assumed the legality of the Koszta action without questioning whether it had constitutional warrant. There was in fact a statute, but it ran the other way. The Act of July 27, 1868 (now codified as 22 U.S.C. § 1732) directed the President to "use such means, *not amounting to acts of war*, as he may think necessary" to obtain the release of a wrongfully held American, and to communicate "all the facts and proceedings relative thereto . . . as soon as practicable" to Congress.[16] Congress wisely reserved to itself the decision whether to go to war for the release of a captive American.

President Ford merely advised Congress that the *Mayaguez* operation was "conducted pursuant to the President's constitutional Executive power and his authority as Commander in Chief."[17] He is not the first to turn to the "Executive power" as a reservoir of presidential power; the argument had been made by Alexander Hamilton in his *Pacificus* papers of 1793. Hamilton built upon the contrast between Article I, which pro-

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14. 135 U.S. 1, 64 (1890).

15. *Id.* *See* SCHLESINGER, *supra* note 6, at 55. A more bizarre incident was the kidnapping in 1904 of an American citizen, John Perdicaris, by Hamid Raisuli, "Sultan to the Berbers." President Theodore Roosevelt sent a cable to Morocco, "Perdicaris alive or Raisuli dead." A biographer of Roosevelt, Edmund Morris, writes: "This was more to impress the 1904 Republican convention [to which Roosevelt read the cable], which was considering his nomination for another term, than Raisuli, who, as Roosevelt well knew, had already released Perdicaris anyway." Morris, *Does Teddy Roosevelt Really Deserve This?*, New York Times, June 15, 1975, § D, at 17, col. 7. This, William Safire comments, "showed the world and the American voter that he was not a leader to be trifled with"! *Id.*, May 15, 1975, at 43, col. 1.

16. Act of July 27, 1868, ch. 249, § 3, 15 Stat. 224 (emphasis added).

17. New York Times, May 16, 1975, at 15, col. 1.

vides that "[a]ll legislative powers herein granted shall be vested in a Congress," and Article II, which declares that "the Executive power shall be vested in a President," brushing aside the enumeration of specific presidential powers that followed as not "derogating from the more comprehensive grant in the general clause."[18] This was poles apart from his efforts in *The Federalist No. 69* to reassure those who had an "aversion" to monarchical power by minimizing the scope of each of the *enumerated* powers —for example, the power to receive ambassadors "is more a matter of dignity than of authority. It . . . will be without consequence. . . ."[19] He emphasized all along the line that the President had far less power than the King of Great Britain, or indeed than some state governors. All of this is at war with his subsequent claims of unenumerated additional powers. Hamilton's view was picked up by Chief Justice Taft in *Myers v. United States*,[20] over the dissents of Justices Holmes and Brandeis, and was later rejected in the *Steel Seizure Case*.[21]

Because this expansive view of the "Executive power" has by dint of constant repetition come to exercise an almost hypnotic spell, I may be indulged for telescoping some of the historical data which undercut it. That the term "Executive power" was not conceived as a bottomless well into which the President could dip without limit was made clear by Madison's emphasis that preliminarily it was essential "to *fix the extent* of Executive authority . . . as certain powers . . . *must be given* to that department," adding that the Executive power "shd. be *confined and defined*."[22] The subsequent sparse enumeration of executive powers attests that it was so "confined and defined." In truth, the Executive power was viewed in very modest terms. Although James Wilson was the "leader of the 'strong

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18. 4 A. Hamilton, Works of Alexander Hamilton 438-39 (H. Lodge ed. 1904). This was the complete reverse of the views he had promulgated in *The Federalist*. After a minute analysis of several of the enumerated powers, downgrading them in order to counter "the aversion of the people to monarchy," Hamilton stated that nothing was "to be feared" from an Executive "with the confined authorities of a President." The Federalist No. 67, at 436; No. 71, at 468 (Modern Lib. ed. 1937)(A. Hamilton) [hereinafter cited as The Federalist]. And he concluded that "the *only remaining powers*" are convening, adjourning, giving information to Congress, and the like. *Id.* No. 77, at 501 (emphasis added). A far cry from a bottomless "Executive power."

19. The Federalist No. 69, *supra* note 18, at 451.

20. 272 U.S. 52, 128 (1926). For the Holmes-Brandeis comments, *see id.* at 177, 292.

21. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). For the remarks of Justices Black, Frankfurter, Douglas and Jackson, *see id.* at 587, 610, 633, 640-41.

22. 1 M. Farrand, The Records of the Federal Convention of 1787, 66-67, 70 (1911) (emphasis added). Charles Pinckney stated in South Carolina: "[W]e have defined his powers, and bound them to such limits as will effectually prevent his usurping authority . . . ." 4 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 329 (1936). *See also* Hamilton, *supra* note 18.

executive' party,"[23] the "only powers he conceived strictly Executive were those of executing the laws, and appointing officers. . . ."[24] His view was shared by Roger Sherman and others,[25] and was repeated in the Ratification Conventions.[26] Moreover, the *enumeration* of powers itself had a clear and special meaning for the Founders, happily explained by Madison in *The Federalist No. 41:*

> For what purpose could the enumeration of particular powers be inserted, if these *and all others* were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning . . . is an absurdity. . . .[27]

The same point was made in the Virginia Ratification Convention by Governor Edmund Randolph. Defending the Constitution against the unremitting onslaught of Patrick Henry, he said that the powers of government "are enumerated. Is it not, then fairly deducible, that it has no power but what is expressly given it? —for if its powers were to be general an enumeration would be useless."[28] Again and again these limits were stressed;[29] let another quotation—from Lee in Virginia—suffice: "When a question arises with respect to the legality of any power, . . . [the question will be]: *Is it enumerated* in the Constitution? . . . It is otherwise arbitrary and unconstitutional."[30] Justice Jackson therefore had ample reason to reject the view that "this [executive power] clause is a grant in bulk of all conceivable executive power but [to] regard it as an allocation to the presidential office of the generic powers thereafter stated."[31]

Among the powers thus enumerated under the Executive power is that of "Commander in Chief." These three words constitute the *sole* textual

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23. E. Corwin, The President: Office and Powers 11 (3d ed. 1948).

24. Farrand, *supra* note 22, at 66.

25. *Id.* at 65. "Mr. Pinckney was for a vigorous Executive but was afraid the Executive powers of [the existing] Congress might extend to peace and war etc. which would render the Executive a Monarchy, of the worst kind . . . ." *Id.* at 64-65.

26. For citations, see R. Berger, Executive Privilege: A Constitutional Myth 52-53 (1974).

27. The Federalist No. 41, *supra* note 18, at 269 (emphasis added). Compare with Chief Justice Taft's statement: "The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate . . . ." Myers v. United States, 272 U.S. 52, 118 (1926).

28. 3 Elliot, *supra* note 22, at 464.

29. *See* Berger, *supra* note 26, at 58-59.

30. 3 Elliot, *supra* note 22, at 186 (emphasis added). What the ratifiers said during the ratification process "shows a stringent reading of the President's enumerated grants of authority and no intent to give him non-enumerated powers." Reveley, *Constitutional Allocation of the War Powers Between the President and Congress: 1787-1788*, 15 Va. J. Int'l Law 73, 143 (1974).

31. 343 U.S. at 641.

reference to presidential war powers. As Commander in Chief, Washington had been kept under a tight rein by the Continental Congress;[32] and the early State Constitutions had made the function subject to law, that is, to governance by the legislature.[33] Distrust of Executive power and executive war-making makes it altogether unlikely that the Framers meant to enlarge these powers; there are in fact indications to the contrary. Hamilton, anxious to dispel "aversion" to monarchical powers and to counter opposition which saw in the President "the full-grown progeny, of that detested parent," downgraded all executive powers and said that as Commander in Chief the President's authority would "amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral. . . ."[34] "But generals and admirals," as Professor Louis Henkin observed, "even when they are 'first,' do not determine the political purposes for which troops are to be used; they command them in the execution of policy made by others."[35] Ample confirmation is furnished by the records of the several Conventions.

To Congress was given the power of "declaring war" plus, as James Wilson stated, "the other powers naturally connected with it."[36] Justice Story commented that "a power to declare war is a power to make, and carry on war,"[37] and so the constitutional history demonstrates. Roger Sherman voiced the prevailing view when he said that the "Executive should be able to repel and not to commence war,"[38] and it was presumably in furtherance of this view that Madison and Gerry proposed to "leave" to the President power "to repel sudden attacks,"[39] a proposal that was superfluous if the President enjoyed sweeping powers, but which harmonizes with Madison's emphasis that the Executive powers must be "confined and defined." Nor did the Founders leave us in the dark as to why they conferred such limited power on the President. It is, said Madison, an "axiom that the executive is . . . distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this

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32. The instruction drafted by John Adams, R. H. Lee and Edward Rutledge for the Continental Congress directed Washington "punctually to observe and follow such orders and directions . . . as you shall receive from this or a future Congress . . . ." *Hearings*, *supra* note 4, at 29.

33. For citations, *see* BERGER, *supra* note 26, at 62 n.14. In THE FEDERALIST No. 74, *supra* note 18, at 481-82, Hamilton stated concerning the designation of the President as Commander in Chief of the state militia "*when called into the actual service* of the United States," that it is "consonant to the precedents of the State Constitution in general . . . ." (emphasis added).

34. *See* THE FEDERALIST No. 67, *supra* note 18, at 436 and No. 69, at 448. *See also* note 18 *supra*.

35. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 50-51 (1972).

36. 1 J. WILSON, WORKS OF JAMES WILSON 433 (R. McCloskey ed. 1967).

37. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 428, at 327 (5th ed. 1905).

38. 2 FARRAND, *supra* note 22, at 318.

39. *Id.*

propensity of its influence."[40] The object, in Wilson's homespun phrase, was to prevent a "single man" from hurrying us into "such distress."[41] "Those who are to *conduct* a war," said Madison, "cannot in the nature of things, be the proper or safe judges, whether a war ought to be commenced, continued or concluded."[42] Such was the "original understanding," a view shared by a roster of eminent scholars—Henry Steele Commager, Alpheus T. Mason, Rudd J. Barthelt, Alexander Bickel and Richard Morris.[43] As Professor Henkin summed up: The "Constitution gave Congress the power to decide . . . whether the nation shall or shall not go to war."[44] The executive branch, to my knowledge, has never maintained that it can draw on the "original understanding" for solo war-making power.[45]

Instead it has relied on a series of tattered incidents[46]—such as Greytown, which Edward Corwin said involved fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts (to "protect" citizens), the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border[47]—that posed no possibility of war because of the vast disparity of power. These incidents have been so thoroughly deflated by Francis Wormuth[48] as to dispense with another going-over. Be it assumed that these "precedents" have greater force than has been attached to them by scholars, they yet cannot prevail against the "original intention" of the Founders. No power was given the President unilaterally to revise the Constitution in order to reallocate congressional power to himself. In the words of the great advocate of expansive Executive power, Hamilton, an "agent cannot new model his own commission. A treaty [much less the President] cannot transfer the legislative power to the executive department."[49] If it be suggested that the case is improved

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40. 6 J. MADISON, WRITINGS OF JAMES MADISON 138, 174 (G. Hunt ed. 1906).

41. 2 ELLIOT, *supra* note 22, at 528.

42. MADISON, *supra* note 40, at 148 (emphasis added).

43. *See Hearings*, *supra* note 4, at 18-20, 79-81, 234, 550-51; *Hearings on United States Commitments to Foreign Powers and Hearings Before the Senate Committee on Foreign Relations*, 90th Cong., 1st Sess., at 9-10 (1967). For documentation *see* HENKIN, *supra* note 35, at 35; Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1972); Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972); Reveley, *supra* note 30, at 73.

44. HENKIN, *supra* note 35, at 80.

45. *Compare* the statement, "In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States." Department of State, Office of Legal Advisor, *The Legality of United States Participation in Vietnam*, 75 YALE L.J. 1085, 1101 (1966).

46. *See* Secretary of State Dean Acheson's justification for Truman's entry into the Korean War, D. ACHESON, PRESENT AT THE CREATION 414-15 (1969).

47. CORWIN, *supra* note 23, at 241-15.

48. Wormuth, *The Vietnam War: The President Versus the Constitution*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 711 (R. Falk ed. 1969). *See also* Berger, *supra* note 26, at 75-88.

49. 6 HAMILTON, *supra* note 18, at 166.

by congressional acquiescence, Congress may not abdicate its power.[50] A redistribution of constitutional grants was reserved by the people to themselves, through the mechanism of an amendment.

A few statements by revered contemporaries of the Constitution will confirm the "original understanding." In 1805 Spain disputed the boundaries of Louisiana; President Jefferson advised Congress that Spain evidenced an "intention to advance on our possessions . . . . Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force . . . ." [51] President Madison advised Congress in 1812 of British outrages—impressment of American seamen, seizure of American shipping—[52] and of the failure of remonstrances, and said that if we are to employ force, the Constitution "wisely confides" the decision to Congress.[53] To spare the reader cumulative evidence, let me close with the 1859 statement made by President Buchanan in the very frame of protection of citizens abroad. He recommended "to Congress the passage of a law authorizing the President to employ the naval force . . . for the purpose of protecting the lives and property of American citizens passing in transit across the Panama . . . routes . . . ." [54] Shades of Greytown! And in due course the Act of July 27, 1868, provided such authorization, but limited it to means "not amounting to acts of war."

It remains to notice an escape hatch sought from time to time in claims of inherent presidential power. Thus Mr. Roderick Hills, counsel to President Ford, stated that "the inherent right of the President to use war powers to protect lives and property had not been challenged." [55] A similar "inherent right" was not merely "challenged" but rejected when it was invoked by President Truman for the seizure of the strike-bound steel mills during the Korean War. There it was the interests of the nation rather than those of an American individual that Truman sought to protect. Nevertheless, Justice Jackson, in what is considered his finest opinion, stated that the Framers "made no express provision for the exercise of extraordinary authority because of a crisis." "[E]mergency powers," he said, "are consistent with free government only when their control is lodged elsewhere than in the executive who exercises them" [56]—that is, in Congress. It is incongruous to attribute to a generation so in dread of executive tyranny an intention to give to a newly created executive a blank

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50. Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935).

51. 1 MESSAGES AND PAPERS, *supra* note 9, at 389.

52. H. HOCKETT, POLITICAL AND SOCIAL HISTORY OF THE UNITED STATES: 1492-1828 at 311 (1925).

53. MESSAGES AND PAPERS, *supra* note 9, at 505. *See also* note 59 *infra* and accompanying text.

54. MESSAGES AND PAPERS, *supra* note 9, at 569.

55. New York Times, May 15, 1975, at 1, col. 3.

56. 343 U.S. at 650, 652.

check, and this at the very moment when it was cautiously enumerating the powers that were being granted, down to the veriest trifle—the express authorization to "require the Opinion, in writing" of each Department head which, as Justice Jackson stated, "would seem to be inherent in the Executive if anything is."[57] To invoke "inherent" power is to confess that there is no explicit grant, no foundation for a claim of implicit grant, and to assert a claim to power not conferred.

Much ado was made by various members of Congress about President Ford's failure to "consult" with the Congress before launching the *Mayaguez* attack. Consultation, in my judgment, is at best a weak reed. Even where the Senate is a partner on equal terms in the making of a treaty, the "consent" of the Senate to a treaty is required. So clear was the predominant and exclusive role of Congress in war-making that the Founders felt no need to spell out the requirement of "consent" in the text. Some forty years after the adoption of the Constitution Justice Story stated that "[t]he power of declaring war is . . . so critical and calamitous, that it requires the utmost deliberation and the successive review of all the councils of the nation."[58] It is high time to act on the counsel of Madison, architect of the Constitution and preeminently fitted to interpret it:

> Every just view that can be taken of this subject, admonishes the public of the necessity of a rigid adherence to the simple, the received, and the fundamental doctrine of the constitution, that the power to declare war, including the power of *judging the causes* of war, is fully and exclusively vested in the legislature; that the executive has no right, *in any case*, to decide the question, whether there is or is not cause for declaring war; that the right of convening and informing congress, whenever such a question seems to call for a decision, *is all the right* which the constitution has deemed requisite or proper . . . .[59]

That this was indeed the "received, and the fundamental doctrine" is confirmed by a remarkable and all but unnoticed decision by Justice William Paterson, who had been a leading member of the Constitutional Convention. His decision in *United States v. Smith*[60] was rendered on circuit during Jefferson's presidency; it arose out of an expedition outfitted in the United States by Francisco de Miranda, who was dedicated to freeing South America from Spanish hegemony. Certain prominent Americans who abetted him were charged with violating the Neutrality Act, and defended that they acted with Jefferson's approbation. They argued that in "limited circumstances . . . the president can authorize hostilities without congressional declaration of war." Government counsel replied that the "power of *making war*" was "*solely* and *exclusively*" in Congress; that, in the paraphrase of Professor Robert J. Reinstein, "no amount of hostilities by

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57. *Id.* at 641 n.9. *See also* THE FEDERALIST No. 74, *supra* note 18, at 482.
58. 2 STORY, *supra* note 37, § 1171, at 92.
59. MADISON, *supra* note 40, at 174 (emphasis partially added).
60. 27 F. Cas. 1192 (No. 16, 342) (C.C.N.Y. 1806).

the Spaniards short of actual invasion could authorize the president to declare the country to be in a state of *de facto* war." [61] On this state of facts, Justice Paterson held that the "power of making war" is "exclusively vested in Congress," that the President has a right

> to repel an invading foe. But to repel aggressions and invasions is one thing, and to commit them against a friendly power is another. . . . There is a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province of congress to change a state of peace into a state of war. A nation, however, may be in such a situation as to render it more prudent to submit to certain acts of a hostile nature, and to trust to negotiations for redress, than to make an immediate appeal to arms . . . . [A]nd, therefore, the organ intrusted with the power to declare war, should first decide whether it is expedient to go to war, or to continue in peace; and until such a decision be made, no individual ought to assume an hostile attitude; and to pronounce contrary to the constitutional will, that the nation is at war, and that he will shape his conduct and act according to such a state of things. This conduct is clearly indefensible, and may involve the nation . . . in all the calamities of a long and expensive war.

If "Congress does not choose to go to war," said Paterson, "where is the individual among us who could legally do so without their permission?" [62]

Presidents Jefferson, Madison and Buchanan acted on this counsel. It was expressed in the Act of 1868, which only authorized means short of war for the release of captive Americans, and it is a counsel that Congress and the American people must take to heart if they hope to avoid another Vietnam quagmire. Power grows by what it feeds on; to condone unauthorized expansion of power is to weaken constitutional bonds and undermine our democratic society.

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61. Reinstein, *An Early View of Executive Powers and Privileges: Trial of Smith and Ogden*, 2 HASTINGS CONST. L.Q. 309–10, 316, 318–19 (1975). The case was virtually unnoticed until brought to light by Professor Reinstein.

62. 27 F. Cas. at 1230-31.

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Curbing The Dog of War:

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The War Powers Resolution

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DONALD E. KING*
ARTHUR B. LEAVENS**

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.

—*Thomas Jefferson*

INTRODUCTION

America's long involvement in Vietnam marked the unhappy climax of a steady growth of independent presidential power to commit American forces to combat. Neither congressional nor public opposition proved capable of forcing an end to United States involvement in that conflict. Consequently, Congress felt compelled to assert greater control over future United States military involvements. In 1973, over President Nixon's veto, the War Powers Resolution was enacted.[1]

This article will develop a theory of the constitutional allocation of the war power and apply it to the provisions of the War Powers Resolution. Examination of the constitutional text and analysis of the respective

*J.D. Harvard Univ. 1976, Member of the Virginia Bar.
**J.D. Harvard Univ. 19[illegible], Member of the Massachusetts Bar.

1. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

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powers of the President and Congress will suggest the division of all United States military activity into three categories: "peacetime deployments," "war threatening actions," and "acts of war." It will be shown that military actions in the first category are controlled exclusively by the President, in the second are controlled both by the President and by Congress through political interaction, and in the third are implemented by the President but require congressional authorization to be constitutionally valid. With respect to those uses of force requiring congressional authorization, three types of authorization will be distinguished —express, implied, and presumed—each of which may in specified circumstances satisfy the constitutional requirement that Congress authorize acts of war. Finally, this constitutional theory will be applied to the provisions of the War Powers Resolution. While it will be demonstrated that the Resolution suffers from a number of constitutional infirmities, it will also be shown that certain aspects of the Resolution legitimately enhance Congress' ability to control war.

THE CONSTITUTIONAL SETTING

Despite the extensive treatment which the allocation of the war power receives in the Constitution,[2] the complete constitutional scheme for that allocation is difficult to discern. Congress is expressly entrusted with the power to declare war[3] and to establish and maintain the armed forces,[4] and courts and commentators alike have taken this to mean that war must have some form of congressional authorization to be constitutionally valid.[5] On the other hand, the President as Commander-

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2. For a compendium of the various constitutional provisions relating to the war power, see the appendix to the district court's opinion in Orlando v. Laird, 317 F. Supp. 1013, 1020–21 (E.D.N.Y. 1970).

3. U.S. Const. art. I, § 8, cl. 11. Note that this clause of the Constitution includes within congressional control the lesser forms of combat which are authorized by means of "Letters of Marque and Reprisal."

4. U.S. Const. art. I, § 8, cls. 1, 12, 13, 15. Note not only Congress' power to provide for an army and navy, but also its analogous power to put the states' militia at the command of the President in cases of national emergency.

5. Although many commentators during the Vietnam era disputed this assertion, *see, e.g.*, Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 Texas L. Rev. 833 (1972); Monaghan, *Presidential War-Making*, 50 B.U. L. Rev. 19 (Special Issue 1970), few, if any, courts have taken seriously the idea that Congress need not authorize war. *See, e.g.*, Mitchell v. Laird, 488 F.2d 611, 614 (D.C. Cir. 1973); DeCosta v. Laird, 471 F.2d 1146, 1156 (2d Cir. 1973); Orlando v. Laird, 317 F. Supp. 1013, 1018 (E.D.N.Y. 1970). This issue thus seems resolved. For an extensive analysis of it, *see* Note, *Congress, The President, and The Power to Commit Forces to Combat*, 81 Harv. L. Rev. 1771 (1968).

in-Chief has actual command of the armed forces[6] and is thereby effectively empowered to order without congressional authorization military actions which might threaten or even provoke war. In their logical extension, therefore, the powers of Congress and of the President appear to conflict. This article will demonstrate, however, that this apparent conflict results not in clashes of authority which are beyond resolution but in a mutual limitation of the respective powers of Congress and the President.

The General Scheme

Since only Congress can authorize United States participation in war, a threshold task is to ascertain the meaning of "war" as a constitutional term of art. The cases which have explored the issue have concluded that "war" means different things in different contexts.[7] Only a few early courts addressed this definitional question in the context of determining the constitutionality of a particular use of force. These courts defined war in very sweeping terms,[8] including within its ambit, for example, the limited naval skirmishes between the United States and France from 1798 to 1800.[9] This broad approach resulted from a formalistic view of warfare which recognized relatively few modes of international conflict,[10] a view inadequate to comprehend the variety of modern uses of armed force.[11]

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6. U.S. CONST. art. II, § 2. Note that the armed forces assigned to the President's tactical command include the militia of the states when they are called into the nation's service.

7. For a good summary of the various contexts in which war has been defined see Note, *supra* note 5.

8. *E.g.*, Prize Cases, 67 U.S. (2 Black) 635, 666 (1862) ("War has been well defined to be, 'that state in which a nation prosecutes its right by force.' "); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40 (1800) ("[E]very contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war.").

9. *E.g.*, Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).

10. *See* Note, *supra* note 5, at 1774. *Compare with* Johnson v. Eisentrager, 339 U.S. 763, 772 (1950).

11. As early as 1853, a significant naval force consisting of four men-of-war was used to "encourage" the Japanese to negotiate a commercial treaty with the United States. American troops were very active in China and the Philippines at the turn of the century, insuring that United States trade interests were protected. And throughout the twentieth century the Marines have played varying roles in "stabilizing" Latin America, at one point fighting Communist-backed insurgents in Nicaragua for over seven years, from 1926 through 1933.

More recently, Presidents have felt free to use shows of force to dissuade political or military actions inimical to American interests. In 1961, President Kennedy ordered the Navy to take positions just off the coast of the Dominican Republic in order to discourage

A more limited concept of "war" emerges from the extensive litigation surrounding United States involvement in Vietnam. The courts which reviewed the Vietnam conflict held that it was a "war" in the constitutional sense,[12] but they did so only because that conflict exhibited two characteristics: first, the size and duration of the United States military commitment was great,[13] and second, the United States military activity was directed against a foreign nation.[14]

These two characteristics of the Vietnam conflict provide a starting point for defining "war" generally. For convenience sake, the size and duration of a military action will be referred to as its "magnitude" and the degree to which a military action is directed against the interests of another nation will be referred to as its "political content."[15]

The first of these two characteristics — the magnitude of commitment — was the focus of extensive treatment by the courts,[16] and needs no further explanation. The second — the political content of the commitment — was not expressly referred to by most Vietnam courts, but is implicit in their decisions given the recognized nature of the military

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the brothers of the late dictator Rafael Trujillo from staging a coup. Six years later, in 1967, President Johnson stationed a large task force within fifty miles of the Syrian coast for the purpose of discouraging Soviet intervention in the Arab-Israeli War. *See War Without Declaration, A Chronological List of 199 U.S. Military Hostilities Abroad Without a Declaration of War, 1796–1972*, 119 Cong. Rec. S14174, S14178–S14181 (July 20, 1973) [hereinafter *War Without Declaration*].

12. *See, e.g.*, Mitchell v. Laird, 488 F.2d 611, 614 (D.C. Cir. 1973); DeCosta v. Laird, 471 F.2d 1146, 1156 (2d Cir. 1973); Orlando v. Laird, 317 F. Supp. 1013, 1018 (E.D.N.Y. 1970). A few courts declined to determine whether war actually existed, holding that issue to be essentially a political question. *See* Massachusetts v. Laird, 451 F.2d 26, 33 (1st Cir. 1971); Velvel v. Johnson, 287 F. Supp. 846, 852 (D. Kan. 1968).

13. *See* note 16 *infra*.

14. Although United States military actions in Vietnam were characterized initially as assistance to South Vietnam, they were nevertheless directed against the Viet Cong and the North Vietnamese. *See* notes 17 and 18 *infra*. Generally, a use of force for the benefit of one government or political entity will be at the same time directed against the interests of another.

15. The word nation is used loosely here. It should be construed to include not only established governments but also insurgent groups. Thus military actions directed against revolutionary forces could have a "political content" similar to actions directed against an established government. Generally, "political content" echoes, though it does not depend for its validity upon, the distinction in international law between humanitarian and other interventions. *See* Humanitarian Intervention and the United Nations (R. Lillich ed. 1973).

16. *E.g.*, Mitchell v. Laird, 488 F.2d 611, 614 (D.C. Cir. 1973) (magnitude and duration of hostilities); Berk v. Laird, 429 F.2d 302, 305 (2d Cir. 1970) (prolonged military activity); Orlando v. Laird, 317 F. Supp. 1013, 1018 (E.D.N.Y. 1970) (magnitude in size and duration); Berk v. Laird, 317 F. Supp. 715, 718 (E.D.N.Y. 1970) (number of men, number killed and wounded, amount of equipment and money expended).

activity there in question.[17] It is necessary to consider political content for an adequate definition of war because magnitude alone is insufficient. Large-scale military activity may be essentially peaceful while small-scale military activity may constitute war. For example, United States troop presence in Western Europe and United States naval presence throughout the world both involve large-scale prolonged commitments of men and materials but neither constitute war. Conversely, a single aircraft bombing raid on a foreign capital or a single battalion invasion of a small nation for the purpose of territorial expansion would involve a relatively small-scale use of force but would be so hostile as clearly to constitute war.

This attempt to define war in terms of magnitude and political content is supported both by the intent of the Framers of the Constitution and by the practical realities of representative government.[18] It was the intent of the Framers that massive economic and physical sacrifice by the nation in a military conflict be possible only with the approval of Congress, the branch of government most broadly representative of the will of the people,[19] and it can be inferred that it was similarly their intent that the drastic moral and legal consequences of hostile action by the United States against another nation require the broad based support of congressional approval.[20] In terms of the practical needs of representative government, a costly and bitter struggle cannot be waged

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17. *See, e.g.*, DeCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973), where the military action reviewed by the court was the mining of Haiphong harbor. In addition, American courts which have defined "war" as a contest between sovereigns or between political entities implicitly recognize the significance of "political content." Prize Cases, 67 U.S. (2 Black) 635 (1862); Lewis v. Ludwick, 46 Tenn. (6 Cold.) 368, 373 (1869); Brown v. Hiatt, 4 F. Cas. 384, 388 (1870); Taffs v. U.S., 208 F.2d 329, 331 (8th Cir. 1953); U.S. v. Bortlik, 122 F. Supp. 225, 227 (D. Pa. 1954); Commercial Cable Co. v. Burleson, 255 F. 99, 105 (S.D.N.Y. 1919); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40 (1800).

18. *See, e.g.*, Note, *supra* note 5, at 1775.

19. *See* 2 M. Farrand, The Framing of the Constitution 318–19 (2d ed. 1937), where the Convention debated vesting Congress with the power to declare war. Although the debate was very brief, the comments of the Framers in combination with the easy passage of the Declare Clause make it plain that the Convention wanted to keep the power to initiate wars as close to the people as possible. Indeed, Thomas Jefferson wrote to James Madison after the Convention, saying, "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." 15 Papers of Jefferson 397 (J. Boyd ed. 1955). Note also the comments of Alexander Hamilton, the leading advocate of executive power, where he argued that only Congress should have the power to initiate war. VII A. Hamilton, Works 745–48 (J. Hamilton ed. 1801), *quoted in* Note, *The War-Making Powers: The Intentions of the Framers in the Light of Parliamentary History*, 50 B.U.L. Rev. 5, 15 (Special Issue 1970).

20. *See* note 19 *supra*; *see also* Justice Taney's comments on the nature of the war power in Fleming v. Page, 50 U.S. (9 How.) 603, 614–15 (1850).

successfully by the government of a free society without the support of its people.[21]

While the Vietnam cases indicate the two characteristics of military activity which are critical in the constitutional definition of war, they do not establish the precise point at which a particular use of force becomes sufficiently large-scale and sufficiently threatening to another nation to be considered war.[22] Indeed, given the variety of military action and of circumstances calling for such action, specification of such a point is not possible. Uses of force do not divide neatly into those that are war and those that are not. Instead, all uses of force demonstrate some degree of both magnitude and political content. This is true of even the most innocuous military maneuver. For example, deployment of troops within the borders of the United States would certainly have some magnitude, and it equally would convey some message to the international community concerning American military or foreign policy intentions.[23] With all uses of force reflecting both magnitude and political content, it follows that peacetime deployments shade imperceptibly into actions which threaten war, and actions which threaten war shade in turn into acts of war.

Since a precise definition of war is impossible, it becomes necessary to determine how the Constitution allocates control over those uses of force which are not so large-scale and so threatening to another nation as clearly to constitute war. A partial answer to this question is provided by delineation of those military actions so far removed from war that they are within the exclusive control of the President.

As Commander-in-Chief the President has two types of command authority. The first is the authority to direct the military in time of war and the second is the authority to deploy troops during peacetime. The President's wartime command authority is beyond question[24] and thus needs no elaboration, but his peacetime command authority raises some difficult questions and will therefore be explored in detail. Although there is virtually no case law on the subject,[25] it seems clear from the

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21. *See* Note, *supra note* 5, at 1775.

22. *See* note 12 *supra*.

23. In 1865, 50,000 troops were sent to the U.S.-Mexican border to back up the protest by Secretary of State Seward of the presence of 25,000 French troops in Mexico. In February 1866, Seward demanded that a definite date for withdrawal be set and France complied. *War Without Declaration*, *supra* note 11, at S25068.

24. Johnson v. Eisentrager, 339 U.S. 763, 789 (1950); DeCosta v. Laird, 471 F.2d 1146, 1154 (2d Cir. 1973).

25. The only courts which even mention the President's command authority do so

text of the Constitution that the President may deploy and maneuver troops when the nation is not engaged in war. The Commander-in-Chief Clause makes no mention of war or peace, simply giving command of the nation's armed forces to the President. If the Framers had wanted to limit the President's use of force to times of war they could have done so through an express limitation such as that imposed on the States. Under the Constitution, States may only use force during times of actual invasion or "imminent danger as will not admit of delay."[26] No such explicit limitation attaches to the President's authority. Indeed, the Framers of the Constitution realized that as long as a military force exists, in peace as well as in war, some branch of government must exercise command authority over it. It was as obvious to the Framers as it is today that the President is best suited to fill that role.[27] Peacetime command of the armed forces is therefore assigned to the President by the Constitution, both with respect to standing armed forces and with respect to militia in service of the national government.[28]

It is this peacetime command authority of the President which creates the potential for conflict with the authority of Congress to control war, since a peacetime use of force might under certain circumstances threaten or even provoke war.[29] This potential is enhanced by the practice of employing peacetime maneuvering of military forces as an integral tool of foreign policy.[30] While the power over foreign affairs is nominally divided between the President and Congress,[31] the institu-

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very perfunctorily, usually with regard to wartime tactics. Johnson v. Eisentrager, 339 U.S. 763, 789 (1950); DeCosta v. Laird, 471 F.2d 1146, 1154 (2d Cir. 1973). *Compare with* Berk v. Laird, 429 F.2d 302, 305 (2d Cir. 1970).

26. U.S. Const. art. I, § 10, cl. 3.

27. *See* 1 M. Farrand, *supra* note 19, at 112. *See also* Hamilton, *The Federalist No. 74*, The Federalist 379 (M. Beloff ed. 1948). For modern commentary noting the advantages of executive control of the military, *see, e.g.*, Rostow, *supra* note 5.

28. U.S. Const. art. II, § 2. *Compare with* Johnson v. Eisentrager, 339 U.S. 763 (1950); Massachusetts v. Laird, 451 F.2d 26, 32 (1st Cir. 1971).

29. It is also possible that presidential selection of wartime "tactics" could impermissibly expand the scope of an authorized war. The court in DeCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973), indicated that a radical change in character of the Vietnam War, such as indiscriminate bombing of civilians, might require separate congressional authorization. But the court rejected the plaintiff's claim that the 1972 mining of North Vietnamese harbors was such a radical escalation that it necessitated specific approval by Congress, *id.* at 1156.

30. See examples cited *supra* note 11. Some commentators have suggested that the foreign affairs powers and the war power are so integrally related that they cannot be meaningfully distinguished. *See, e.g.*, Monaghan, *supra* note 5, at 33, where the Vietnam War is seen as "an instrument of presidential foreign policy."

31. In the conduct of foreign affairs, the President is assigned a basically active role (appointing ambassadors, receiving foreign ministers and making treaties, U.S. Const.

tional advantages of the unitary executive over the legislature produce a recognized ascendency of the President in foreign affairs.[32] Were there an unlimited presidential power to use the military as a tool of foreign policy, congressional control over war making would be rendered nugatory.[33] Since the Framers could not have intended such a result, the scope of the President's peacetime command authority must be limited by the countervailing congressional power to control war. Thus the President has exclusive control only over those military actions which in no way threaten war, actions referred to hereafter as "peacetime deployments."

It is impossible to define peacetime deployments precisely just as it is impossible to define war precisely. However, as is the case with war, the considerations of magnitude and political content indicate those military actions which without question constitute peacetime deployments. Just as large-scale military actions which threaten another nation epitomize war, small-scale apolitical actions epitomize peacetime deployments. The latter are likely to involve very limited physical and economic sacrifice and similarly limited moral and legal consequences. The purposes which would be served by congressional approval in such cases are clearly outweighed by the value of presidential control over the tactics and strategies appropriate for achieving limited apolitical objectives.

An example of a peacetime deployment might be the dispatch of a fleet to the North Atlantic for a NATO training exercise or of a detachment of troops to protect an American Embassy in Europe from terrorists.[34] Although both of these uses of force have some potential for

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art. II, §§ 2, 3) while the Congress operates to oversee and limit the President (through appropriations. U.S. Const. art. I, §§ 1, 7, and through the requirement that the Senate ratify treaties and approve ambassadorial appointments. U.S. Const. art. II, § 2). Congress has an independent role, of course, in the regulation of foreign commerce. U.S. Const. art. I, § 8.

32. From the earliest stages of American history, it has been recognized that the institutional advantages of the presidency effectively insure that the President would assume primacy over the conduct of foreign affairs. *See* Remarks of Justice Marshall delivered to the House of Representatives (1800), *quoted in* United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 319 (1936). This view of the President's power has not diminished but rather grown in the context of modern times. In 1936, the Supreme Court in *Curtiss-Wright* asserted, albeit in dictum, that "the President alone has the power to speak or listen as a representative of the nation." 299 U.S. at 319. *See also* Monaghan, *supra* note 5, at 22.

33. Berk v. Laird, 429 F.2d 302, 305 (2d Cir. 1970).

34. A distinction should be made between terrorists like the Baader-Meinhoff Gang, who demonstrate no political connections, and terrorists like those of the Palestinian Liberation Organization, who have some affiliation with a recognized or extant political

confrontation and the firing of shots, they are sufficiently small-scale and apolitical to constitute peacetime deployments under the exclusive control of the President.

But few uses of the military are so clearly limited and apolitical. Most contain the seeds of broader conflict. These uses of force are neither peacetime deployments nor acts of war but instead constitute "war threatening actions." Figure I illustrates graphically these three categories of military activity.

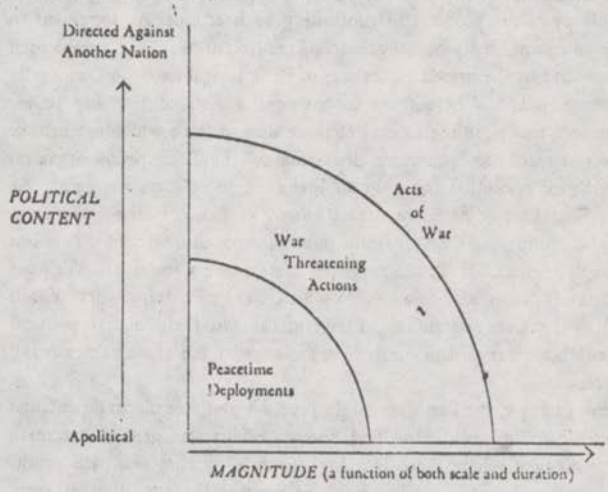


FIGURE I

The large category of military activity which constitutes "war threatening actions" includes most of the significant military activity in the past hundred years.[35] It encompasses uses of force ranging from

group. While a military operation against the former would be virtually apolitical, a use of force against the latter could conceivably have a very high political content.

35. Of the 199 American military actions conducted without a declaration of war prior to 1973, fifty were for broad strategic aims, ranging from the protection of commerce in the Mediterranean to the forestalling of Japanese expansion into Russia after World War I. Eighty-two of these uses of force actually involved combat or ultimata, while ninety-seven lasted more than thirty days. *War Without Declaration, supra* note 11, at S14182-S14184. Most of the uses of force which were of significant dimension and thus which represented genuine threats of war occurred during the period since the

deployment of troops to a sensitive area such as the Congo in 1964,[36] through a blockade of a foreign nation like that of Cuba in 1962,[37] to situations which involve some extended hostilities as in the 1965 Dominican Republic action.[38] In short, it includes any use of force which, in today's world, has a reasonable chance of provoking war but which is not of sufficient magnitude and political content to actually be war.

Recognition of the broad category of war threatening actions necessarily poses the problem of controlling such actions. As suggested in the foregoing analysis, congressional control of war and presidential command of the armed forces are, in their logical extension, mutually incompatible.[39] Where these inconsistent aspects of the war power intersect, that is, in the control of those uses of force which are neither "acts of war" nor "peacetime deployments" the Constitution offers no principled resolution but only an invitation to political struggle.[40] As the First Circuit noted in *Massachusetts v. Laird*,[41] "the war power of the country is an amalgam of powers, some distinct and others less sharply limned."[42] Taken together these powers provide a "delicate fabric of checks and balances"[43] which serve as a framework within which the Congress and the President can test their relative political strength with regard to controlling a particular use of war threatening force.

For example, the President might justify a complete blockade of Cuba under his Commander-in-Chief, foreign affairs and general executive powers, even where there is a high probability that war will result. While the Congress cannot direct or prevent the execution of mere peacetime deployments,[44] the threat of war implicit in this blockade provides the Congress with constitutional authority to try to prevent or halt the blockade by utilizing the political means available to it, *e.g.*,

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Civil War. For example, of the fifty actions for broad strategic aims, only eleven took place before 1880. This is not surprising given the geographic extent of United States national interests in this period.

36. *Id.* at S14181.
37. *Id.*
38. *Id.*
39. *See, e.g.*, Berk v. Laird, 429 F.2d 302, 305 (2d Cir. 1970); Davi v. Laird, 318 F. Supp. 478, 483 (W.D. Va. 1970).
40. *See* Davi v. Laird, 318 F. Supp. 478, 483 (W.D. Va. 1970).
41. 451 F.2d 26 (1st Cir. 1971).
42. *Id.* at 31.
43. Davi v. Laird, 318 F. Supp. 478, 483 (W.D. Va. 1970).
44. *See* text at notes 24–34 *supra*.

selective suspension of appropriations, joint resolution or even threat of impeachment.[45] To take yet another example, if the President employed a naval show of force to deter Soviet intervention in a local conflict,[46] Congress would be well within its constitutional power to use similar means to bring to an end this show of force as long as there was a reasonable chance that the deployment would lead to war.

This concept, which leaves to political struggle the determination of the particular outcome in an area of shared power, is not a novel one. It is most forcefully articulated in Justice Jackson's classic analytic approach to executive power in *Youngstown Sheet & Tube Co. v. Sawyer*.[47] The opinion of the Court[48] is a sweeping rejection of President Truman's asserted power to nationalize the nation's steel mills during the Korean War. Justice Jackson's concurrence, however, is more sensitive to the idea that presidential power cannot be viewed from a single perspective, but rather that its exercise can only be assessed in the context of relevant congressional action or inaction.

Justice Jackson recognized that all presidential actions must logically take place in one of three circumstances. Presidential power to take such action, he reasoned, depends on which of the three circumstances obtains in the particular case. First, when a President acts with congressional approval, either explicit or implicit, presidential power is at its height, the only limitation normally being whether the federal government as a whole is constitutionally authorized so to act.[49] Second, when a President's action is in an area in which Congress has neither granted nor denied him authority, the President must rely on his independent constitutional power to validate his action.[50] Justice Jackson here recognized that there exist certain "twilight" areas where the constitutional allocation of power between the President and Congress is imprecise or concurrent, and that in these "twilight" areas congressional inaction might as a practical matter expand the permissible scope

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45. *See* Massachusetts v. Laird, 451 F.2d 26, 33–34 (1st Cir. 1971); Orlando v. Laird, 317 F. Supp. 1013, 1018–19 (E.D.N.Y. 1970); Davi v. Laird, 318 F. Supp. 478, 483–84 (W.D. Va. 1970).

46. This is, in fact, precisely the action taken by President Johnson in the 1967 Arab-Israeli War. *See War Without Declaration*, *supra* note 11, at S14181.

47. 343 U.S. 579, 635–37 (1951) (Jackson, J., concurring).

48. Justice Black wrote the opinion of the Court, but his opinion was accompanied by concurring opinions from each of the Justices who formed the six to three majority.

49. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1951) (Jackson, J., concurring).

50. *Id.* at 637.

of executive authority.[51] Third, where a President's act is clearly incompatible with the express will of Congress, presidential action under this circumstance is not constitutionally valid unless it is supported solely by the President's independent power minus any authority which the Constitution allocates to Congress over the matter.[52] Justice Jackson asserted that in this category, the President's power is at its "lowest ebb." [53]

Analyzing the constitutional allocation of control over war threatening actions in terms of Justice Jackson's framework, when the President acts unilaterally to utilize war threatening force, he is acting within Justice Jackson's "twilight" area of concurrent authority, and absent congressional opposition, is constitutionally entitled to take the action.[54] If Congress responds with opposition in such a situation, that opposition will not conclusively bind the President. Rather, as Justice Jackson said, "in this area [of concurrent authority], any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." [55]

During such a "test of power" the most effective weapon which Congress can employ, and therefore the most likely to be used, is the appropriations power.[56] While war threatening actions are not constitutionally invalid merely because they lack congressional authorization,[57]

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51. *Id.*

52. *Id.* at 637–38.

53. *Id.* at 637. Justice Jackson's three categories can be applied to analyze the constitutionality of any presidential action. They are not delineations of a particular substantive allocation of constitutional authority as is the tripartite analysis of the war powers presented in this article. The two should not be confused.

54. The court in Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971), specifically reserved judgement on the issue of whether the President can validly exercise a shared war power in the face of congressional silence, holding that Congress had clearly participated in the decision to fight in Vietnam. However, it seems clear from Justice Jackson's analysis in *Youngstown* and from cases which have actually dealt with presidential acts in the face of congressional silence, that such acts are valid so long as they do not impinge on an exclusive congressional power. Of course, Justice Jackson was not dealing with a case in *Youngstown* where Congress had been silent and thus his assertions are dictum. But, for example, in United States v. Midwest Oil Co., 236 U.S. 459 (1914), the Supreme Court upheld a President's unilateral act essentially on the ground that Congress had not opposed that act.

55. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637 (1951).

56. It should be noted that in dealing with appropriations for armed forces, the Constitution contains a special provision which limits those appropriations to two years, U.S. Const. art. I, § 8, cl. 12. This special provision has been widely read as emphasizing the intent of the Framers that Congress use the appropriations power to control executive uses of force. *See* Note, *The Appropriations Power as a Tool of Congressional Foreign Policy Making*, 50 B.U.L. Rev. 34, 40 (Special Issue 1970) for a good summary of that position.

57. *See* text at notes 39–46 *supra*.

Congress can make the prosecution of such actions impossible by cutting off appropriations which support them.[58] This indirect method of proscribing war threatening uses of force may appear to be inconsistent with Congress's inability directly to order their termination, but an analysis of the two powers reveals that they are very different in their exercise and in their impact.

First, an order to stop a particular military action would be easier to draft and enact than an appropriations cut-off to accomplish the same objective. An order to halt contested activities could be phrased in general terms, leaving to the President the difficulties of actually disengaging American forces. In contrast, an appropriations limitation would have to define the specific amounts which the President could spend and the particular activities on which the money could be spent if it were to have the desired effect on the President's actions. Any less specific limitation of funds such as one which simply directed the President not to spend more money in conjunction with a particular use of force would make it impossible for the President to conduct a withdrawal. Indeed, Congress demonstrated the truth of this proposition when it expressed its opposition to the Vietnam War with its repeal of the Gulf of Tonkin Resolution in 1970, but continued to fund the war until its conclusion in 1973.[59]

The second and perhaps more important difference between the two approaches to halting war threatening military activity is that appropriation limits are subject to presidential veto whereas resolutions ordering the halt of a particular use of force are not. Thus, where the President desires to continue a specific use of war threatening force, a two-thirds majority in Congress is effectively required to limit or cut off appropriations supporting that action. If such a two-thirds majority is not attainable, Congress must either accede to the President's actions or refuse to pass any appropriations at all until a suitable compromise is arranged.

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58. *See* note 45 *supra*.

59. As noted, the Constitution specifically limits appropriations for the armed forces to two years. U.S. CONST. art. I, § 8, cl. 12. The idea that this was to be an operative check on the President is borne out by the Constitutional Debates. The Framers were concerned about the danger of giving the President control of a standing army and consequently a limitation on its size was proposed. This was not, however, adopted because it was ultimately decided that the best protection against executive abuse was the limiting of appropriations. 2 M. FARRAND, *supra* note 19, at 330. Drinan v. Nixon, 364 F. Supp. 854, 862 (D. Mass. 1973), indicates that a cut-off of funding for the 1973 bombing of Cambodia could well have been a valid way to stop that action.

60. *See* DeCosta v. Laird, 448 F.2d 1368, 1369 (2d Cir. 1971). As the court in Mitchell v. Laird, 488 F.2d 611, 615 (D.C. Cir. 1973) noted, congressmen opposed to

This is the epitome of political "struggle" and highlights the difference between the direct and indirect methods of restricting uses of armed force.[61]

To summarize the constitutional scheme for allocating the war power, the Constitution assigns to the President exclusive control over peacetime deployments while requiring some form of congressional authorization for war. Neither war nor peacetime deployments are self-limiting concepts, however; thus, the power of Congress and the President clash in that broad range of military activity which is neither clearly war-making nor clearly peacetime deployments. In this middle category of war threatening actions, control is determined not according to legal formulae but by political struggle between Congress and the President.

Forms of Congressional Authorization

This analysis of the war powers began with a focus on the requirement that war receive some form of congressional authorization to be constitutionally valid. It is time now to examine the forms which congressional authorization of war can take. They are threefold: express, implied, and presumed.

Express authorization needs little elaboration. It may consist of a formal declaration of war or of a simple statutory authorization.[62] The provisions of a treaty, however, cannot constitute express authorization since only the Senate participates in treaty ratification.[63]

Implied authorization may take many forms. Virtually every court

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the war continued to vote for the appropriations supporting it simply to avoid abandoning the men engaged in combat. Congress did attempt an appropriation cut-off of the 1973 Cambodia bombing, but that was a case where sudden disengagement would not have exposed American troops to any danger. *See* Drinan v. Nixon, 364 F. Supp. 854 (D. Mass. 1973) for a summation of that congressional action.

61. *See* Drinan v. Nixon, 364 F. Supp. at 860–64 (D. Mass. 1973) for an interesting account of the political impact and resulting compromise involved in President Nixon's veto of Congress' attempt to cut off appropriations for the 1973 Cambodia bombing. By applying political pressure through this action, Congress was able to force the end of the bombing despite its inability to pass the actual appropriation measure over the President's veto.

62. *See* Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40–41, 43, 45 (1800) (holding that Congress authorized the undeclared naval "war" with France).

63. The Framers considered giving the Senate the power to declare war. 2 M. Farrand, *supra* note 19, at 250–53, but ultimately decided that that power should be vested in the full Congress. *Id.* at 318–19. Further, it is well established that if a war were conducted under the auspices of a treaty, congressional opposition to the war would nullify the treaty authorization. *See* Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889).

that reviewed the Vietnam War took a very broad view of what constitutes adequate congressional authorization, holding that the particular method chosen is a matter for congressional discretion and that continuation of appropriations and of the selective service system was a sufficient expression of congressional approval to support the President's actions.[64] Thus, if Congress wishes to withhold authorization of a war it must do so unequivocally.

The third category of congressional authorization — presumed authorization — involves a novel approach and thus merits extended analysis. There are two types of presumed congressional authorization of war. They arise in situations which are analytically distinct and thus each deserves special attention. Both types of presumed authorization, however, derive from the fact that Congress in supplying the President with armed forces has given him the ability to respond to emergencies.

The first type of presumed congressional authorization of war arises in the event of attack or threat of imminent attack on the territory of the fifty states. Although the Framers wanted to give the Congress virtually total control over the authorization of war, they also recognized that war might well be forced on the United States by an invading enemy and that the President was far better equipped than Congress to defend against invasion.[65] Therefore, the original draft of the Constitution[66] was changed to empower Congress to "declare war" instead of

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64. *E.g.*, Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971); Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971). While it is true that the Vietnam conflict was initially approved by Congress in the Gulf of Tonkin Resolution, courts continued to hold that congressional appropriations and continuation of the selective service system constituted authorization of the war, even after the Resolution was repealed in 1970. *See* DeCosta v. Laird, 448 F.2d 1368, 1369 (2d Cir. 1971). Two courts did, however, hold that the Vietnam War was not authorized by Congress and that it was therefore unconstitutional. *See* Mitchell v. Laird, 488 F.2d 611, 615 (D.C. Cir. 1973) (holding appropriation vote not equivalent of approval of war in view of the danger to American troops which a cut-off would pose); Holtzman v. Schlesinger, 361 F. Supp. 553, 563 (E.D.N.Y. 1973), *rev'd on other grounds*, 484 F.2d 1307 (2d Cir. 1973) (holding that post peace treaty bombing in Cambodia not authorized by general Vietnam military appropriations).

65. Alexander Hamilton, perhaps the most prominent supporter of a strong executive, argued forcefully that the conduct of war, whether it was initiated by a hostile attack on the United States or was declared by Congress, was exclusively the province of the President. Hamilton, *supra* note 27, at 379-80. Under his proposed version of the Constitution, the President would have had explicit power to engage in war which was begun by another nation. 1 M. FARRAND, *supra* note 19, at 292. Even George Mason, who advocated circumscribing executive power by having a three-person executive council instead of a single executive, conceded that one of the main advantages of a unitary executive was the speed, energy and secrecy with which he could conduct war. 1 M. FARRAND, *supra* note 19, at 112.

66. The Committee of Detail submitted a first draft of the proposed Constitution in ....

"make war," after a debate which made it clear that the Framers intended the President to have the "power to repel sudden attacks." [67] By establishing and maintaining the armed forces during a time of peace[68] and thus subjecting them to the President's command authority,[69] the Congress can be presumed to have authorized their use in defending the territory of the United States itself. Indeed, it is hard to imagine a more appropriate or legitimate use for a standing army. No court has ever questioned such a use of force by a President, notwithstanding the absence of express or even implied congressional authorization for the specific action taken.[70]

In fact, there is much which suggests not only that congressional authorization of the defense of American soil may be presumed, but also that such a presumption is constitutionally irrebutable and that the President, as Commander-in-Chief, has a duty to act on that authorization. In the *Prize Cases*,[71] cases challenging President Lincoln's blockade of Confederate ports without express or implied congressional authorization, the Supreme Court upheld the President's action saying, "[i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force." [72] Although this language in the *Prize Cases* is dictum since the cases involved insurrection not invasion and since Congress later ratified the blockade,[73] the Court's position that a President who has been provided by Congress with armed forces[74] has a duty to defend the nation's sovereignty has constitutional roots beyond the "establish and maintain" armed forces and "Commander-in-Chief" clauses. Article IV, Section 4 (the Guarantee Clause) of the Constitution requires the United States to "protect each of [the States] against Invasion. . . ." [75] This constitutional obligation

late July, 1787. This draft incorporated the Convention's work for the first two months. According to its provisions, Congress had the power to "make war." 2 M. FARRAND, *supra* note 19, at 168.

67. *Id.* at 318.

68. *See* note 4 *supra*.

69. *See* note 6 *supra*.

70. *See, e.g.*, Prize Cases, 67 U.S. (2 Black) 635, 668 (1982), which contain perhaps the most ringing judicial endorsement of such a use of force, although arguably in dictum. Unquestioning recognition of the legitimacy of unilateral use of force by a President in defense against an attack on the United States continued through the relatively recent Vietnam cases. *See e.g.*, Mitchell v. Laird, 488 F.2d 611, 613 (D.C. Cir. 1973).

71. 67 U.S. (2 Black) 635 (1862).

72. *Id.* at 668.

73. *Id.* at 671.

74. Either in the form of a standing army or in the form of state militia activated for federal service.

75. U.S. CONST. art. IV, § 4.

of the United States obviates the need for a congressional determination of the appropriateness of war if a State is invaded. The President, as Commander-in-Chief of the armed forces provided by Congress, is constitutionally presumed to have been authorized to respond to the attack and is automatically under an obligation to determine what response to the invasion is tactically appropriate. While it is conceivable that for tactical reasons defense of a particular State might be unwise or impossible and that this obligation could not be fulfilled, it is the President, as Commander-in-Chief, not the Congress, who must make such an assessment because these decisions are clearly questions of wartime tactics. Thus the presumed authorization is irrebuttable.

This authorization of the President to defend against actual attacks on the nation naturally includes authorization to defend against the threat of imminent attack. Such an extension is clearly necessary in the technologically shrunken world of the twentieth century, but even in the early 1800's the power of the President to respond to "imminent danger of invasion" was recognized.[76] While this would not justify fighting the Communists in Vietnam to avoid fighting them in California, it would surely justify intercepting enemy bombers bound for American shores. The limiting principle here is simply that the nation must be actually under attack or about to be attacked.[77]

This irrebuttable presumption of authorization is not, of course, a license which would allow the President to respond to a border skirmish with a massive offensive invasion. The presumed authorization is based on an obligation to defend the States; while it does not require the President to halt operations at the border, neither does it allow him to go beyond those measures necessary to reestablish the nation's security.

The second presumption of congressional authorization of war arises in the event of a threat to the interests of the United States which is so grave that Congress clearly would approve of war but is unable to do so

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76. Martin v. Mott, 25 U.S. (12 Wheat.) 19, 29 (1827). This case involved a challenge by a New York militiaman to the President's power during the War of 1812 to activate the militia before the British had actually invaded. In an opinion by Justice Story, the Supreme Court held the constitutional power to repel invasions included the authority to "provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place." *Id.* at 29.

77. "About to be attacked" should, of course, be read very narrowly. It would not, for example, include a ground or naval attack on Canada or Great Britain, although it could conceivably cover a missile attack against those allies. Generally, if there is any doubt concerning the possibility of attack on the United States itself, entrance into war is not required by the Constitution, but is discretionary. Such situations give rise to the second type of presumed congressional authorization. *See* text at note 78 *infra*.

within the time available for decision. In today's world of virtually instantaneous communications and weapons delivery, threats to United States interests can easily be imagined which require immediate military response even though they do not involve attacks on the United States itself.[78] If Congress cannot act within the period required to defend the nation's interests but may safely be presumed to desire that these interests be protected by military action, if necessary, there is no reason for the President to refrain from taking the required action. However, since presidential power in this situation rests solely upon a presumption that Congress would have authorized war if time to consider the situation had been available, the presumption of authorization evaporates once Congress has had the time necessary to make an informed decision. If Congress then disapproves of the war already initiated by the President, it can compel him to terminate American participation in the conflict.[79] Thus, in contrast to the first type of presumed authorization, the presumption of authorization in grave threat situations is rebuttable.

Presumed authorization of war in grave threat situations is not explicitly recognized in the early cases which consider the war power.[80] Three early Supreme Court cases dealt with the legal status of ships captured during the early nineteenth century American-French naval conflicts and each involved an interpretation of Congress' express authorization of the hostilities. None discussed the possibility of emergency action by the President on the basis of presumed authoriza-

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78. Indeed, there has evolved in the years following World War II a theory of collective self-defense under which nations with various common national interests have united themselves against nations perceived as common enemies. *See* Note, *supra* note 5, at 1782-84. Much of this collective self-defense has been manifested in multilateral defense agreements or treaties, whereby the signatories agree to treat an attack on any party as an attack on all parties. *See* examples cited in Note, *supra* note 5, at 1782–83. While it is highly doubtful that any of these treaties could be construed as advance congressional approval of war thereby binding the United States to respond to an attack on an ally, the fact that such agreements are common suggests that both the President and the Senate at various times have agreed that certain American interests abroad are so vital to the nation's security that they merit military protection.

79. There are, to be sure, many problems with enforcing such a withdrawal order, given the foreign policy and military problems which the unauthorized use of force would itself create. *See* Mitchell v. Laird, 488 F.2d 611, 613 (D.C. Cir. 1973), holding that the issue of whether or not President Nixon's actions in Vietnam constituted withdrawal was a political question. These problems will be discussed further below. See note 154 *infra*.

80. Only five cases before 1850 actually dealt with the war power. *See* Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800); Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827); United States v. Smith, 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342).

tion.[81] One early Circuit Court opinion involving an incident in Spanish Florida does imply that the President cannot make war without express congressional authorization in any situation except an actual invasion of the United States.[82] But the case did not involve an emergency situation in which Congress was unable to act and the apparent sweeping prohibition of presumed authorization of war in such situations is merely dictum.

The failure of these early cases to recognize presumed congressional authorization of war in grave threat situations could also be explained by the fact that at the time they were decided, only an invasion could actually threaten the vital interests of the United States. However, in the modern world "the difference between safety and cataclysm can be a matter of hours or even minutes,"[83] and, not surprisingly, modern courts have recognized the possibility of a rebuttable presumption of congressional authorization, although it has never been so labelled.

The Vietnam War was, of course, the catalyst for virtually all of the modern judicial review of the war powers. By the time the first lawsuits challenging the war actually came before the courts, Americans had

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81. The question in Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800), and in Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801), was whether the United States and France were at war, thus justifying the capture of vessels under French control. The Court recognized that no formal declaration of war had been made, but held that Congress had authorized a limited war which would support the captures. There was therefore no need for the Court to consider the independent power of the President to order such seizures on the basis of presumed authorization.

Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804), on the other hand, held that the President was without authority to order the seizure of the ship there in question. However, *Little* did not involve the capture of a French vessel as a war prize, but rather concerned the seizure of what was thought to be an American ship trading with France in violation of the Non-Intervention Act. In spite of the fact that *Little* has been cited as relevant to the war power, *see, e.g.*, Rostow, *supra* note 24, at 856–57, it is really a case which circumscribes the President's power to seize American property during a national emergency. Like Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1951), which, as noted earlier, also dealt with emergency domestic seizures during wartime, *Little* actually has very little to say about the President's authority to make war in an emergency. In addition, even if *Little* had addressed the question of emergency authorization of war its objection to the President's actions was based on their violation of congressional legislation not on the absence of congressional authorization.

82. United States v. Smith, 27 F. Cas. 1192, 1230–31 (C.D.N.Y. 1806) (No. 16,342). This case has virtually no precedential value, never having been cited in any subsequent case. Further, its statements concerning war power were expressly predicated on a "manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration." *Id.* Such a dichotomy is clearly invalid in the modern world.

83. Fulbright, *American Foreign Policy in the 20th Century Under an 18th Century Constitution*, 47 CORNELL L.Q. 1, 3 (1961).

been heavily involved in the fighting for at least four years,[84] and virtually no one was maintaining that the war could be justified on the basis of presumed authorization.[85] Nevertheless, some courts have examined presumed authorization, although in a somewhat cursory manner and under the label of emergency power.[86] While not clearly defining this form of authorization, they have recognized its existence, both in its irrebuttable and rebuttable aspects.[87] A typical example is the following passage from *Mitchell v. Laird*:[88]

> Without at this point exhaustively considering all possibilities, we are unanimously of the opinion that there are some types of war which, without Congressional approval, the President may begin to wage: for example, he may respond immediately without such approval to a belligerent attack, or in a grave emergency he may, without Congressional approval, take the initiative to wage war. Otherwise the nation would be paralyzed. Before Congress could act the nation might be defeated or at least crippled. In such unusual situations necessity confers the requisite authority upon the President. Any other construction of the Constitution would make it self-destructive.[89]

It seems clear that in a world made small by modern communications and weapons technology, the multitude of circumstances which would conceivably threaten vital national security interests necessitates the recognition of a presumed though rebuttable congressional authoriza-

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84. United States military assistance to South Vietnam in the form of training and advising began almost immediately after the French withdrew in 1954. It was steadily expanded and by 1962 fully 12,000 uniformed American advisors were in Vietnam. *War Without Declaration*, *supra* note 11, at S14181. The earliest lawsuits challenging the war effort were not heard at the district court level until 1966, at least four years after the heavy personnel commitment commenced and fully two years after the initiation of open American involvement in combat. *E.g.*, Luftig v. McNamara, 252 F. Supp. 819 (D.D.C. 1966), *aff'd* 373 F.2d 664 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 945 (1967).

85. *But see* Department of State, *The Legality of U.S. Participation in the Defense of Vietnam*, 75 YALE L.J. 1084, 1100–01 (1966).

86. *See, e.g.*, Orlando v. Laird, 317 F. Supp. 1013, 1018 (E.D.N.Y. 1970) where the court held that the war effort clearly needed congressional approval and thus felt no necessity to determine whether the President could initiate war in any but pure defensive situations.

87. *See* Mitchell v. Laird, 488 F.2d 611, 613–14 (D.C. Cir. 1973); Massachusetts v. Laird, 451 F.2d 26, 30 (1st Cir. 1971); Drinan v. Nixon, 364 F. Supp. 854, 859 (D. Mass. 1973). *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645 (1951) (Jackson, J., concurring); United States v. Smith, 321 F. Supp. 424, 430 (C.D. Cal. 1971).

88. 488 F.2d at 613–14.

89. While the court did not specifically qualify its use of "congressional approval" as express or implied, this is because the conceptualization of emergency war power as presumptively authorized by Congress has not been heretofore articulated. This concept, although novel, accurately reflects the Constitution's allocation of the war power.

tion of the President to act in situations which defy a more specific definition than "grave emergencies." [90]

This recognition of a rebuttable presumption of authorization to make war is as dangerous as it is inevitable. The limits on the power are simply that Congress not have time to act and that the United States' interests at stake be so vital that Congress would in all probability have approved the President's actions if time had been available. These are not clear limits such as those which apply to the case of the irrebuttable presumption of authorization which can arise only in the event of an attack or imminent attack on the United States itself. Since a myriad of circumstances might require emergency action for the protection of "vital" interests, a catalog specifically defining all such circumstances is impossible to construct. Thus, Congress can rebut presumptions of authorization only by responding in an *ad hoc* manner to each situation which might call for their invocation. This has led commentators such as Professor Eugene Rostow and Senator William Fulbright to suggest that modern Presidents possess virtually limitless power to conduct war.[91]

Such a suggestion, however, overstates the President's power for two reasons. First, genuine emergencies that would justify actually making war before going to Congress for express authorization will be very rare and probably very dramatic. An example might be a sudden Soviet invasion of Western Europe. In such situations the drastic nature of the actions involved will serve to insure that the President act in good faith, making war only when he is confident of subsequent congressional support. Second, if the President should ever wrongly presume congressional authorization, Congress can quickly order him to terminate his actions since the presumption is valid only so long as Congress has been unable to act. Once Congress has expressed opposition to the President's actions his authority to continue them ceases.[92]

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90. What constitutes a "grave emergency" is, of course, very difficult to say. But the problem is not as critical as it first appears, for if the Congress disagrees with the President's assessment of a particular situation, it can order his withdrawal. *See* text at note 92 *infra*.

91. *See* Rostow, *supra* note 5; Fulbright, *supra* note 83.

92. It has been forcefully suggested by both courts and commentators that the President's institutional advantage over Congress in dealing with sensitive information provides constitutional justification for the President's continuance of war making in the face of congressional opposition. *See, e.g.*, Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948). *See also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). *See generally* Rostow, *supra* note 5; Monaghan, *supra* note 5; Fulbright, *supra* note 83. If such [illegible] is suggested merely by the Presi-

Of course, there still remains the problem that a war once started is difficult to end.[93] That problem is not solved, however, by forbidding the President to initiate war in emergencies while at the same time entrusting the President with command of the armed forces. As long as he has the ability to order troops to war, the possibility of his abusing his power and the problem of terminating an improperly initiated war will exist. The only real check against such an abuse is a strong and vigilant Congress that makes clear to the President what it will tolerate and what it will not. This is precisely what the Congress was attempting to accomplish when it enacted the War Powers Resolution.

THE WAR POWERS RESOLUTION OF 1973

The War Powers Resolution of 1973[94] attempts to maximize Con-

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dent's greater access to this information, it loses all force at the point when Congress becomes sufficiently well informed to make a decision in a particular case of war making. Since Congress is the branch best suited to determine when it has overcome that "information gap," a good faith assertion by Congress that it has made an informed decision to terminate presidential war making should be conclusive. *See* Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 221 (1971).

If it is further argued that the inability of Congress to safeguard sensitive information justifies presidential war making based on information withheld from Congress, the analysis is different, but the result is the same. Courts have indicated that the President justifiably might withhold certain foreign affairs information from the judicial branch on a competency rationale. *E.g.*, United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973); United States v. Butenko, 494 F.2d 593, 605 (3rd Cir. 1974). *But see* Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) (requiring prior judicial approval of foreign intelligence wiretaps). But no such rationale would support the President's withholding such information from Congress, given its constitutional role in decision-making involving military and foreign affairs. Concern over congressional handling of sensitive material is certainly well founded, an example of Congress' inability to insure continued secrecy of sensitive information being the celebrated leak by the House of Representatives of classified information related to the Central Intelligence Agency. N.Y. Times, Jan. 27, 1976, § 1, at 1, col. 6. (Even the executive branch has its problems with secrecy. One of the nation's most spectacular leaks, which originated in the executive branch, was the publication of the Pentagon Papers in June, 1971. *See* E. SHEEHAN, THE PENTAGON PAPERS ix (1971).) But this concern is insufficient to overcome the constitutional mandate for congressional control of war making. Further, in cases involving truly sensitive information, some accommodation involving disclosure of the critical data to a few selected congressional leaders would surely evolve. In the extraordinary circumstances justifying a President's unilateral use of war making force, it is almost inconceivable that Congress would order withdrawal of committed American forces if an informed congressional leadership assured the American people that such a commitment of forces was necessary.

93. *See* Mitchell v. Laird, 488 F.2d 611, 615-16 (D.C. Cir. 1973) on problems of withdrawal. *See also* Note, *supra* note 5, at 1776, on Congress' reluctance to oppose the President once hostilities have begun — the *fait accompli* problem.

94. *War Powers Resolution*, Pub. L. No. 93-148, 87 Stat. 555 (1973). The Resolution was synthesized from H.J. Res. 542, 93d Cong., 1st Sess. (1973) and S. 440, 93d Cong., 1st Sess. (1973). It is titled a resolution instead of an act in deference to the original

gress' control over United States military activity. It contains four major provisions: first, a broad definition of the military activity which it attempts to regulate; second, strict limits on presidential initiation of such activity; third, procedures for requiring the termination of such activity when not approved by Congress; and, fourth, consultation and reporting requirements to keep Congress well informed. The Resolution also contains a fifth, less important, set of provisions concerning interpretation of the Resolution, war related legislation and United States treaties. In the five sections which follow, the four major provisions and the interpretation provisions will be summarized and evaluated. The evaluation will proceed on three levels. First, the provisions will be analyzed in terms of the Constitution's allocation of power over peacetime deployments and war threatening actions. Second, insofar as they apply to war, the provisions will be evaluated in terms of the Constitution's requirement of congressional authorization of war —either express, implied, or presumed. Finally, careful attention will be given to any effect the various provisions might have on the role of the courts in deciding disputes which could arise in the war powers area.[95]

The Breadth of Coverage of the Resolution

The Resolution describes in broad terms military activity it is intended to govern:

> It is the purpose of this joint resolution . . . to insure that the collective judgment of 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.[96]

"[H]ostilities" and "situations where imminent involvement in hostilities is clearly indicated by the circumstances" are the key definitional

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House version which was designed to "elaborate" on the war powers rather than give an "itemized definition" of them. *See* H.R. REP. No. 287, 93d Cong., 1st Sess. 6 (1973). Despite its title, Congress treated the Resolution as an enactment of law in passing it over President Nixon's veto.

95. For other discussions of the Resolution *see* Note, *1973 War Powers Resolution: Congress Re-Asserts Its Warmaking Power*, LOY. CHI. L.J. 83 (1974); Statutory Comment, *The War Powers Resolution: Statutory Limitation on the Commander-in-Chief*, 11 HARV. J. LEGIS. 181 (1974).

96. War Powers Resolution, Pub. L. No. 93-148, § 2(a), 87 Stat. 555 (1973).

phrases. The breadth of these phrases turns on the meaning of the word "hostilities". The term is not defined in the Resolution itself but the Resolution's legislative history shows that "hostilities" includes both "armed conflict" and "a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict."[97] The legislative history then describes "imminent hostilities" as a situation in which there is a "clear potential" for "hostilities."[98] Thus the Resolution's key definitional phrase encompasses all military activity involving even a "clear potential" for a "state of confrontation in which there is a clear and present danger of armed conflict."

The phrase is made even more inclusive by a special provision in the Resolution elaborating the meaning of "introduction of United States Armed Forces":

> . . . the term 'introduction of United States Armed Forces' includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged in hostilities.[99]

Thus the Resolution attempts to regulate even the assignment of advisors to foreign military forces faced with merely a "clear potential" for such a "state of confrontation."

To illustrate the breadth of the Resolution's coverage in concrete terms, the following are examples of recent executive uses of force which would have been covered by the Resolution: President Eisenhower's deployment of troops to Lebanon;[100] President Kennedy's blockade of Cuba;[101] President Johnson's deployment of troops to the Dominican Republic;[102] and the initial advisory activity in Vietnam.[103] President Nixon's "incursion" into Cambodia[104] was arguably an expansion of the Vietnam War that would have merited independent regulation under the Resolution.[105] Both the rescue of the Mayaguez[106]

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97. H.R.Rep. No. 287, 93d Cong., 1st Sess. 7 (1973).
98. *Id.*
99. War Powers Resolution, Pub. L. No. 93-148, § 8(c), 87 Stat. 555 (1973).
100. *See War Without Declaration*, *supra* note 11, at S14180.
101. *Id.* at S14181.
102. *Id.*
103. *Id.*
104. *Id.*
105. For a discussion of when a radical change in the character of war operations

and the evacuation of the Vietnamese Refugees in the Spring of 1975[107] did fall within the Resolution's coverage.

This broad coverage creates significant constitutional difficulties, particularly with regard to control of peacetime deployments and war threatening actions. As noted earlier, the critical factors in determining whether a use of force is a peacetime deployment, war threatening action or act of war are its magnitude and political content.[108] Once a particular use of force has been classified by means of these two criteria, it can then be determined if Congress can prevent or halt that use of force. Only if a use of force is of such magnitude and political content that it constitutes war does it require congressional authorization. If the use of force is merely a peacetime deployment, Congress can assert no control over it whatsoever, and, if the use of force is war threatening, Congress can control it only through political struggle with the President. Political struggle may, however, include use of the appropriations power.[109]

The War Powers Resolution, by including under its regulations all uses of force which entail armed conflict or the clear potential for it,[110] purports to impose congressional control over all three categories of military action. Peacetime deployments, despite their small scale and apolitical character, might involve a clear potential for limited armed conflict or even an actual exchange of fire.[111] War threatening actions by definition involve at least a clear potential for armed conflict. Thus, the Resolution attempts to subject some peacetime deployments and all war threatening actions to direct congressional control.

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requires special authorization, *see* Holtzman v. Schlesinger, 361 F. Supp. 553 (E.D.N.Y. 1973) *rev'd* 484 F.2d 1307 (2d Cir. 1973); DeCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973); Mottola v. Nixon, 318 F. Supp. 538, 540 (N.D. Cal. 1970) *rev'd* 464 F.2d 178 (9th Cir. 1972).

106. *See War Powers: A Test of Compliance, Hearings before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 1st Sess. 76–77 (1975) (President Ford's report in compliance with section 4(a)(1) of the War Powers Resolution) [hereinafter *Compliance Hearings*].

107. *Id.* at 4, 5–6, 7.

108. *See* Figure I at note 34 *supra*, and accompanying discussion.

109. These three stages of congressional power are described respectively in text at notes 7–21, 24–34, and 35–46 *supra*.

110. In the discussions below, military activity which the Resolution attempts to regulate will be described as "military activity involving armed conflict or the clear potential for it." This shorthand description is intended to convey the broad scope of the Resolution's coverage. At the same time, it is probably less inclusive than the Resolution's own wording.

111. *See* text at note 34 *supra*.

The Resolution's Initiation Provisions

The Resolution states that the President may initiate military activity involving armed conflict or the clear potential for it[112] only pursuant to: 1) a declaration of war, 2) specific statutory authorization, or 3) a national emergency created by an attack upon the United States, its territory or possessions, or its armed forces.[113] This allows the President to act without prior express congressional approval only in the event of an attack upon the United States, its territories or possessions, or its armed forces, and the attack must have created a "national emergency."

This provision poses severe constitutional problems with regard to executive use of force short of war. Since the Resolution applies to all war threatening force,[114] these criteria would, if valid, deprive the President of all power to initiate war threatening actions except in the enumerated situations. Since these situations do not exhaust the set of circumstances in which war threatening force might be used, they impermissibly intrude on the President's authority to use war threatening force without congressional authorization. Further, the initiation provisions could operate to deny the President authority to order some peacetime deployments, for, as noted earlier, peacetime deployments can sometimes come within the broad ambit of the Resolution's coverage.[115] This application of the Resolution is even more clearly unconstitutional.

The initiation provisions are also subject to constitutional attack in their attempt to regulate war. Although the Resolution's initiation provisions recognize the presumed authorization of war that arises from the direct attack situation, they attempt an exhaustive enumeration of the situations in which a rebuttable presumption of authorization might arise, *i.e.*, attacks on American territories, possessions, and troops. The Constitution, however, allows such a presumption to arise during any "grave emergency" which the President has good reason to believe would cause Congress to authorize war if it had time to consider the situation.[116] For example, if Canada were subjected to an unexpected attack by a mutual enemy, a presumption would certainly arise which

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112. As discussed in note 110 *supra*, "military activity involving armed conflict or the clear potential for it" is the shorthand phrase that will be used in these discussions to describe the range of actions which the Resolution attempts to regulate.

113. War Powers Resolution, Pub. L. No. 93-148, § 2(c), 87 Stat. 555 (1973).

114. *See* text at note 111 *supra*.

115. *Id.*

116. *See* text at note 78 *supra*.

would enable the President to assist Canada's resistance by use of war making force. The Resolution's initiation provisions bar the President from rendering such assistance save pursuant to a declaration of war or specific statutory authorization.

It is true that under the Constitution Congress can rebut the presumption arising from a grave threat situation once it has had time to evaluate that situation. After such consideration, Congress can then issue an order legally binding the President to disengage American forces.[117] However, the nature of the situations which give rise to the rebuttable presumption requires that congressional rebuttal of such presumed authorization be accomplished on an *ad hoc* basis after assessment of the circumstances of the particular situation involved.[118] It is conceivable that Congress could with regard to a particular "emergency," rebut a presumption by the President of congressional authorization to make war prior to its invocation.[119] Congress cannot, however, issue a blanket prohibition against all future presumptions of congressional authorization to engage in war during "grave emergencies." Any such blanket proscription would, in the words of the D.C. Circuit, leave the nation "paralyzed."[120] The Resolution's initiation provisions attempt, with the exception of the four enumerated authorizations, just such a blanket prohibition and are therefore unconstitutional. Indeed, the initiation provisions attempt to restrict the presumption of authorization of war in grave threat situations so severely that some members of Congress who debated the Resolution considered these provisions to be merely a preamble.[121]

Ironically, a primary effect of the initiation provisions may be to increase the power of the President, since they seem to authorize war in any national emergency created by attack on United States terri-

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117. *See* text at note 92 *supra*.

118. *See* text at notes 90–91 *supra*.

119. For example, Congress might anticipate the possibility of a flare-up in the Middle East and forbid United States military intervention in advance. This is essentially what occurred in relation to anticipated presidential action in Angola in 1976. *See* N.Y. Times, Dec. 20, 1975, at 1, col. 1; N.Y. Times, Jan. 18, 1976, at 18, col. 5; N.Y. Times Jan. 28, 1976, at 1, col. 8, for a contemporary account of the course of the struggle between the President and Congress regarding U.S.-financed covert operations in Angola.

120. *See* Mitchell v. Laird, 488 F.2d 611, 613 (D.C. Cir. 1973).

121. Cong. Rec. S18,992–96 (daily ed. Oct. 10, 1973) (remarks of Senator Eagleton, D.-Mo.); *but compare id.* at S18,986 (remarks of Senator Javits, R.-N.Y.). Congress may have confirmed this preamble theory when it failed to object to President Ford's use of force to rescue Americans from Vietnam and Cambodia and to rescue the Mayaguez from its Cambodian captors. All of the incidents involved armed conflict, none had advance congressional authorization. *See Compliance Hearings*, *supra* note 106.

tories, possessions, or troops.[122] A shot across the bow of a PT boat could be used by the President to justify making war under such provisions.[123] While it is true that to satisfy the Resolution such an incident would have to be a "national emergency," Congress and the courts have historically deferred to a President's factual claims concerning hostile foreign actions and to his subsequent assertions of the existence of a "national emergency."[124] This pattern of deference could translate the Resolution's initiation provisions into implied authorization of almost any war effort which a President might undertake in connection with a crisis involving United States troops or possessions.[125] Indeed, several congressmen expressed opposition to the Resolution on precisely these grounds.[126]

It could be answered that the Resolution's reference to "national emergency" essentially restricts presidential war making to situations where Congress would have given its approval. In other words, the Resolution arguably does no more than recognize the rebuttable grave threat presumption in specified circumstances. This construction is bolstered by Section 8(d)(2) which declares that nothing in the Resolution should be construed to give the President any authority which he would not have had in its absence.[127]

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122. War Powers Resolution, Pub. L. No. 93-148, § 2(c)(3), 87 Stat. 555 (1973).

123. The Gulf of Tonkin Resolution was a response to alleged attacks by the North Vietnamese on two United States destroyers.

124. *See e.g.* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 29-32 (1827). An excellent contemporary example is the Gulf of Tonkin Resolution. On the basis of presidential allegations Congress described the North Vietnamese as having "deliberately and repeatedly attacked United States naval vessels lawfully present in international waters" and as having "created a serious threat to international peace." 112 Cong. Rec. 1841 (1964). Congress was probably misled by the President. *See The Gulf of Tonkin, the 1964 Incidents, Hearings before the Senate Comm. on Foreign Relations*, 90th Cong., 2d Sess. (1968) (testimony of Robert S. McNamara, Secretary of Defense).

125. This arguably would be an abdication by Congress of its responsibility to control war making. *See* Velvel, *The War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 Kan. L. Rev. 449 (1968); Wormuth, *The Vietnam War: The President versus the Constitution*, in 2 The Vietnam War and International Law 711 (R. Falk ed. 1969); *War Power Legislation Hearings on S. 731, S.J. Res. 18 and S.J. Res. 59 before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 549, 554-55, 560-63 (1972) (testimony of Alexander M. Bickel). But the Supreme Court seems to view almost any delegation of authority by Congress to the President in the area of foreign affairs to be proper. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 324 (1936); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1951). *See also* Jones, *The President, Congress, and Foreign Relations*, 29 Calif. L. Rev. 565, 575 (1941).

126. *See* 119 Cong. Rec. S18,992-94 (daily ed. Oct. 10, 1973) (remarks of Senator Eagleton, D.-Mo.); Eagleton, *A Dangerous Law*, N.Y. Times, Dec. 3, 1973 at 39, col. 3 (city ed.).

127. War Powers Resolution, Pub. L. No. 93-148, § 8(d)(2), 87 Stat. 555 (1973).

Even granting the conceptual validity of this argument, a President may, as a practical matter, find it easier to engage in war making under the explicit language of the Resolution than he would if acting pursuant to a more nebulous rebuttable presumption of authorization.[128] Consequently, fears of increased presidential power as a result of the Resolution cannot be dismissed.

In summary, the Resolution's initiation provisions state that the President can employ military force involving armed conflict or the clear potential for it without prior congressional approval only in the event of a national emergency created by an armed attack on the United States, its territories or possessions, or its armed forces. This is unconstitutional insofar as applied to peacetime deployments or war-threatening actions. The initiation provisions are also unconstitutional insofar as they are intended to negative presumed authorization of war in grave threat situations other than those involving American troops or possessions. Finally, as a practical matter, the initiation provisions dangerously increase the potential for independent presidential war making by seeming to authorize war in a large number of situations.

The Resolution's Termination Provisions

The Resolution provides for the termination of all military activity involving armed conflict or the clear potential for it after a maximum of sixty days of deliberation. It employs two termination provisions to achieve this end.

The first is the sixty day cut off provision contained in Section 5(b). If the President uses military force involving armed conflict or the clear potential for it in the absence of a declaration of war, he must report his actions to Congress within forty-eight hours.[129] If Congress has not already authorized this use of force with specific legislation and does not either enact such legislative authorization or declare war within sixty days, the President must terminate the military activity.[130] If the President certifies to Congress that he needs time to withdraw safely the armed forces he has deployed, Congress can give him up to thirty days to do so.[131] Under this provision, Congress' failure to enact

128. *See* text at note 78 *supra*.
129. War Powers Resolution, Pub. L. No. 93-148, § 4(a), 87 Stat. 555 (1973).
130. *Id.* § 5(b).
131. *Id.*

authorization suffices to obligate the President to terminate his use of force. Since termination, consequently, is required even absent a specific congressional vote of opposition, the President's veto power is circumvented. A simple majority of Congress can, therefore, successfully terminate executive war making by voting against the passage of any authorization bill.

A second termination provision is contained in Section 5(c). Here, Congress provides itself with authority to order the President by concurrent resolution to withdraw immediately "armed forces engaged in hostilities outside the territory of the United States, its possessions and territories."[132] Since a concurrent resolution is merely an expression of the majority will of both houses of Congress, it does not go to the President for his signature. Thus, the President's veto power is again circumvented.

These two termination provisions are coupled with priority procedures designed to insure swift congressional action.[133] Once the President reports a use of force to Congress, any member of Congress can introduce a bill supporting or opposing the President's actions. Under the Resolution's procedures, any such bill would move swiftly through committee, and would be submitted to a vote by the full Congress within a maximum of sixty days. These procedures serve to answer the objection that war can be terminated by congressional inaction. They operate to insure that any bill which would authorize executive war making will be considered and voted on in some form by both houses.[134]

The main effect of the Resolution's termination provisions is to expeditiously transform congressional nonapproval of military activity into a legal obligation to halt such activity. The Resolution attempts to accomplish this result by making continuation of unapproved military activity beyond its deadlines unlawful. This creates several constitutional difficulties.

First, there is the problem of congressional regulation of peacetime deployments and war threatening actions which has been discussed

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132. *Id.* § 5(c).

133. *Id.* §§ 6, 7.

134. The Resolution allows suspension of these priority procedures, however, by voice vote. War Powers Resolution, Pub. L. No. 93-148, §§ 6(a)-(c), 7 (a)-(c), 87 Stat. (1973). Using a voice vote to delay beyond the sixty day limit a vote by roll call on an authorization bill would enable individual congressmen to avoid personal accountability for their failure to authorize a controversial presidential action.

above.[135] As noted at that point, any congressional attempt to regulate peacetime deployments would be unconstitutional.[136] Of more interest would be an application of the termination provisions to war threatening actions. In view of the shared nature of authority over war threatening actions, any attempt by Congress to legally bind the President simply by a majority vote to terminate such activity would be invalid.[137]

However, if the Resolution's procedures and the resulting order to terminate are interpreted as merely facilitating the expression of congressional will for the purpose of exerting political pressure on the President, their application to war threatening actions would be valid. Unified and unambiguous congressional opposition might itself be enough to force the President to end such a use of force. A public outcry might accompany Congress' opposition and pressure the President into disengagement or encourage Congress to employ more effective means of opposition such as a cut-off of appropriations. All of these potential effects of congressional utilization of the termination provisions would be constitutional. But efforts under the Resolution to force the termination of war threatening force by means of a legally binding order to the President would be unconstitutional.

The second constitutional difficulty with the termination provisions involves their effect on actual war making. As has been shown, there are two types of presumed authorization of war — one irrebuttable and the other rebuttable — and the termination provisions' treatment of each presents different problems.

The Resolution, in its initiation provisions, recognizes the irrebuttable presumption arising from the direct attack situation. However, the Resolution would allow Congress to force the President to stop defending the nation against direct attack. Congress simply does not have the authority to order the termination of such defensive actions by a President.[138] While it is most unlikely that Congress would ever wish to abandon one or more of the States to foreign invasion, it is conceivable that in the midst of a war effort, defense of part of the nation might have to be abandoned for tactical reasons. That decision,

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135. *See* text at notes 29–33 and 39–44 *supra*.
136. *See* text at notes 29–33 *supra*.
137. *See* text at note 54 *supra*.
138. *See* text at note 75 *supra*.

however, must be made by the President as Commander-in-Chief, not by the Congress.[139]

This constitutional restriction on congressional authority does not apply to grave threat situations which give rise to a rebuttable presumption of authorization, even if those situations involve defense of United States' possessions, territories or troops.[140] Congress can order the President to terminate a war effort in such situations, and he must make a good faith attempt to withdraw from the hostilities.[141] However, despite Congress' recognized authority in these situations, three constitutional objections might be made to the Resolution's treatment of them.

It might first be argued that the President can make war in grave threat situations, in spite of congressional opposition, if he possesses sensitive information or special expertise which make his judgment superior to that of Congress.[142] While this argument is not without support, it has been examined above[143] and should be rejected.

The second possible objection to the termination provisions is that by forcing Congress to approve or disapprove of presidential war making within sixty days, they unconstitutionally restrict Congress' ability to review and respond to grave threat situations in an *ad hoc* manner. In response to this objection, it can first be noted that the termination provisions do not prevent Congress from evaluating each situation on its own merits. Secondly, while they do seem to limit the time which Congress can spend evaluating any one situation to sixty days, there is nothing in the Resolution to prevent Congress from giving itself more time by authorizing a President's use of force temporarily.[144] This would allow Congress to consider the war making itself more extensively or to put continued pressure on the President to end his use of force without resorting to overt confrontation.[145] A temporary authori-

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139. *Id.*

140. *See* text at note 92 *supra.*

141. What constitutes good faith withdrawal from hostilities is a difficult question. *See* Mitchell v. Laird, 488 F.2d 611, 616 (D.C. Cir. 1973).

142. *See* Monaghan, *supra* note 5, at 31–33: "The doctrine of separation of powers should, at least in the area of foreign affairs, be viewed as essentially a political, not a legal, construct. . . . Any attempt to circumscribe on constitutional grounds the president's power to use the armed forces abroad confuses political with constitutional issues." *See* note 92 *supra.*

143. *See* note 92 *supra.*

144. The Resolution does require that authorization be "specific." War Powers Resolution, Pub. L. No. 93–148, § 8(a)(1), 87 Stat. 555 (1973). A time limit would be a reasonable element of specificity.

145. Congress often is constrained by the perception that conflicts between it and the

zation is to some degree, however, an imprimatur,[146] and by forcing Congress in some situations to resort to its use, the termination provisions do restrict Congress' political options somewhat. But the judgment of whether they limit the political options of Congress too severely can only be reached by balancing the loss of political flexibility against the gain of decisive action. Congress more than any other branch of government is in a position to evaluate the factors involved. In imposing a sixty day limit on its consideration of grave threat situations, Congress has struck the balance in favor of decisive action. Its judgment on this issue should be honored.[147]

The third and perhaps most substantial objection to the termination provisions is that they require American forces to be withdrawn from hostilities under time pressures which might make safe withdrawal impossible. Withdrawal of American forces from hostilities is required either upon the failure by Congress to authorize within sixty days the hostilities in question[148] or upon the passage by Congress of a concurrent resolution ordering withdrawal even before the sixty days have expired.[149] At such a point American involvement in a war effort might have become so pervasive and intense that an orderly and safe withdrawal of American forces would not be immediately possible. This problem could be remedied in some cases by the use of the provision in Section 5(b) of the Resolution under which Congress can give the President up to thirty days to make a staged withdrawal from unauthorized hostilities.[150] But situations may still arise in which the President has run out of time to end American involvement in a conflict but immediate withdrawal of American forces would result in greater casualties than would a more prolonged withdrawal.

In such situations it would seem that the President's only obligation would be to make a good faith effort to end the United States involvement as quickly as possible. This, of course, would not justify conducting a protracted withdrawal in order to further some foreign policy

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President "discourage the confidence of our allies and encourage the actions of our enemies." Note, *supra* note 5, at 1796.

146. Once approval of war making has been expressed, even if in limited terms, it is difficult to recant. The Gulf of Tonkin Resolution unleashed a war machine that Congress was powerless to control. *See U.S. Commitments to Foreign Powers, Hearings before the Committee on Foreign Relations of the United States Senate*, 90th Cong., 1st Sess. (1967); and S. REP. No. 797, 90th Cong., 1st Sess. (1967).

147. *See* Cox, *supra* note 92, at 221.

148. War Powers Resolution, Pub. L. No. 93-148, § 5(b), 87 Stat. 555 (1973).

149. *Id.* § 5(c).

150. *Id.* § 5(b).

objective since Congress presumably rejected such a course of action when it ordered immediate withdrawal. But it would allow the President to withdraw in a manner perceived by him to involve the least risk of American casualties.

It is, however, very unlikely that this problem would ever develop. By the time American forces became so deeply involved in a conflict that their immediate withdrawal would be impossible, Congress would be very reluctant to order an end to the hostilities.[151] One of the strengths of the Resolution is that it forces Congress to act quickly with regard to American military involvements so that an order to terminate can be given before the situation gets out of control.

Swift and decisive congressional action under the Resolution's termination provisions has another important effect. It increases the possibility of judicial resolution of disputes over military activity. Once Congress has clearly declared its opposition to a particular military activity, constitutional principles come into play which should govern disputes over the continuation of that activity.[152] If it were clear that either Congress or more likely the President were acting unlawfully in such a dispute, it might be appropriate for a court to condemn the unlawful conduct. The dispute would have to be presented to the court as a genuine controversy ripe for adjudication by parties with legally protected interests in its outcome.[153] The court would have to be able

151. This is another manifestation of the *fait accompli* problem. *See* notes 92 and 145 *supra*.

152. These principles, derived from the constitutional analysis already presented, may be stated simply. The President has exclusive control over peacetime deployments, and Congress may not interfere with them even through the appropriations process. War-threatening uses of force are subject to the joint control of the President and the Congress, permitting the President to employ such force without congressional authorization and permitting the Congress to limit their use by use of the appropriations power or other means available to it. War can only be initiated pursuant to congressional authorization, express, implied or presumed. In cases of presumed authorization of the rebuttable type, war must be terminated when opposed by Congress.

153. This aspect of justiciability involves both the article III "case and controversy" restriction on judicial power and the court made "rules of practice" designed to postpone judicial resolution of issues that could be more "prudently" handled under different circumstances. *See* Scharpf, *Judicial Review and the Political Question*, 75 YALE L.J. 517, 520–35 (1966). A. BICKEL, THE LEAST DANGEROUS BRANCH (1962). Functional as well as constitutional considerations are involved.

On the requirement of genuine controversy, *see generally* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 102–20 (2d ed. 1973) [hereinafter HART & WECHSLER]; Scharpf, *supra*.

As to ripeness, *see generally* HART & WECHSLER, *supra* at 120–49; Davis, *Ripeness of Governmental Action for Judicial Review*, 68 HARV. L. REV. 1122 (1955); Scharpf, *supra*.

Standing is considered in HART & WECHSLER, *supra* at 150–214; Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 601 (1968); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971); Scharpf, *supra*.

to ascertain and evaluate the relevant facts, to discover manageable standards for resolution of the issues, and to administer a meaningful remedy on behalf of the aggrieved party.[154] While it might be a rare occurrence for all of these conditions to be satisfied in a dispute over military activity, it is possible to conceive of several such lawsuits.

For example, a soldier might petition for habeas corpus to prevent his deployment to an unauthorized war;[155] a congressman might seek an injunction to enforce congressional opposition to a war or at least a declaratory judgment to ratify the binding nature of Congress' opposition;[156] the Comptroller General might seek to enjoin the Secretary of Defense from violating congressional spending limitations.[157] Each of these examples presents a controversy which is real and mature. Each of the parties can satisfy a test for standing imposed in the past.[158] If it is assumed that the military activity in each case clearly falls into one of the peacetime deployments, war threatening actions or war categories, there should be no significant factual disputes[159] and the legal standards to be applied will be judicially manageable: war continued in the fact of congressional opposition is unlawful;[160] appropriations limitations, unless they interfere with peacetime deployments must be obeyed.[161] Finally, the remedies sought might be effective means to resolve the controversies at hand. Freeing individual soldiers from their duty to report to battle might be a quick and simple way to

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154. The political question doctrine addresses more the suitability of a particular issue for judicial resolution than the suitability of a particular case. The doctrine can best be analyzed in functional terms: are the means available to the judiciary sufficient to actually resolve the issue presented? *See* Scharpf, *supra* note 153. Other interpretations have been given to the doctrine, but these alternate explanations seem less satisfying. *Compare* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) *with* L. HAND, THE BILL OF RIGHTS (1958) *and* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

155. *See, e.g.*, Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971) (serviceman with orders to fight in Vietnam challenging the legality of the war).

156. *See, e.g.*, Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973) (congressmen seeking declaratory judgment and injunction against the Vietnam War); *Compare with* Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973) (congressmen challenging the bombing of Cambodia held not to have standing).

157. *Compare with, e.g.*, Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972) *aff'd* 411 U.S. 911 (1973) (suit to enjoin expenditures by Secretary of Defense for Vietnam War).

158. *See* notes 153, 155–57 *supra*.

159. Whether a use of force is a peacetime deployment, war threatening or war making in character depends upon questions of fact or questions of evaluation of fact which will often be impossible to resolve. The passage of time, however, can serve to clarify the nature of a particular military situation. United States involvement in Vietnam exemplifies this well.

160. *See* text at note 92 *supra*.

161. *See* text at notes 44–45 *supra*.

end a war.[162] Rendering a declaratory judgment ratifying the binding authority of congressional opposition to a war might be the critical factor in forcing a President to comply with Congress' will.[163] Upholding a spending limitation could lay to rest a presidential claim to exclusive authority over a war threatening action, while striking down a spending limitation could end congressional interference with a peacetime deployment.

It is clear, then, that the termination provisions do provide some basis for an increase in judicial resolution of disputes over allocation of the war power. However, many such disputes will still be beyond the reach of the courts. It is likely, for example, that a contested military action would not fit neatly into one of the peacetime deployments, war threatening actions, or war categories and thus would not be susceptible to the application of manageable standards.[164] It is possible that the remedies available to a court would aggravate rather than assist the resolution of a particular controversy.[165] And it will often be the case that war powers disputes will involve war threatening force and thus require political resolution until they reach the stage of presidential defiance of a cut-off of appropriations.[166]

In summary, the termination provisions of the Resolution force Congress to act decisively in response to presidential uses of force. When the response is disapproval, these provisions validly operate either to impose a legal obligation on the President to terminate war making in grave threat situations or to help orchestrate Congress' political opposition to war threatening actions. However, congressional interference which might result from these provisions with either peacetime deployments or defense against direct attack on the nation would be unconstitutional. Finally, the termination provisions increase to some extent the possibility of judicial resolution of disputes concerning the nation's war power.

The Resolution's Consultation and Reporting Provisions

The Resolution contains consultation and reporting provisions de-

162. It could also be disastrous. In Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973), the Vietnam War was declared unlawful but the mode of withdrawal was left to the President's discretion.

163. It is far more difficult for a President to defy a confirmed legal obligation than to defy mere political opposition from Congress.

164. *See* note 154 *supra*.

165. *See* Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).

166. *See* text at notes 39–43 *supra*.

signed to keep Congress sufficiently informed to exercise the control over United States military activity which the Resolution entrusts to it. Under Section 3, the President must consult with Congress in "every possible instance"[167] before initiating military activity involving armed conflict or the clear potential for it. The President must consult "regularly" with Congress while such military activity continues. The process of consultation, according to the Resolution's legislative history, should involve a genuine interchange of ideas and not merely a report of information.[168]

Under Section 4 the President must report to Congress any initiation of military activity involving armed conflict or the clear potential for it[169] and any significant deployment or build up of United States Armed Forces abroad.[170] The report must be made within forty-eight hours of the President's use or deployment of troops[171] and must set forth the authority under which the President acted and the estimated scope and duration of his actions.[172] In addition, the President may be required to report any other information that "Congress may request in the fulfillment of its constitutional responsibilities with respect to the committing of the Nation to war and to the use of United States Armed Forces abroad."[173] The President is relieved of these reporting obligations only if Congress has declared war.[174]

These provisions respond to Congress' legitimate need for information concerning United States military activity. Congress' war powers and its other grants of authority cannot be responsibly exercised without the relevant war related information.[175] However, there is the countervailing consideration of the President's recognized needs for secrecy in the conduct of foreign and military affairs.[176] While it is certain that basic information pertinent to war making should not be withheld from Congress, it is by no means clear that all war related data should be disclosed to the whole of Congress. Indeed, in situations where, due to its institutional incapacity for rapid complex decision making, Con-

167. War Powers Resolution, Pub. L. No. 93-148, § 3, 87 Stat. 555 (1973).
168. H.R. Rep. No. 287, 93d Cong., 1st Sess. 6-7 (1973).
169. War Powers Resolution, Pub. L. No. 93-148, § 4(a)(1), 87 Stat. 555 (1973).
170. *Id.* § 4(a)(2)-(3).
171. *Id.* § 4(a).
172. *Id.* § 4(a)(A), (B), (C).
173. *Id.* § 4(b).
174. *Id.* § 4(a).
175. *See* note 92 *supra.*
176. *Id.*

gress would have little use for sensitive information, it would seem that disclosure by the President should not be required. With all of these competing considerations present at one time or another, it is inevitable that disputes will arise over access to war related information.[177]

In theory, the consultation provisions seem to indicate that such disputes over information would be legal disputes which a court could resolve.[178] Whatever the validity of that view, it is clear as a practical matter that such disputes should be resolved through the political process. Congress can hardly use the courts to force the President to report on matters about which Congress has no knowledge. Nor could the courts hope to tell the President and Congress how they should consult with one another. Finally, if the President reports a use of force but refuses to divulge his reasons for it, or reports inaccurate or incomplete information, congressional disapproval of his actions and various political sanctions are available to force the President to act more cooperatively.

In summary, the consultation and reporting provisions serve legitimate congressional needs for information but may conflict with valid presidential requirements for secrecy. Further, Congress' inability to make complex decisions swiftly militates against the extensive degree of consultation mandated by the Resolution. It is certain that disputes will arise over access to war related information but these disputes should be resolved by political means rather than by any legal formulae which might be derived from the terms of the Resolution's consultation and reporting provisions.

The Resolution's Interpretation Provisions

The Resolution contains several provisions concerning interpretation of the Resolution itself, of other war related legislation, and of United States treaties. While these sections raise virtually no constitutional problems, they do have an impact on the exercise of the war power and thus merit brief discussion. The first is Section 8(a)(1) which elaborates the meaning of "specific statutory authorization." In order for legislation to specifically authorize military activity involving armed

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177. This has been the primary difficulty under the Resolution thus far. *See Compliance Hearings*, *supra* note 106, at 53–88.

178. The Resolution employs the word "shall." War Powers Resolution, Pub. L. No. 93–148, § 3, 87 Stat. 555 (1973).

conflict or the clear potential for it, the legislation must 1) be specific and 2) explicitly refer to the War Powers Resolution.[179] Unfortunately, it is not clear from the Resolution or its legislative history how specific a "specific statutory authorization" must be. Furthermore, no matter how specific a presently existing statutory authorization might be, it is impossible for it to contain a reference to the War Powers Resolution of 1973 if it was enacted before 1973.

The requirement of specificity grows out of a history of presidential claims to war making authority under the general language of various United States treaties and resolutions and out of the tendency of courts to treat appropriations for Vietnam as authorization of that war. The language of treaties and resolutions is often general in nature so that it can express policies of the United States without committing the nation to specific actions which in the future might become undesirable.[180] Appropriations bills are often passed by Congress not because Congress approves of a war but because it fears endangering the safety of troops already committed to battle.[181] These actions by Congress are unsatisfactory means of authorizing war simply because they are not necessarily intended to have that effect. If Congress' intent were made clear there would be no difficulty.[182] Thus, the Resolution should be interpreted as requiring merely that authorizations of war manifest a clear intent to confer war making power. Any further requirements, such as time limits, area limits, or purpose limits, might in some situations create an unnecessary burden of detail in an area fraught with complexity.[183]

Applying this principle to legislation passed prior to the Resolution reveals that three "area resolutions" seem to empower the President to make war without further authorization from Congress: the "Formosa Resolution,"[184] the "Middle East Resolution,"[185] and the "Cuban

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179. *Id.* § 8(a)(1). *See* S. REP. No. 220, 93d Cong., 1st Sess. 24 (1973).

180. *See* Note, *supra* note 5, at 1800 (treaties), 1802 (resolutions).

181. *Id.* at 1799–1800.

182. *Id.* at 1803.

183. Of course, in some situations time limits, area limits, or purpose limits might be appropriate. *See* text at note 145 *supra;* Note, *supra* note 5, at 1803.

184. 50 U.S.C. app. n. prec. § 1 (1970) (originally enacted as Pub. L. No. 84–4, 69 Stat. 7 (1955)). The President is authorized "to employ the Armed Forces of the United States as he deems necessary for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack. . . ."

185. 22 U.S.C. § 1962 (1970). "[I]f the President determines the necessity thereof, the United States is prepared to use armed forces to assist any nation . . . requesting assistance against armed aggression from any country controlled by international communism. . . ."

Resolution."[186] However, the requirement of specific reference to the War Powers Resolution remains. The Resolution's legislative history indicates that Congress must reconsider these prior authorizations to sustain their validity.[187]

A similar analysis must be made of United States treaties. It is complicated, however, by two additional provisions of the Resolution. Section 8(a)(2) requires that a treaty, in order to constitute an authorization of war making, must be accompanied by implementing legislation which 1) is specific and 2) refers explicitly to the War Powers Resolution.[188] The purpose of this provision is to insure that the House of Representatives participates in the authorization process[189] and that grants of war making authority in treaties possess the same clarity of intent as such grants in legislation.[190] However, Section 8(d)(1) states that the Resolution is not intended to alter the provisions of existing treaties.[191] If, absent the Resolution, existing United States treaties would have authorized war making by the President, such treaties arguably should be exempt from the implementing legislation and specific authorization requirements of Section 8(a)(2). The weight of authority on this issue, however, is that no existing United States treaties empower the President to make war without further authorization from Congress.[192] Thus the implementing legislation and specific authorization requirements do not alter any existing treaties but merely specify how such treaties must be amended if they are to authorize war.

There is one final provision of the Resolution to be discussed. Section 8(d)(2) provides that nothing in the Resolution is intended to give the President any authority which he would not have had in the absence of the Resolution.[193] This provision was briefly discussed above in the context of the Resolution's initiation provisions but merits further examination. Its apparent purpose was to assuage the fears of those members of Congress who viewed the Resolution as a license to the President to act even more independently in the use of military force

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186. Pub. L. No. 87–733, 76 Stat. 697 (1962). The United States is determined "to prevent by whatever means necessary, including the use of arms, . . . [any Cuban aggression in the Western Hemisphere]."

187. S. Rep. No. 220, 93d Cong., 1st Sess. 24 (1973).

188. War Powers Resolution, Pub. L. No. 93–148, § 8(a)(2), 87 Stat. 555 (1973).

189. S. Rep. No. 220, 93d Cong., 1st Sess. 26 (1973).

190. *Id.*

191. War Powers Resolution, Pub. L. No. 93–148, § 8(a)(1), 87 Stat. 555 (1973).

192. *See* Note, *supra* note 5, at 1798–1801.

193. War Powers Resolution, Pub. L. No. 93–148, § 8(d)(2), 87 Stat. 555 (1973).

than was possible absent the Resolution.[194] The provision would have answered such fears if the balance of war making power between the President and Congress depended on legal principle. However, since most uses of force are war threatening and not acts of war, control in the majority of cases depends on political power.[195]

The Resolution increases Congress' political power by forcing it to act decisively in response to presidential war making.[196] But the Resolution also weakens Congress by limiting Congress' political options.[197] Under the Resolution, Congress may not maintain a neutral posture for longer than sixty days in order to evaluate the information, policies and events involved in a particular military engagement unless temporary authorization is given, which is itself a form of congressional approval. It may not delay decision in the face of a presidential claim that more data is available for Congress' consideration. It may not oppose the President in ways more subtle and potentially less damaging to an ongoing military effort than an overt declaration of the illegality of that effort.[198] Although the end result is uncertain, history seems to indicate that when Congress is faced with an absolute "yes" or "no" decision regarding an assertedly necessary use of force, approval is the likely result.[199] Once a military adventure receives initial congressional approval, it can be almost impossible to contain.[200] It will thus take a vigilant Congress to prevent the fear of inflated presidential power from becoming a reality.

CONCLUSION

While the War Powers Resolution may be unconstitutional in some of its possible applications, especially with regard to peacetime deployments and war threatening actions, it could prove to be a useful tool for increasing Congress' participation in the decisions which commit the United States to war. By forcing Congress to act decisively in response to presidential uses of force, the Resolution insures that the

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194. *See* note 126 *supra*.
195. *See* text at notes 35–46 *supra*.
196. *See* text at notes 133–34 *supra*.
197. *See* text at notes 144–47 *supra*.
198. Congress is often constrained by the perception that conflicts between it and the President "discourage the confidence of our allies and encourage the actions of our enemies." Note, *supra* note 5, at 1796.
199. *See* notes 123–24 *supra* and accompanying text.
200. *See* note 146 *supra*.

legal status of actual war making will be clearly established and that disfavored war threatening actions will be subjected to the constraints of well orchestrated political pressure. This creates a tremendous incentive for the President to cooperate with Congress and for Congress to take its role in United States military affairs seriously. It also makes possible judicial support for Congress' legitimate assertions of authority in the disputes that will inevitably arise over the limits of presidential power.

President Ford has already complied with the Resolution on three occasions,[201] and if nothing else this begins to establish a pattern of executive cooperation with the legislature concerning United States military ventures. Such a pattern is in marked contrast to the claims of independent authority that characterized the administrations of Truman through Nixon and the passive response by Congress at the time to those claims. Hopefully, cooperation between the President and Congress will become sufficiently established to insure that the Dog of War will never be loosed without the consent of those who ultimately must pay its price.

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201. *See Compliance Hearings*, *supra* note 106, at 4–7.

[Excerpt from Harvard Journal on Legislation, Vol. 11:181 1974]

STATUTORY COMMENTS

THE WAR POWERS RESOLUTION: STATUTORY LIMITATION ON THE COMMANDER-IN-CHIEF

Introduction

As the Vietnam conflict dragged on, Congress became increasingly aware of its inability to influence the course of events. Extensive congressional hearings and debate on Congress' proper role in the initiation and continuation of war culminated on November 7, 1973, in the enactment of the War Powers Resolution[1] — the first bill in the 93d Congress to become law over the President's veto.[2] This Note will describe why Congress felt it needed to reassert its warmaking role and will analyze how the War Powers Resolution responds to this goal.

I. The Historical Setting

The war powers struggle has its origins in the ambiguities of the Constitution.[3] The character of the struggle has evolved through two centuries of presidential and congressional practice. The Administrations of Presidents Roosevelt and Truman marked the beginning of a more expansive conception of presidential war powers.[4] President Roosevelt engineered the famous destroy-

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1 Pub. L. No. 93-148, 87 Stat. 555 (1973). *Hearings on War Powers Before the Subcomm. on Nat'l Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *1973 House Hearings*]; *Hearings on S. 440 Before the Senate Comm. on Foreign Relations*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *1973 Senate Hearings*]. For the conference report (H.R. Rep. No. 547, 93d Cong., 1st Sess. (1973)), which synthesized S. 440, 93d Cong., 1st Sess. (1973) and H.J. Res. 542, 93d Cong., 1st Sess. (1973), see 119 Cong. Rec. H8655-58 (daily ed. Oct. 4, 1973) [hereinafter cited as Conference Report]. For the President's veto message, see 9 Weekly Comp. Pres. Doc. 1285-87 (1973).

2 N.Y. Times, Nov. 8, 1973, at 1, col. 8.

3 The constitutionality of the War Powers Resolution is beyond the scope of this Note.

4 The historical development of the war powers of Congress and the President is considered in Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 Va. L. Rev. 1243, 1260-65 (1969); Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 Harv. L. Rev. 1771 (1968) [hereinafter cited

ers-for-bases deal, occupied Greenland and Iceland, and carried on an undeclared naval war with Germany, all without specific congressional authorization.[5] In committing American troops to Korea, President Truman also acted without specific congressional approval. The Truman Administration spoke of "the *traditional* power of the President to use the Armed Forces of the United States without consulting Congress . . . ."[6]

Under Presidents Eisenhower, Kennedy, Johnson, and Nixon this expansion continued at the expense of congressional war

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as Harvard Note]; Indochina: The Constitutional Crisis (prepared by students at Yale Law School, May 1970), in SENATE COMM. ON FOREIGN RELATIONS, 91ST CONG., 2D SESS., DOCUMENTS RELATING TO THE WAR POWER OF CONGRESS, THE PRESIDENT'S AUTHORITY AS COMMANDER-IN-CHIEF AND THE WAR IN INDOCHINA 73 (Comm. Print 1970) [hereinafter cited as DOCUMENTS]. *See also* J. JAVITS, WHO MAKES WAR (1973).

Early in the history of the United States President Jefferson articulated a view of the power of the President to engage in war defensively. In 1801, after disarming enemy vessels in hostilities off Tripoli, the Navy liberated the vessels and their crews. While ordering this operation, President Jefferson believed that anything else would have constituted offensive action requiring congressional approval. Fifty years later, President Polk sent troops into disputed territory between the United States and Mexico, claiming the resulting clashes were defensive. Although Congress finally declared that a state of war existed, two years later the House of Representatives passed a resolution referring to "a war unnecessarily and unconstitutionally begun by the President." CONG. GLOBE, 30th Cong., 1st Sess. 95 (1848). In the Civil War the Supreme Court upheld the validity of Lincoln's blockade of southern ports. The Prize Cases, 67 U.S. (2 Black) 635 (1862). However these cases were limited to direct armed attacks against the territory of the United States.

It was only after two world wars that this limited presidential power was combined with theories of extraterritorial interest and collective self-defense to greatly increase presidential powers. *See* Harvard Note, *supra*, at 1782. Additionally, even the offensive/defensive war distinction no longer provides an effective limitation on presidential war powers in an age with increasingly mobile weapons where "the President may sometimes conclude that offense is the best defense." Ratner, *The Coordinated Warmaking Power — Legislative, Executive, and Judicial Roles*, 44 S. CAL. L. REV. 461, 469 (1971). As Professor Commager has noted, "the kind of intervention we have witnessed in the past quarter century is, if not wholly unprecedented, clearly a departure from a long and deeply rooted tradition." *Hearings on S. 731, S.J. Res. 18 and S.J. Res. 59 Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 8 (1971) [hereinafter cited as *1971 Senate Hearings*]. Regarding McKinley's intervention in the Boxer Rebellion as an anomaly, Professor Commager notes that all other presidential commitments of troops before the past quarter century have been related to hemispheric defense. *Id.* at 9. Professor Bickel has argued that the Vietnam War marked the farthest extension of presidential power: "The decisions of 1965 amounted to an all but explicit transfer of the power to declare war from Congress, where the Constitution lodged it, to the President, on whom the framers explicitly refused to confer it." *Id.* at 552.

5 S. REP. No. 129, 91st Cong., 1st Sess. 14-15 (1969).

6 *Dep't of State Memorandum of July 3, 1950*, 23 DEP'T STATE BULL. 173, 174 (1950) (emphasis added).

powers.[7] In spite of Congress' shrinking warmaking role, few congressional voices rose in opposition until Vietnam made the public and Congress aware of Congress' subordinate and ineffectual role in the initiation and continuation of war. This awareness led to considerable activity by legal writers and finally to congressional action.[8]

One explanation for the growth in presidential power stems from the nature of the President's office. One person can act and react more quickly and decisively than 535 persons. A single person chosen by the entire electorate creates a focal point for the press and the public.[9] The President is easier to see and follow and therefore occupies an advantageous position in shaping and

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7 When President Eisenhower asked Congress for authority to use armed forces to protect Formosa and the Pescadores, he stated, "Authority for some of the actions which might be required would be inherent in the authority of the Commander-in-Chief. Until Congress can act I would not hesitate, so far as my Constitutional powers extend, to take whatever emergency action might be forced upon us in order to protect the rights and security of the United States." 1955 D. EISENHOWER, PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES 209-10.

President Kennedy consulted congressional leaders only after he had made the decision to "quarantine" the missile shipments. Arguably he could have been basing his actions on the Cuba Resolution. *See* notes 15-16 *infra* and accompanying text; S. REP. No. 129, 91st Cong., 1st Sess. 21 (1969).

Discussing the Gulf of Tonkin Resolution, the Johnson Administration said that the authority to commit troops to South Vietnam did not depend on the resolution, but on article II of the Constitution. Meeker, *The Legality of U.S. Participation in the Defense of Vietnam*, 54 DEP'T STATE BULL. 474, 484 (1966).

Finally, in the Nixon Administration the State Department's official position in opposing S. Res. 85 (a war powers proposal) was that "although reasonable men may differ as to the circumstances in which he should do so, the President has the constitutional power to send U.S. military forces abroad without specific Congressional approval." Memorandum attached to letter from William B. Macomber, Jr., Asst. Secretary of State for Congressional Relations, to Senator Fulbright (D.-Ark.), in S. REP. No. 129, 91st Cong., 1st Sess. 37 (1969). Later the State Department did not fight the attempt to repeal four area resolutions, see text at note 15 *infra*, because "the Administration is not depending on any of these Resolutions as legal or constitutional authority for its present conduct of foreign relations, or its contingency plans." Letter from H. G. Torbert, Jr., Acting Asst. Secretary for Congressional Relations, to Senator Fulbright, Mar. 12, 1970, in 62 DEP'T STATE BULL. 468 (1970).

8 Eagleton, *Congress and the War Powers*, 37 MO. L. REV. 1 (1972); Fulbright, *American Foreign Policy in the 20th Century Under an 18th Century Constitution*, 47 CORNELL L.Q. 1 (1961); Javits, *The War Powers Crisis*, 8 NEW ENG. L. REV. 157 (1973); Reveley, *supra* note 4; Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEXAS L. REV. 833 (1972); Spong, *Can Balance Be Restored in the Constitutional War Powers of the President and Congress?*, 6 U. RICH. L. REV. 1 (1971); Harvard Note, *supra* note 4.

9 *See* Reveley, *supra* note 4, at 1265-67.

molding public opinion. This is in direct contrast to Congress' popular image as a "parochial and inefficient group" which represents a variety of vested interests and is afraid to take a decisive stand.[10]

Executive power has also been augmented by what has been referred to as the "cult of executive expertise."[11] The President purportedly has access to much secret information, extensive diplomatic communications, and teams of foreign policy experts. Whenever he claims, citing expert opinion based on secret information, that a crisis situation exists requiring unilateral executive action, it has been and will continue to be very difficult for anyone without access to the secret information to effectively criticize or evaluate the executive action.[12] If only the President has the information, then only the President can decide.

Also offered to explain Congress' abdication of its warmaking authority are the constant crises, real or assumed, which have existed since World War II. Such urgencies often have placed emphasis on expediency rather than constitutionality.[13] For Congress to raise nice constitutional questions when the United States purportedly faced an impending crisis was not feasible politically.[14] Such considerations have led either to congressional acquiescence or to overbroad delegations of congressional authority in the form of area resolutions.[15] Depending on the in-

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10 *Id.* at 1296.

11 S. REP. No. 129, 91st Cong., 1st Sess. 16 (1969); L. Fisher, Congress and the War Power, July 28, 1971 (paper presented to the Center for the Study of Democratic Institutions, Santa Barbara), in *1971 Senate Hearings, supra* note 4, at 812. Louis Fisher is a member of the Congressional Research Service.

12 For an attack on the large role secrecy plays in the formulation of foreign policy, see Katzenbach, *Foreign Policy, Public Opinion and Secrecy*, 52 FOREIGN AFFAIRS 1 (1973).

13 S. REP. No. 129, 91st Cong., 1st Sess. 8 (1969).

14 "In time of emergency there is a natural, powerful tendency to fall in line behind the leadership of the President. When the nation is thought to be in danger, it seems to most people irresponsible, capricious, or even unpatriotic to question the President's word as to the need for action of one kind or another." S. REP. No. 606, 92d Cong., 2d Sess. 10-11 (1972). The Senate report illustrated this process by quoting from *Hearings on S. Con. Res. 8 Before the Senate Comm. on Foreign Relations and the Senate Comm. on Armed Services*, 82d Cong., 1st Sess. 93 (1951), where then Secretary of State Acheson said, "[W]e are in a position in the world today where the argument as to who has the power to do this, that, or the other thing, is not exactly what is called for from America in this very critical hour . . . ."

15 Javits, *supra* note 8, at 157-58.

stitutional prejudices one holds, area resolutions either give powers to the President in a specific geographic area or reconfirm his powers in that area. These resolutions are reminders that Congress once considered the office of the President capable of exercising war powers decisions without congressional help.[16]

Finally, Congress' own reluctance to deal with foreign policy helps to explain the extension of executive power. Congress' unwillingness is said to stem partly from a type of penance for its isolationist position during the twenties and thirties,[17] and partly from practices and procedures in Congress that render it unable to act with the speed at which the relationships among nations are changing. Until now, Congress tacitly chose to lose part of its power rather than to reform its practices and procedures.[18] At the other end of Pennsylvania Avenue, strong Presidents were ready to increase the prestige and power of their office.[19]

Once in 1967 and again in 1969 the Senate passed war powers legislation — not in the form of a bill but as a nonbinding "sense of the Senate" resolution that any subsequent national commitments should be concluded by both the President and the Senate.[20] Only after President Nixon's incursions into Laos and Cambodia indicated his unwillingness to accept the nonbinding resolutions did both the House and the Senate commence a second approach — the enactment of binding legislation.

The Senate and the House embarked upon divergent paths which could only be reconciled after several years of legislative effort. No joint action was taken in the 91st Congress.[21] In the

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16 Berlin Resolution, H. Con. Res. 570, 87th Cong., 2d Sess., 76 Stat. 1429 (1962); Cuba Resolution, Pub. L. No. 87-733, 76 Stat. 697 (1962); Middle East Peace and Stability Act, 22 U.S.C. §§ 1961-65 (1970); Formosa Resolution, 50 App. U.S.C. n. prec. § 1 (1970) (originally enacted as Pub. L. No. 84-4, 69 Stat. 7 (1955)); United Nations Participation Act of 1945, 22 U.S.C. §§ 287-87e (1970).

17 S. REP. No. 129, 91st Cong., 1st Sess. 16 (1969).

18 *See* Reveley, *supra* note 4, at 1271.

19 *Id.* at 1265, 1298-99.

20 On July 31, 1967, Senator Fulbright introduced S. Res. 151 on national commitments, which was reported from committee on November 20, 1967, as S. Res. 187. S. REP. No. 797, 90th Cong., 1st Sess. (1967). On April 16, 1969, the Senate Committee on Foreign Relations again reported out a national commitments resolution, S. Res. 85. S. REP. No. 129, 91st Cong., 1st Sess. (1969).

21 The House approved a war powers resolution near the end of the 91st Con-

92d Congress each chamber successfully passed a bill affecting war powers only to see it die because conferees were unable to agree before the end of the session.[22] In the 93d Congress the Senate tried again with S. 440, which was identical to the bill it had approved the previous year.[23] Meanwhile the House passed H.J. Res. 542, which only slightly modified its previous attempt.[24] These two bills formed the basis of the conferees' compromise bill subsequently passed by both Houses by a comfortable margin, vetoed by the President, and repassed by a two-thirds majority of both Houses.[25]

It is against this historical and institutional backdrop that the significance of the War Powers Resolution and the other war powers bills introduced in Congress since 1967 must be judged. Of course the very introduction of different bills and resolutions and the passage of one of them by a two-thirds majority in both Houses is an indication that many members of Congress are ready to take a more active role in decisions concerning the deployment of United States armed forces. Whether they are willing to undertake necessary institutional changes to make Congress an active partner remains an open question.

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gress, H.J. Res. 1355, 91st Cong., 2d Sess. (1970). *Hearings on Congress, the President, and the War Powers Before the Subcomm. on Nat'l Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. (1970).

22 On February 9, 1972, the Senate Committee on Foreign Relations reported a war powers bill, S. 2956, which represented a synthesis of war powers bills introduced by a number of Senators. S. Rep. No. 606, 92d Cong., 2d Sess. (1972); *1971 Senate Hearings, supra* note 4. S. 2956 was passed in April 1972. 118 Cong. Rec. S6101 (daily ed. Apr. 13, 1972).

Representative Zablocki (D.-Wis.), chairman of the Subcommittee on National Security Policy and Scientific Developments of the House Committee on Foreign Affairs, introduced H.J. Res. 1, a slightly modified version of H.J. Res. 1355 (*see* note 21 *supra*) during the first session of the 92d Congress. *Hearings on War Powers Legislation Before the Subcomm. on Nat'l Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 92d Cong., 1st Sess. (1971). H.J. Res. 1 was passed August 2, 1971. 117 Cong. Rec. 28,878 (1971).

23 On June 14, 1973, the Senate Committee on Foreign Relations reported out S. 440, which was identical to S. 2956 in the 92d Congress. S. Rep. No. 220, 93d Cong., 1st Sess. (1973).

24 Representative Zablocki submitted H.J. Res. 542, which was reported out of committee on June 15, 1973. H.R. Rep. No. 287, 93d Cong., 1st Sess. (1973). The House passed the bill a month later. 119 Cong. Rec. H6284 (daily ed. July 18, 1973).

25 *See* note 1 *supra*.

II. The War Powers Resolution

A. *Using Troops Without Congressional Approval*

Although the War Powers Resolution embodies elements of both S. 440 and H.J. Res. 542, the end result is closer to the House version than to the Senate. The resulting compromise is not only ambiguous in its wording but also in its ultimate purpose. Nowhere is this more apparent than where it delineates the circumstances in which the President could commit troops upon his own authority and those in which he could not without specific congressional approval.

The Senate bill explicitly enumerates the circumstances in which the President can commit troops without congressional approval by allowing him to do so only: (1) to repel armed attacks upon the United States, to retaliate in the event of such an attack, and to forestall the direct and imminent threat of such an attack; (2) to repel an attack against the armed forces of the United States and to forestall the direct and imminent threat of such an attack; (3) to protect citizens and nationals of the United States while evacuating them; or (4) pursuant to specific statutory authorization.[26] Any other use of American armed forces on foreign soil would require congressional approval. This limited enumeration of presidential powers is subject to the general criticism that any attempt to specify presidential war powers will be too narrow since all possible future exigencies cannot be prophesied. Such a criticism would be undercut by a flexible interpretation of "armed attack." Any future exigencies which threatened the United States as an "armed attack" could be treated as an armed attack. Nevertheless, such a functional interpretation is not clear from the statute; and the enumeration of war powers may be too inflexible to cover novel situations.

The Senate bill also was attacked as being overly broad. The provisions allowing presidential action to retaliate (not just defend) and to forestall the threat of an attack are claimed to give the President too much discretion.[27] Also, once the President

26 S. 440, 93d Cong., 1st Sess. § 3 (1973).

27 S. Rep. No. 220, 93d Cong., 1st Sess. 33-35 (1973) (supplemental views of Senator Fulbright).

could fit a war powers decision into a pigeonhole, S. 440 would give him license to continue hostilities with impunity until the expiration of 30 days.[28]

H.J. Res. 542, on the other hand, contained no such list. Any restriction on the variety of circumstances in which the President may commit troops without congressional approval must be implicit in other parts of the resolution. Two parts which appear to be relevant to this question specify that nothing in the resolution "is intended to alter the constitutional authority of the Congress or of the President . . . . " and nothing "[s]hall be construed as granting any authority to the President with respect to the commitment of United States Armed Forces . . . ."[29] However, according to the House report on H.J. Res. 542, the first provision was designed to help insure the constitutionality of the resolution "by making it clear that nothing in it can be interpreted as changing in any way the powers delegated to each branch of government by the Constitution,"[30] and the second was included to emphasize that the resolution did not grant the President any authority he did not already have.[31] So interpreted, neither seems to limit the variety of authorized unilateral presidential troop deployments.

Like the House bill, the War Powers Resolution contains only § 2(c), which states that the President's power as Commander-in-Chief to "introduce United States Armed Forces can only be exercised" 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."[32] Section 2(c)(3) seems to limit the President's power more than the Senate bill did. That section requires a national emergency and an attack on United States territory or its armed forces. Gone is the language referring to retaliation or forestalling the threat of an attack. Also no mention is made of the President's powers to intervene while evacuating United States citizens and nationals. In fact, since it does not specifically allow the Presi-

28 *Id.* at 34-35.
29 H.J. Res. 542, 93d Cong., 1st Sess. §§ 8(a), (c) (1973).
30 H.R. Rep. No. 287, 93d Cong., 1st Sess. 12 (1973).
31 *Id.* at 13.
32 War Powers Resolution, Pub. L. No. 93-148, § 2(c), 87 Stat. 555 (1973).

dent to use armed forces to evacuate American citizens and nationals, the provision has been questioned on constitutional grounds.[33] Alternatively this may be considered a mere statement of policy to be interpreted much as a preamble.[34] Such an interpretation would eliminate any constitutional problems by eliminating any changes in the current division of war powers.

As a result, anyone supporting § 2(c)(3) as an effective limitation on the situations in which the President can unilaterally deploy troops finds himself in a dilemma. If the policy statement is given a definite statutory effect, it is of dubious constitutional validity — excluding powers arguably within the President's prerogative. However, if one interprets § 2(c)(3) only as a general policy statement, the War Powers Resolution would not restrict in advance the types of situations in which the President can introduce troops without congressional authorization. Instead of clearly mapping out exactly which situations allow the President to initially introduce armed forces without congressional participation, the War Powers Resolution leaves the President and Congress in the same uncertain positions they traditionally occupied.

It was precisely this objection that prompted one of the early sponsors of S. 440 to vote against the War Powers Resolution. He felt that without the careful enumeration of the limited situations in which the President could introduce troops, the resolution might not only fail to reconfirm the Congress' proper role but might even lead to a further expansion of executive power.[35]

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33 119 CONG. REC. S18,992-95 (daily ed. Oct. 10, 1973) (remarks of Senator Eagleton, D.-Mo.). Senator Javits (R.-N.Y.) attempted to counter the constitutional argument but was effectively rebutted by Senator Eagleton.

34 *Id.* at S18,992.

35 Senator Eagleton's views are summarized in his essay *A Dangerous Law*: "The President assumes the inherent right to initiate war. By remaining silent about this assertion and attempting only to impose an after-the-fact review, Congress has now provided a legal basis for the President's erroneous claim. Instead of curbing executive power, the bill has dangerously expanded it." Eagleton, *A Dangerous Law*, N.Y. Times, Dec. 3, 1973, at 39, col. 3 (city ed.). Senator Eagleton thus claims that although the War Powers Resolution does constitute "a more efficient mechanism for terminating Presidentially initiated American participation in hostilities after they have begun," it is potentially counterproductive because it contains no substantive limits on the initial presidential actions that can be taken. 119 CONG. REC. S18,993 (daily ed. Oct. 10, 1973).

B. *Reporting Provisions*

Since the War Powers Resolution does not place any clear limitations on the specific situations in which the President can act, but rather seeks to give Congress effective control over the actions once they have already been taken, the reporting provisions are of primary importance. The final version, as did both the House and Senate bills,[36] specifies both the content of the report required and the circumstances under which the report must be made.[37] In addition to requiring the President to set forth: "(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," it requires "such other information as the Congress may request."[38] It further provides for periodic reports as hostilities continue.[39]

Much more important than the details of the report are the circumstances which require a report. The nature of the triggering device not only is critical to the determination of when a report is required, but additionally sets a starting point for the time during which the President is able to continue hostilities without explicit congressional approval.[40] If the President can successfully argue that his actions do not trigger the 60-day period, the cutoff provisions of the resolution are ineffectual. The triggering device of S. 440 was exactly the same list which enumerated when the President could act without prior congressional authorization.[41] The bill therefore provides a useful dichotomy: either the President must obtain prior congressional authorization or he must justify his actions as within one of the enumerated categories and thus submit a report.

The House resolution and the War Powers Resolution employ a slightly different triggering device. Instead of drawing up a list

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36 H.J. Res. 542, 93d Cong., 1st Sess. § 3 (1973); S. 440, 93d Cong., 1st Sess. § 4 (1973).

37 War Powers Resolution, Pub. L. No. 93-148, § 4, 87 Stat. 555-56 (1973).

38 *Id.* §§ 4(a), (b).

39 *Id.* § 4(c), 87 Stat. 556.

40 *Id.* § 5(b).

41 S. 440, 93d Cong., 1st Sess. § 4 (1973).

of situations with which the President might be confronted, as did the Senate bill, they set up a triggering device in terms of the responses the President might take.[42] The responses which trigger the reporting requirement are limited to introducing armed forces: "(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated; . . . (2) into the territory, airspace or waters of a foreign nation, while equipped for combat; . . . or (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation . . . ."[43]

Both lists of triggering devices are subject to two important caveats. First, many presidential actions which ordinarily might be considered exercises of war powers are simply outside the ambit of the triggering devices. No report would be required after military alerts, destroyers-for-bases deals, movements of ships in international waters, or movements of military equipment unless United States troops were involved. Since Presidents of the recent past have been unwilling to initiate clashes by the actual introduction of troops, only rarely would reports be required. These more passive measures would force foreign opponents to be the first to intervene with armed forces.[44]

Certain actions, although not involving troops directly, could have such a high correlation with retaliations and subsequent troop involvement that they should also trigger the reporting requirement and start the cutoff period running.[45] Of course such a widening of the circumstances included within the triggering definition would destroy the bright line offered by the introduction-of-troops test. The importance of such a bright line must be weighed against the utility of including Congress in warmaking decisions at an earlier time. The potential overreporting resulting from the destruction of the bright line might well be less egregious than underreporting caused by an unduly restrictive bright line test. On the other hand, overreporting could

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42 H.J. Res. 542, 93d Cong., 1st Sess. § 3 (1973); War Powers Resolution, Pub. L. No. 93-148, § 4, 87 Stat. 555-56 (1973).

43 War Powers Resolution, Pub. L. No. 93-148, § 4, 87 Stat. 555-56 (1973).

44 A salient example of such a decision was President Kennedy's determination to "quarantine" missile shipments to Cuba instead of bombing the emplacements.

45 The cutoff period is discussed in part II(C) *infra*.

weaken the bill to a certain extent. The President could submit reports for even the most inconsequential movements of troops, such as assigning a small armed contingent to an embassy, until their sheer volume would make Congress' subsequent approval little more than a perfunctory act.

The effectiveness of the triggering list depends on the interpretation of its various elements. "Introduction of United States Armed Forces" is defined to include

> the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such military forces will become engaged, in hostilities.[46]

Although the term "advisor" does not appear, the clear import of the definition seems to control this notorious form of American involvement in past hostilities. The definition does leave open such questions as whether training troops on American soil for a subsequent invasion of a foreign country would constitute an "introduction of United States Armed Forces." The status of people in charge of a military aid program also would be open to question.

Many elements of the triggering list are not defined by the War Powers Resolution or by either of the predecessor bills. Most notable are "hostilities" and "imminent" and to a lesser extent "equipped for combat."[47] Furthermore, policymakers and their lawyers will probably be able to construe other elements in a manner so as to make their meaning unclear. Under such circumstances it becomes critical to resolve who determines when a report is required.

Curiously, neither the War Powers Resolution nor the accompanying report makes any mention of who determines the necessity of a report, nor does S. 440 or H.J. Res. 542.[48] While the President has the relevant information at his disposal, and only

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46 War Powers Resolution, Pub. L. No. 93-148, § 8(c), 87 Stat. 559 (1973).

47 *See, e.g., id.* § 4(a)(1), 87 Stat. 555.

48 *Id.* § 5(b), 87 Stat. 556; S. 440, 93d Cong., 1st Sess. § 4 (1973); H.J. Res. 542, 93d Cong., 1st Sess. § 4(b) (1973).

he can determine when the facts satisfy the ambiguous standards necessitating a report, there is an obvious danger in allowing any branch of government to determine the limits of its own power. This general fear is especially appropriate when this power seems to be the very evil the statute is trying to remedy.[49] This argument suggests that Congress must ultimately decide when the President has failed to submit a necessary report. The legislative history, as well as the "Purpose and Policy" section of the War Powers Resolution, confirms this interpretation.[50] Moreover, it would seem that § 2(c), while it does not narrow the circumstances in which the President can act without congressional approval, does establish the standards which Congress should apply to decide whether a report is required.[51]

An argument against allowing Congress to decide whether a report is to be submitted is that Congress may have insufficient data on which to base a rational judgment. However § 3 of the War Powers Resolution, which is similar in effect to corresponding provisions of the House version, states that "[t]he President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into

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49 In this context note Abraham Lincoln's admonition in 1848:

> Allow the President to invade a neighboring nation, whenever *he* shall deem it necessary to repel an invasion, and you allow him to do so, *whenever he may choose to say* he deems it necessary for such a purpose — and you allow him to make war at his pleasure. Study to see if you can fix *any limit* to his power in this respect . . . . If, to-day, he should choose to say he thinks it necessary to invade Canada, to prevent the British from invading us, how could you stop him? You may say to him, "I see no probability of the British invading us" but he will say to you "be silent; I see it, if you don't."

Letter from Abraham Lincoln, while in Congress, to William H. Herndon, his law partner, Feb. 15, 1848, in 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 451 (R. Basler ed. 1953).

50 This argument draws most of its force from the claim that if Congress actually intends to reassert its authority in the war powers area, it must be the final arbiter of the necessity for a report. Section 2 of the War Powers Resolution, the "Purposes and Policy" section, states that the resolution is designed to insure that the "collective judgment" of the President and Congress would determine whether troops would be introduced. Pub. L. No. 93-148, § 2, 87 Stat. 555 (1973). This implies an equality in war powers that would be undercut if the President could decide whether a report was required. Similarly, the Senate committee report speaks of reconfirming Congress' authority in the declaration and conduct of war. S. REP. No. 220, 93d Cong., 1st Sess. 2 (1973). For there to be any role other than an advisory one, Congress must be able to decide when a report is required.

51 *See* note 32 *supra* and accompanying text.

situations where imminent involvement in hostilities is clearly indicated by the circumstances . . . ."[52] The legislative history of this section indicates that this consultation is to be "meaningful," *i.e.*, the President must not have already made up his mind when he consults Congress.[53] Therefore if this section is to have any effect, Congress will have to be consulted in a wider range of circumstances than those requiring a report. Then hopefully a cooperative decision could be reached. If not, Congress would then have the requisite data upon which it could make an informed judgment as to whether a report is required.

C. *No-Action, the Time Limitations, and Priority Provisions*

The determination that a report is required leads to a series of additional events. First, if by the end of the 60 days Congress has taken no affirmative action specifically authorizing the President to continue hostilities, his power to continue lapses, and he must withdraw the troops in question.[54] But there is one loophole. The President has an extra 30 days "if he determines and certifies to the Congress in writing that unavoidable military

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52 War Powers Resolution, Pub. L. No. 93-148, § 3, 87 Stat. 555 (1973); *see* H.J. Res. 542, 93d Cong., 1st Sess. § 2 (1973). The Senate bill contained no such provision.

53 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 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. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available.

H.R. REP. No. 287, 93d Cong., 1st Sess. 6-7 (1973). Congress had something more in mind than the after-the-fact briefing President Kennedy gave congressional leaders after his decision to "quarantine" Cuba. S. REP. No. 129, 91st Cong., 1st Sess. 21-22 (1969). Of course enforcement could be difficult. Other than forcing the President to go through the procedural motions of a meaningful consultation, the section might have little effect.

Also it can be argued that even though the President has made up his mind, his warmaking decision is not final until he undertakes an irrevocable action. Until then Congressmen may well be able to change the President's mind.

54 War Powers Resolution, Pub. L. No. 93-148, § 5(b), 87 Stat. 556 (1973). This 60-day limitation is the result of a compromise between the 30-day period originally proposed by the Senate bill, S. 440, 93d Cong., 1st Sess. § 5 (1973), and the 120-day period proposed by the House bill, H.J. Res. 542, 93d Cong., 1st Sess. § 4(b) (1973). CONFERENCE REPORT, *supra* note 1, at H8657.

necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."[55]

If the bill does not realistically limit in advance the situations in which the President can introduce armed forces, the main force of the bill is to limit the length of time the President can continue hostilities. This gives Congress a good bargaining position since it can revoke the President's authority at any time. Previously Congress had to affirmatively pass legislation over a presidential veto to stop a presidential war. Under the War Powers Resolution Congress need do nothing to stop further hostilities. It is the President who must report to Congress and convince the members to allow him to continue. Since the President would know that he would have to convince a majority of the House and Senate that hostilities should be continued, he would have to be more cautious in deciding to commit American troops.

The question remains whether the President should be required to withdraw armed forces, presumably against his own judgment, without affirmative action by Congress. Two arguments can be made against an affirmative answer to this question. First, Congress took affirmative action when it passed the War Powers Resolution. This position is weakened because Congress could not have foreseen the circumstances of a particular future confrontation when it overrode the President's veto. Second, the priority provisions in the War Powers Resolution provide a substitute for affirmative action. Once a Senator or Representative introduces a bill which would authorize an extension of the 60- or 90-day limitations, the measure must be debated, considered, and voted on within the 60-day period.[56] Only in the unlikely event that no one introduced a measure could Congress prevent further hostilities by taking "no action."

A very different situation arises if Congress is not in session when the report is submitted. Then the Speaker of the House and the President pro tempore of the Senate, if they deem it advisable or if they are petitioned by 30 percent of the membership of

55 War Powers Resolution, Pub. L. No. 93-148, § 5(b), 87 Stat. 556 (1973).
56 *Id.* § 6(a), 87 Stat. 557.

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their respective Houses, would have to request the President to convene Congress so that action could be taken.[57]

Another problem concerning this "no-action" provision is whether anything can be inferred from a lack of congressional action. Assume, for example, that troops are committed in a situation for which no one is sure whether a report is necessary, and the President fails to submit one. Assume further that Congress does nothing for the next 90 days. In trying to determine whether the President still has the authority to keep troops there, one must somehow discern from Congress' inaction whether it meant that no report was required or whether it meant to revoke the President's authority by inaction.

It is important to note that affirmative action here does not imply the same type of action required to pass a bill. The President would not be able to veto inaction by Congress. Congress can effectively prevent an extension of the 60-day period if a majority of either House fails to support such an extension. Thus, by the passage of the War Powers Resolution, Congress has purposely changed the terms on which it can overcome presidential opposition.

Congress' inability to prevent the continuation of hostilities has frequently stemmed not from the majority's desire to continue the fighting but from a coalition of those favoring continuation and those preferring to criticize the President rather than take affirmative action themselves.[58] This coalition can oftentimes prevent Congress from coming to a decision; absent an affirmative decision by Congress, the President has been able to pursue his own policies. The "no-action" provisions effectively break up this coalition.

D. *Disengagement and the 30-Day Extension*

Congress can force a disengagement of troops prior to the end of the 60-day period by concurrent resolution.[59] Such a resolution must be reported out of either the House Foreign Affairs Committee or the Senate Foreign Relations Committee within 15 days

57 *Id.* § 5(a), 87 Stat. 556.

58 *Cf.* Katzenbach, *supra* note 12, at 14-15; Spong, *supra* note 8, at 10.

59 War Powers Resolution, Pub. L. No. 93-148, § 5(c), 87 Stat. 556-57 (1973).

after being referred to one of these committees.[60] The House whose committee reported the resolution must vote on it within three days.[61] After passage, the other House must follow the same procedure.[62] After each House has adopted a bill, a conference committee must be established and must report a deadlock within 48 hours or, if in agreement, issue a report within six days.[63] Both Houses must then vote on the conference report within six days.[64] The longest period from introduction to passage would be 48 days.

If Congress decided to pass such a resolution, the question remains whether the resolution would eliminate the 30-day extension. Such an interpretation would be unwise. If Congress could at any time pass legislation which would require the President to withdraw armed forces immediately, those uses of the armed forces over which there might be dispute, but which ultimately were decided to be legitimate, would have to be conducted so as to insure a quick retreat. This interpretation would unduly inhibit the legitimate use of armed forces by the President.

A practical problem with the preceding analysis is that it assumes such a rapid pace of congressional action that cessation of fighting would be mandated before the President had an opportunity to plan an orderly withdrawal. Such rapid congressional action is highly unlikely. The War Powers Resolution does prescribe limits on the amount of time Congress can devote to the various phases of considering a proposed concurrent resolution,[65] but these maximum times are so abbreviated that they are also likely to be minimum times. This conclusion is strengthened if one assumes that many Congressmen are reluctant to take public positions on war powers issues until they have to. Rarely would a concurrent resolution proceed from introduction in one House to the final vote in the other House in significantly less time than the 48-day maximum. Furthermore, additional time would probably be lost because of delay between the introduction of troops

60 *Id.* § 7(a), 87 Stat. 557.
61 *Id.* § 7(b).
62 *Id.* § 7(c), 87 Stat. 557-58.
63 *Id.* § 7(d), 87 Stat. 558.
64 *Id.*
65 *See* notes 60-64 *supra* and accompanying text.

by the President and the introduction of a concurrent resolution. As a result, disengagement resolution would take almost as much time as the 60-day no-action period. Tacking the 30-day extension (and any delay in introducing a resolution) onto the 48-day period would almost destroy any extra disengagement power the concurrent resolution section would give Congress. If the concurrent resolution section is to have a nontrivial effect, Congress must have intended that the 30-day period not be available.

E. *Condemnation of Certain Presidential Practices*

The section of the War Powers Resolution which establishes rules of construction seeks to limit possible inferences drawn from treaties and appropriation measures.[66] It states that no law or statute shall be construed to authorize the introduction of armed forces unless such authorization is explicit.[67] This section should effectively negate statements made by previous Presidents that by appropriating funds for military operations Congress was tacitly endorsing the executive action.[68] Such a provision recognizes the difference between voting to feed, clothe, and otherwise logistically supply American fighting men and voting to support a continuing involvement in a presidential war.

The effect of these provisions on the area resolutions is less clear. It is possible that they satisfy the strict requirements set forth in the War Powers Resolution, which states that authority shall not be inferred

> from any provision of the law (whether or not in effect before the date of the enactment of this joint resolution) . . . unless such provision specifically authorizes the introduction of

66 War Powers Resolution, Pub. L. No. 93-148, § 8(a), 87 Stat. 558 (1973).

67 *Id.* § 8(a)(1).

68 *See* F. WORMUTH, THE VIETNAM WAR: THE PRESIDENT VERSUS THE CONSTITUTION 54-58 (1968); The War in Southeast Asia: A Legal Position Paper, 1970 (paper prepared by students at New York University School of Law), in DOCUMENTS, *supra* note 4, at 106; Harvard Note, *supra* note 4, at 1801-02.

There is some indication that judges have also interpreted congressional appropriation measures as implied concurrence in warmaking decisions. *See* Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971); DaCosta v. Laird, 448 F.2d 1368, 1369 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972); Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); United States v. Sisson, 294 F. Supp. 511, 514-15 (D. Mass. 1968).

> United States Armed Forces into hostilities or into such situations *and* states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution . . . .[69]

Some of the area resolutions seem to satisfy the first requirement. For example, the Middle East Resolution states:

> The President is authorized to undertake . . . military assistance programs with any nation or group of nations of that area desiring such assistance. . . . [I]f the President determines the necessity thereof, the United States is prepared to use armed forces to assist any such nation or group of such nations requesting assistance against armed aggression from any country controlled by international communism . . . .[70]

Similarly the Formosa Resolution authorized the President "to employ the Armed Forces of the United States as he deemed necessary for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack . . . ."[71] The Cuba Resolution noted that the United States was determined "to prevent by whatever means may be necessary, including the use of arms, . . . [any Cuban aggression in the Western Hemisphere]."[72]

Whether these resolutions satisfy the second requirement in § 8(a)(1) is more troublesome. No clue is offered in the conference report as to how the second requirement should be interpreted, except that it was an "adoption of modified Senate language defining specific authorization."[73] S. 440 would have included the above resolutions within the definition of specific statutory authorization.[74] Although the final version varies from the Senate bill, it seems unlikely that Congress would attempt to effect the wholesale repeal of all current area resolutions sub rosa. Given this improbability, plus the ambiguity of the provision upon which implied repeal must depend, it seems reasonable to

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69 War Powers Resolution, Pub. L. No. 93-148, § 8(a)(1), 87 Stat. 558 (1973) (emphasis added).

70 Middle East Peace and Stability Act, 22 U.S.C. § 1962 (1970).

71 Formosa Resolution, 50 App. U.S.C. n. prec. § 1 (1970).

72 Cuba Resolution, Pub. L. No. 87-733, 76 Stat. 697 (1962).

73 CONFERENCE REPORT, *supra* note 1, at H8658.

74 S. 440, 93d Cong., 1st Sess. § 3 (1973).

conclude that Congress did not intend to nullify the area resolutions.

The section also stands for the proposition that many of the collective defense treaties entered into by the United States should not be considered "self-executing," *i.e.*, as authorization for the intervention of United States armed forces without subsequent approval by Congress.[75] This provision should buttress previous contentions that the "constitutional processes" clauses in most collective defense treaties incorporate by reference the Congress' duty and power to decide whether to declare war.[76] The resolution was careful to exclude situations in which United States armed forces were part of a high level military command such as NATO or the United Nations, but this exclusion was clearly restricted to the joint operations of such commands.[77]

F. *Conflicting Congressional Intent*

The interpretation section also stated that nothing in it "is intended to alter the constitutional authority of the Congress or the President . . . ."[78] Such a provision seems to present a certain lack of consistency. The War Powers Resolution is written in an area which is generally acknowledged to be one of concurrent powers held by both Congress and the President.[79] When legislating in such an area, Congress cannot pretend that it is not altering constitutional powers. In the words of Justice Jackson in the *Steel Seizure Case*, "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[80]

There is a great distinction between a President acting on his authority in an area in which Congress has failed to legislate and acting on his authority in direct contravention of a legislative mandate. Therefore the very fact that Congress passed the War Powers Resolution switches the standards by which a presidential

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75 War Powers Resolution, Pub. L. No. 93-148, § 8(a)(2), 87 Stat. 558 (1973).

76 Harvard Note, *supra* note 4, at 1798-800.

77 War Powers Resolution, Pub. L. No. 93-148, § 8(b), 87 Stat. 558 (1973).

78 *Id.* § 8(d)(1).

79 *See generally* Harvard Note, *supra* note 4.

80 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

action is to be judged from the second to third division of Justice Jackson's tripartite universe of presidential power. When the President acts in an area where Congress has neither granted nor denied him authority, he must rely only on his independent powers. But "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . ."[81] Therefore the War Powers Resolution alters the constitutional balance by its very existence. The explanation for this apparent inconsistency lies in Congress' intent merely to restore the traditional constitutional balance between the two branches and not to take any power from the President other than those that belong to Congress.

III. The Potential Effectiveness of the War Powers Resolution

The War Powers Resolution, as well as many of the earlier legislative attempts, is limited by the *fait accompli* problem. With his wide, virtually unlimited discretion over foreign affairs, the President is free to start a chain of events which might require presidential deployment of armed forces without the necessity of congressional approval.[82] Such foreign policy actions can be distinguished from those actions which involve military maneuvers.

For example, the President could break off diplomatic relations or impose other nonmilitary sanctions. Information concerning such actions would not even have to be reported to Congress.[83] Therefore whenever the President has a number of possible alternatives, each with a different probability of causing future hostilities, he is able to choose action which is either more or less likely to lead to war. When the time to deploy troops finally arrives, the decisionmaking process will have already been completed. Unless Congress can involve itself in these earlier decisions, it may find its later participation ineffective.

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81 *Id.* at 637.

82 *See* Morgenthau, *The American Tradition in Foreign Policy*, in Foreign Policy in World Politics 264 (R. Macridis ed. 1967).

83 *See* part II(B).

Another aspect of the War Powers Resolution's effectiveness is whether it will prevent future Vietnams. Recognizing that Congress can never legislate wisdom, it appears unlikely that the War Powers Resolution alone could prevent a future Vietnam. First, the President could have instituted armed intervention after the Gulf of Tonkin incident within the War Powers Resolution, since his claim was that American ships were fired upon.[84] If such a situation recurred, Congress could be caught up in the same kind of emotions that led to the Gulf of Tonkin Resolution in the first place. The statute would not prevent such a result. A President wishing to introduce forces in the future would still have all of his special advantages, including selectively supplying information to Congress until a vote was taken to support the presidential position.

Finally, since the earlier Presidents and Congresses did not seem too worried about the constitutional questions concerning the use of American troops without congressional approval, it is unlikely that a statutory solution would have changed anything. Arguably the only way Congress could effectively prevent a future Vietnam would be to be involved in foreign policy matters from the beginning in order to rationally judge the commitment of American troops. At most, the War Powers Resolution would give an already angered Congress a technique for restricting the President. Although the War Powers Resolution would make it easier for Congress to articulate and enforce its judgment, Congress must become aroused through means independent of this legislation. This arousal and not the wording of a particular statute will prevent future Vietnams.

Another question concerning the effectiveness of the resolution is whether it actually would limit the President's warmaking. The Senate's version seems to show that the Senate was interested in arresting the steady flow of power toward the President. The House bill and the War Powers Resolution are not so clear. Senator Eagleton and others believe that its net effect is to increase the role of the President, not to limit it.[85] Indeed the War Powers Resolution contains no explicit list of situations in which the President can act without congressional approval. It provides

84 War Powers Resolution, Pub. L. No. 93-148, § 2(c)(3), 87 Stat. 555 (1973).
85 *See* note 35 *supra*.

for no mandatory congressional participation in foreign affairs until after armed forces have crossed onto foreign soil equipped for combat. It does not codify the existing constitutional division of powers between the President and Congress.

The danger remains that the War Powers Resolution might cripple the President in foreign affairs by eliminating secrecy and decisiveness as diplomatic tools. Any crippling effect would be partially undercut by the likelihood that the President would not hesitate to follow a course of action he felt to be in the national interest. To assure later congressional approval, he might be forced to inform Congress, and thus the world, of his plans. Foreign leaders might be more willing to force a confrontation if they knew that the President would need congressional support before he could respond forcefully. Negotiations might be delayed while a foreign power waited for the 60- or 90-day period to expire. The President might also tend to use excessive force to win a victory within 60 days.

IV. Alternative Approaches

One alternative found to be successful is the actual or threatened termination of appropriations. Although often considered a clumsy and ineffectual weapon, it did work to end the Cambodian bombing campaign.[86]

The creation of a congressional committee whose members would be privy to the same secret diplomatic information and the same foreign policy experts as the President might also work.[87] The President would then have to convince the permanent committee whenever he wished to introduce troops, unless the emergency fell within those limited circumstances for which prior permission need not be sought. Such a committee would at least

86 Although opposition to American operations in Indochina had been growing for some time, it was not until May 10, 1973, that the House amended an appropriations bill, H.R. 7447, 93d Cong., 1st Sess. (1973), to cut off funding for such activities. 119 Cong. Rec. H3548-605 (daily ed. May 10, 1973). President Nixon vetoed this bill. 9 Weekly Comp. Pres. Doc. 861-62 (1973). Only the imminent cutoff of appropriations for the entire federal government at the end of the fiscal year prompted him to accept a compromise of an August 15, 1973, cutoff of funds for combat in Indochina. *See* N.Y. Times, July 1, 1973, § 4, at 4. The House and Senate both passed this compromise on June 29, 1973. 119 Cong. Rec. H5659-87, S12,582 (daily ed. June 29, 1973). *See* Pub. L. No. 93-50, 87 Stat. 99 (1973).

87 Spong, *supra* note 8, at 20. *But see* Katzenbach, *supra* note 12, at 16.

insure the independent judgment of more than one person before the nation was committed to war. Whatever the committee's composition, there could exist the same "cult of expertise" and the same cloak of secrecy.

Congress could be much more restrictive in passing area resolutions.[88] One possible step would be to repeal the ones still in existence. Another step would be to carefully draft future ones to clarify that Congress is delegating power which belongs exclusively to it. Such resolutions might also contain reporting provisions and specific limitations as to the scope and type of operations to be conducted. These proposals do encroach on the President's powers as Commander-in-Chief as the conditions approximate tactical decisions usually left to the military. Arguably, some traditionally military decisions, such as expanding the theater of war operations, even for defensive purposes, should involve more than the Commander-in-Chief.[89] Another possible condition on future area resolutions is a definite time limit,[90] so that Congress will be forced to periodically review the wisdom of a continuing involvement.

The legislative history of the War Powers Resolution makes it very clear that Congress no longer, if indeed it ever did, views inaction or passage of an appropriations bill as tacit approval of presidential conduct. In fact, Congress goes even further to state that it does not interpret previous treaties as self-executing.[91] The President has been made aware of where Congress stands and will be more likely to act in a manner consistent with Congress' view.

*Gerald L. Jenkins**

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88 For a list of current resolutions, see note 16 *supra*.

89 The characterization of the Cambodian bombing campaign as a purely tactical decision would no doubt cause argument today. A continuum could be constructed running from broad national goals, to foreign policy, to global military strategy, and finally to tactical decisions. Most would agree that Congress has the power to engage in the determination of national goals. On the other hand, the President, as Commander-in-Chief, is in charge of military operations including tactical decisions and even strategy. This dichotomy is beginning to break down because the last decade has shown that strategy and tactical decisions can implicate foreign policy and national goals. *But cf.* Rehnquist, *The President and Cambodia, His Constitutional Authority*, N.Y.L.J., June 9, 1970, in *1971 Senate Hearings, supra* note 4, at 829-32.

90 S. REP. No. 129, 91st Cong., 1st Sess. 19 (1969).

91 War Powers Resolution, Pub. L. No. 93-148, § 8(a)(2), 87 Stat. 558 (1973).

*B.A., 1971, Eastern Illinois University; member of the Class of 1975 at Harvard Law School.

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THE PRESIDENCY, WAR, AND FOREIGN AFFAIRS: PRACTICE UNDER THE FRAMERS*

ABRAHAM D. SOFAER†

INTRODUCTION

American government is in a period of turmoil and apparent change. Our nation's recent failures, diplomatic and military, foreign and domestic, have undermined confidence in existing institutions and practices. The executive branch, in particular, is blamed for much of what has gone wrong. Recent presidents are said to have exercised too much power over all forms of legislation, controlled information to prevent criticism or legislative interference, engaged in covert activities here and abroad, and made war without sufficiently explicit legislative approval.

Congress has adopted unprecedented measures to check sweeping executive claims of power over foreign and military affairs. Most notable is the War Powers Act.[1] Other measures have been considered, including proposals to submit to the courts some conflicts between the legislative and executive over access to information.[2] The courts have been busy deciding cases concerning the division of powers, even without special legislative encouragement.[3]

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* This paper is based on research conducted by Professor Sofaer as Director of the American Bar Association sponsored study of the war powers in American history. The views expressed are the sole responsibility of the author. For greater detail and discussion of the incidents described herein, *see* A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS (1976).

† Professor of Law, Columbia University.

1. Joint Resolution of Nov. 7, 1973, Pub. L. No. 93-148, 87 Stat. 555. Other notable examples are the Congressional Budget and Impoundment Control Act of July 12, 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified in scattered sections of 1, 2, 31 U.S.C.); and the Antideficiency Act of 1950, ch. 896, § 3679c(2), 64 Stat. 765, *as amended*, 31 U.S.C. § 665 (Supp. IV, 1974). The executive's authority to impound under this statute has been strictly construed. State Highway Comm'n v. Volpe, 479 F.2d 1099, 1118 (8th Cir. 1973).

2. *See* S. 2073, 93d Cong., 1st Sess. (1973). This bill has not been reintroduced.

3. The most striking example is United States v. Nixon, 418 U.S. 638 (1974), in which a unanimous Supreme Court refused to allow the President to decide unilaterally what information to submit in response to a judicial subpoena. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1970), has also provided bases for litigation. *See, e.g.*, United States v. Giordano, 416 U.S. 505 (1974); United States v. Chavez, 416 U.S. 562 (1974). More recently, telephone surveillance of executive department officials by the Secretary of State has been the subject of a civil action. *See* Halperin v. Kissinger, 401 F. Supp. 272 (D.D.C. 1975); N.Y. Times, Jan. 13, 1976, at 21, col. 2. The issue of impoundment of funds appropriated by Congress has also stimulated court activity. *See* Train v. New York, 420 U.S. 35 (1975) (Impoundment Control Act does not permit allotment of less than entire amounts authorized to be appropriated). See also, on the impoundment issue, *e.g.*, Pennsylvania v. Lynn, 501 F.2d 848 (D.C. Cir. 1974); Pennsylvania v. Weinberger, 367 F. Supp. 1378 (D.D.C. 1973). The Vietnam

This symposium is an attempt to focus on the present state of executive power and to consider remedies for felt deficiencies or dangers. The symposium understandably enlists people from many different fields and with a broad spectrum of views on the crucial issues. They must all, to one degree or another, invoke and rely upon past experience as a guide, just as Congress and the courts use experience to devise or at least to rationalize proposed solutions. Indeed, many politicians and writers, since the war in Vietnam, have used history to explain or to justify what went wrong and to devise new rules or institutions to deal with the problem of distributing power between the executive and legislative branches.

The purpose of this paper is to deal with one recurrent use of history in the current debate over our institutions of government. Again and again, those critical of recent practices have invoked the experience of the Constitution's framers.[4] The first twenty to thirty years of experience under the present Constitution are generally regarded as a period of national progress and achievement, and modern critics strongly suggest that our early successes may be attributed, at least in part, to the willingness of our first presidents to abide by the Constitution.[5]

An important example of this use of our early history is found in the Report of the Senate Committee on Foreign Relations, filed February 9, 1972,

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War engendered a flurry of activity in the courts. Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974) (reversing district court decision that there was not sufficient authorization to warrant Cambodia bombings, on ground that issue presented a political question); Da Costa v. Laird, 471 F.2d 1146 (2d Cir. 1973) (repeal of Tonkin Resolution did not withdraw congressional authorization implicit in other legislation); Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971) (Gulf of Tonkin Resolution held sufficient authorization).

4. *See, e.g.*, SENATE COMM. ON FOREIGN RELATIONS, 91ST CONG., 2D SESS., DOCUMENTS RELATING TO THE WAR POWER OF CONGRESS, THE PRESIDENT'S AUTHORITY AS COMMANDER-IN-CHIEF AND THE WAR IN INDOCHINA 12-13, 74-76, 88, 99-101, 153-56 (Comm. Print 1970); *Hearings on War Powers Before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. 31 (Thomas F. Eagleton), 209-12 (Raoul Berger) (1973); *Hearings on Congress, the President, and the War Powers Before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. 513-17 (1970) (*Harvard Law Review* Legal Memorandum on the Constitutionality of the Amendment to End the War); R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 78-81, 130-40, 167-81 (early practice), 11-14, 35-42, 50-56, 61-69, 127-29, 146-49 (original intent) (1974); Ratner, *The Coordinated Warmaking Power—Legislative, Executive, and Judicial Roles*, 44 S. CALIF. L. REV. 461, 464 n.12, 470 (1971); Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243, 1260-61 (1969); Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 7-11 (1972).

Those defending recent practices have also frequently invoked the framers' experiences to support their arguments. *See, e.g.*, Rogers, *Congress, the President and the War Powers*, 59 CALIF. L. REV. 1194-98 (1971); DOCUMENTS RELATING TO THE WAR POWER OF CONGRESS, *supra* at 176; *Hearings on War Powers, supra* at 297 (Barry Goldwater). Edward Corwin raised many of these arguments over half a century ago. *See* E. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 90-97, 131-35 (1917).

5. *See* DOCUMENTS RELATING TO THE WAR POWER OF CONGRESS, *supra* note 4, at 30-31; *Hearings on War Powers, supra* note 4, at 31-32 (statement of Thomas F. Eagleton).

concerning an early version of the "war powers bill." The report flatly asserts that "whatever else they may have painted with a 'broad brush,' the Framers of the American Constitution were neither uncertain nor ambiguous about where they wished to rest the authority to initiate war," namely "in the legislature, and in the legislature alone."[6] The power to declare war and to control the military resources placed at the nation's disposal are repeatedly cited as reflecting an intent to require legislative approval before war is commenced. Some commentators even argue that the Constitution meant to avoid the sort of gradual involvement that occurred in Vietnam by requiring Congress to declare war or to authorize it unequivocally, not just to delegate vague discretionary power over military actions or to pay for actions already undertaken.[7] Treaties committing the nation to come to the aid of others represent, under this view, only a prediction by the President and Senate that the Congress would, when faced with a situation contemplated in the treaty, authorize hostilities in the constitutionally prescribed manner. The sole exception to the requirement of prior legislative approval, some assert, is the President's power to defend the nation from actual, or perhaps also imminent, attack.[8] And this power is sometimes narrowly construed to limit its application to attacks on the nation as a geographic entity, rather than on ships and citizens abroad, and to preclude preemptive strikes.

The unambiguous allocation allegedly made by the framers was, according to the theory I am addressing, faithfully followed by the same men when they assumed power. No in-depth exposition of what actually occurred in the early administrations is attempted to demonstrate this hypothesis. Rather, isolated and—as I will show—unrepresentative and misleading events are relied upon, such as Madison's argument in the Pacificus-Helvidius debate, Jefferson's statement in his first annual address that Congress alone has the power to authorize "offensive" military actions, and Madison's message of June 1, 1812, asking Congress whether the United States should go to war with Britain—"a

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6. SENATE COMM. ON FOREIGN RELATIONS, WAR POWERS, S. REP. No. 606, 92d Cong., 2d Sess. 12 (1972).

7. *See, e.g.*, ACLU Amicus Brief and Appellant's Brief, *Orlando v. Laird*, *excerpted in* L. FRIEDMAN & B. NEUBORNE, UNQUESTIONING OBEDIENCE TO THE PRESIDENT, THE ACLU CASE AGAINST THE ILLEGAL WAR IN VIET NAM 62-72, 130-74 (1972); Van Alstyne, *supra* note 4, at 16-17; Velvel, *The War in Vietnam: Unconstitutional, Justiciable and Jurisdictionally Attackable*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 651, 680-81 (R. Falk ed. 1969); *cf.* Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 137 (1971).

In Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971), the court held the Gulf of Tonkin Resolution and other legislative collaborations to be sufficient authorization for the war. Even after the Gulf of Tonkin Resolution was repealed, the Second Circuit found adequate authorization. *See* Da Costa v. Laird, 448 F.2d 1368 (2d Cir. 1971), *cert. denied*, 405 U.S. 969 (1972). *See also* Da Costa v. Laird, 471 F.2d 1146 (2d Cir. 1973).

8. *See, e.g.*, statement of Professor Richard B. Morris, in S. REP. No. 606, *supra* note 6, at 15; Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Original Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 529, 612 (1974); Reveley, *supra* note 4, at 1285-88, 1290 n.55.

solemn question which the Constitution wisely confides to the legislative department of the Government."[9]

Much can be gained, I think, by reviewing the highlights of our early history to determine how the framers and their contemporaries actually viewed and exercised power. Enough has been said to establish that the constitutional allocation of powers relating to war making is far from unambiguous.[10] Clearly, the Constitution accords Congress the upper hand, or final say, on most issues of significance. But it also assigns the President great powers over the military, and in the execution of policy. What needs closer examination than it has so far received is the construction actually given the Constitution's allocation during the first few administrations.

I

FORGING THE EXECUTIVE BRANCH, 1789-1797

Any in-depth treatment of the allocation of power over foreign and military affairs in modern times necessarily leads to a discussion of the extent to which the American executive controls other powers and functions that virtually assure him the power to make war or to lead the nation to war. The presidency gains its war-making capacity not only from the power to command the military forces Congress provides but from its control of the conduct of foreign relations, including its capacity to obtain and to keep from Congress information necessary for that body to formulate and to judge foreign and military policy; from its extensive role in planning legislation, including the budget; from the discretion it exercises over funds allocated by the legislature; from its control over most important executive offices; and perhaps most of all from the vast powers Congress has willingly delegated that directly concern the use of military force.

The first lesson of George Washington's presidency is that the pattern of executive-congressional relations that we associate with the modern executive was established in all its essentials by 1797. This was accomplished, moreover, with a remarkably high degree of awareness in the legislature of the enormous power that the executive might acquire if allowed to assume the functions involved. One of the first decisions made by Congress, for example, was to allow, or to recognize, the President's power to remove the principle execu-

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9. Madison's papers as Helvidius are in 6 THE WRITINGS OF JAMES MADISON 138-88 (G. Hunt ed. 1906). Jefferson's statement is in 11 ANNALS OF CONG. 11, 12 (1801); and Madison's message is in 24 ANNALS OF CONG. 1714, 1719 (1812).

10. The best and most balanced treatment is L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972). Other able treatments include Bestor, *supra* note 8, at 537-66; Lofgren, *War-Making Under the Constitution, The Original Understanding*, 81 YALE L.J. 672 (1972); Reveley, *Constitutional Allocation of the War Powers Between the President and Congress: 1787-1788*, 15 VA. J. INT'L L. 73 (1974); Note, 81 HARV. L. REV. 1771, 1772-80 (1968). My own coverage is in A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS ch. 1 (1976).

tive officers without cause. Many of those favoring this allocation rested their case on an expansive construction of the power to execute the laws. As Madison described the prevailing argument: "[T]he Executive power being in general terms vested in the President, all power of an Executive nature not particularly taken away must belong to that department."[11] The planning function was quickly assumed by Washington, who ordered Secretary of War Henry Knox to prepare a plan for organizing the militia;[12] Congress seemed agreeable to this mode of proceeding when it included in the act establishing the Treasury a requirement that the Secretary "digest and prepare plans" concerning revenue and expenditures,[13] and soon thereafter instructed Alexander Hamilton to report a plan for supporting the public credit.[14] Republicans forcefully challenged this practice when they increased their numbers in the Second Congress, warning "that the Executive, or rather the Treasury Department, was really *the efficient Legislature of the country*, so far as relates to the revenue, which is the vital principle of Government."[15] But rather than restricted, the practice was actually expanded to include planning for frontier defense, with many legislators noting the superior capacity of executive officers to prepare plans in their respective areas of expertise.[16]

Congress quickly granted the executive broad control over funds by making most appropriations in lump sums; by allowing the Secretaries of Treasury and War to shift such funds as were specifically appropriated from one category to another; by appropriating funds to cover deficiencies in categories for which appropriations had been expended; and by ratifying expenditures on authorized purposes for which no appropriation had been made, such as the expedition to suppress the so-called Whiskey Rebellion.[17] Albert Gallatin's opposition to these practices was as sophisticated and effective as any that could be mounted today, after almost two hundred years of experience.[18] But

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11. Letter from James Madison to Edmund Pendleton (June 21, 1789), in 5 WRITINGS OF JAMES MADISON 405-06 (G. Hunt ed. 1904). Madison noted that this doctrine was subject to modification but that he favored executive authority over removal to help preserve an equilibrium against the far more awesome legislative power.

12. *See* 1 ANNALS OF CONG. 938 (1790). *See also* 2 ANNALS OF CONG. 2087-2107 (1790).

13. Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 65. For the related debate, see 1 ANNALS OF CONG. 615-31 (1789).

14. *See* 1 ANNALS OF CONG. 904 (1789).

15. 3 ANNALS OF CONG. 351 (1792).

16. See particularly the statement of Theodore Sedgwick, of Massachusetts, *id.* at 437-40, including his response to Madison's contentions. A comprehensive statement by John Page, of Virginia, against such delegations appears in *id.* at 441-44. Military planning was added to the list of executive functions in 1795. *See* 4 ANNALS OF CONG. 1120-21 (1795).

17. *See generally* L. WHITE, THE FEDERALISTS, A STUDY IN ADMINISTRATIVE HISTORY 326-29 (1961); L. WILMERDING, THE SPENDING POWER, A HISTORY OF THE EFFORTS OF CONGRESS TO CONTROL EXPENDITURES 20-49 (1943). The Act of Dec. 31, 1794, ch. 6, 1 Stat. 404, appropriated funds to cover expenses incurred in suppressing the insurrection.

18. For a sampling of Gallatin's arguments, *see* 6 ANNALS OF CONG. 2336-42, 2348-51, 2358 (1797).

his minor successes proved futile in practice and were undone before Washington's second term ended.[19]

Just as Congress allowed the executive broad fiscal discretion, it delegated broad, undefined authority over foreign and military affairs.[20] Legislators recognized that to delegate without specificity on subjects like the suppression of insurrections was both dangerous and an abdication of Congress' duty.[21] But the only subject on which Congress consistently insisted on specificity was the location of post roads,[22] which of course involved the allocation of contracts for construction, maintenance, and related economic development.

Washington early decided, after cabinet discussion, that he possessed discretion to withhold information requested by Congress if its disclosure might harm the nation's interests.[23] He actually exercised this power on two occasions—once in response to an unqualified Senate request for certain dispatches from the minister to France, Gouverneur Morris, and once in response to a House request for material relating to the Jay Treaty.[24] In the second instance, he went so far as to assert that the House lacked power to consider the merits of treaties duly ratified by the Senate, a position the House majority resolved to reject.[25] Neither the House nor the Senate, how-

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19. Gallatin succeeded in having included in the military appropriations for 1797 language to the effect that sums specified "shall be solely applied to the objects for which they are respectively appropriated." 6 ANNALS OF CONG. 2349 (1797). The change was ineffectual in controlling military spending, and was rejected the very next year. *See* 7 ANNALS OF CONG. 575; 8 ANNALS OF CONG. 1874 (1798); L. WILMERDING, *supra* note 17, at 44-45.

20. For example, on June 5, 1794, Washington was authorized to use land and naval forces to keep foreign cruisers fitted out here in the United States from carrying on hostile action against a state with whom this country was at peace, and to make foreign vessels depart when by the law of nations or United States treaties they ought not to remain. Act of June 5, 1794, ch. 50, 1 Stat. 384. In the Resolution of March 26, 1794, 1 Stat. 400, Congress authorized the President to administer and enforce an embargo in the manner best adopted to give it "full effect." Most significantly, in the Act of June 4, 1794, ch. 44, 1 Stat. 372, the President was given virtually complete discretion, during the recess of Congress plus fifteen days, as to whether and when to lay an embargo, the vessels to be covered, and the regulations to be adopted in its implementation. The Act of Sept. 29, 1789, ch. 25, 1 Stat. 95, 96, granted the President authority "to call into service from time to time, such part of the militia . . . as he may judge necessary" to protect the inhabitants of the frontiers from hostile incursions by Indians. Section 1 of the Act of May 9, 1794, ch. 27, 1 Stat. 367, authorized the President to require the states to have 80,000 effective militia held "in readiness to march at a moment's warning." Discretion as to whether to build up to a certain number of naval vessels was delegated in Act of March 27, 1794, ch. 12, 1 Stat. 350 and Act of June 5, 1794, ch. 46, 1 Stat. 376.

21. *See* 3 ANNALS OF CONG. 552-55 (1792) (debate on militia bill). Some legislators urged greater specificity even for subjects of lesser importance. *See, e.g.*, 1 ANNALS OF CONG. 879-80 (1789) (debate about permanent seat of government).

22. *See* 2 ANNALS OF CONG. 1527, 1640-41, 1676-77, 2295 (1790); 4 ANNALS OF CONG. 1431-43 (1794); 6 ANNALS OF CONG. 2957 (1797).

23. *See* THE COMPLETE JEFFERSON 1222-23 (S. Padover ed. 1943); Sofaer, *Book Review*, 88 HARV. L. REV. 281, 289-90 (1974).

24. For a summary of these instances, see Sofaer, *Executive Privilege: An Historical Note*, 75 COLUM. L. REV. 1318-21 (1975).

25. *See* 5 ANNALS OF CONG. 771-72, 782-83 (1796).

ever, challenged his claim that he could withhold information "for public considerations."[26]

The second major lesson of Washington's administration was that he assumed the power to make unilateral decisions in foreign affairs that could have led to war. The Neutrality Proclamation of 1793 was not the first time Washington and his cabinet decided that they could declare the nation's policy; they were ready to do so in 1790, during the Nootka Sound controversy.[27] What the cabinet added in 1793 was its unanimous decision to dispense with calling Congress into special session.[28] Washington decided to construe treaties to avoid apparent obligations to France, and to promulgate and enforce regulations against American assistance to either the French or British. His decision to delay consulting Congress until months after implementing these policies was undoubtedly based on his apprehension, shared even by Jefferson, that Congress might too readily be swayed by popular support for France.[29] While these decisions were being made and executed, Hamilton and Madison engaged in a written debate as Pacificus and Helvidius. Madison insisted that the President could not exercise even a specifically assigned power without calling Congress if its exercise could make war more likely.[30] This position, repeated as authority even today,[31] was rejected in practice by Washington and his entire cabinet, including Jefferson; and when Congress convened, it overwhelmingly approved what Washington had done.[32]

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26. *See* 4 ANNALS OF CONG. 56 (1794). An interesting contrast in this regard is Washington's willingness to reveal all information demanded by Edmund Randolph in the personal dispute that resulted from Randolph's dismissal from the cabinet. *See* J. FLEXNER, GEORGE WASHINGTON: ANGUISH AND FAREWELL 234-39 (1972).

27. *See* 17 THE PAPERS OF THOMAS JEFFERSON 109-10 (J. Boyd ed. 1965). *See also id.* at 121, 127, 128-29, 135-36, 138-39, 141-42; 18 *id.* at 289-93; 4 THE WORKS OF ALEXANDER HAMILTON 53 (J. Hamilton ed. 1850).

28. Washington asked his cabinet whether Congress should be called back early, and they voted against doing so. *See* 12 WRITINGS OF GEORGE WASHINGTON 280-81 (W. Ford ed. 1891); 6 WRITINGS OF THOMAS JEFFERSON 219 (P. Ford ed. 1895).

29. *See* Letter from Thomas Jefferson to James Madison (June 2, 1793), in WRITINGS OF THOMAS JEFFERSON, *supra* note 28, at 277, 278-79. Two months later, on August 4, 1793, Jefferson did argue that Congress should be convened earlier than scheduled. But he sought only a starting day in early November, instead of the scheduled opening in December, "because while it would gain a month in making provisions to prevent or prepare for war, it leaves such a space of time for their assembling, as will avoid alarm either at home or abroad." *Id.* at 363. By that time, the President's policies had been formulated and largely implemented. *See generally* C. THOMAS, AMERICAN NEUTRALITY IN 1793, A STUDY IN CABINET GOVERNMENT (1931).

30. *See* 6 WRITINGS OF JAMES MADISON 170-71, 182-83 (G. Hunt ed. 1906).

31. *See, e.g.*, Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 17-25 (1972) (attempting to refute Hamilton's Pacificus position of a plenary executive power and supporting generally Madison's Helvidius position); Note, 81 HARV. L. REV. 1771, 1786-87 (1968) (referring to any deployment of troops by the executive).

32. *See* 4 ANNALS OF CONG. 17-18 (1793) (Senate); *id.* at 138-39 (House).

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II

UNDECLARED WAR AS CONSCIOUS NATIONAL POLICY

John Adams was a Federalist. As such, he was committed to the pattern of executive-congressional relations established during Washington's tenure. On the other hand, Adams lacked Washington's political strength. He faced a hostile Congress throughout his term as President, dominated by Republicans, who in general favored France over Britain. Consequently, when France persisted in seizing American commerce, Adams realized that he would have grave difficulty obtaining a declaration of war.

He specifically asked his cabinet in early 1798 whether he should seek a declaration. Secretary of War James McHenry replied on February 15, after being tutored by Hamilton, by then practicing law in New York.[33] The people were generally averse to war, he said, and a portion of them particularly averse to war with France. He recommended, instead, an undeclared war as the national policy:[34]

> An express declaration of hostility . . . would subject us to . . . all the chances of evil which can accrue from the vengeance of a nation stimulated by . . . extraordinary success . . . [a] mitigated hostility will [therefore] be the most likely to fall in with the general feeling, while it leaves a door open for negotiation and secures some chance to avoid some of the extremities of a formal war.

Soon thereafter, Adams received firm evidence, in the so-called XYZ Papers, that the ministers he had sent to France had been poorly treated and asked to pay bribes. Once again, he asked his cabinet whether to recommend "an immediate declaration of war."[35] At least one member urged such a recommendation,[36] but McHenry persisted in his view that a "qualified hostility" was preferable to a formal declaration of war, since France had qualified its hostility and had held out "terms of accomodation, tho' humiliating and inadmissible in their present nature and form. . . . Such a procedure as this, while it secures the objects essential and preparatory to a state of open war, involves in it the fewest evils, and the greatest number of possible chances and advan-

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33. *See* THE LIFE AND CORRESPONDENCE OF JAMES MCHENRY 291-95 (B. Steiner ed. 1907). Hamilton replied in a detailed paper to McHenry's request of January 26 that Hamilton assist him with "suggestions and opinions," since a "wrong policy" could be "extremely injurious," and he, McHenry, could not "do justice to the subject," as Hamilton could. *Id.* at 291. McHenry's answer practically embodied the whole of Hamilton's letters. *See* ADAMS PAPERS, Mass. Hist. Soc'y microfilm, pt. IV, reel 387, item 267.

34. ADAMS PAPERS, *supra* note 33.

35. 8 WORKS OF JOHN ADAMS 568 (C. Adams ed. 1856).

36. *See* Letter from Charles Lee to John Adams (Mar. 14, 1798), in ADAMS PAPERS, *supra* note 33 pt. IV, reel 387, item 218.

tages." He advised that Congress be asked to set aside existing treaties with France, and to provide the means for defense.[37]

Adams accepted McHenry's advice. The President announced to Congress on March 19, 1798, that he had studied the dispatches and concluded there was no ground to expect peace. He called again for defensive preparations and unilaterally suspended the order he had issued restricting the arming of merchant vessels. But he did not request a declaration of war.[38]

Republicans in Congress sensed the nation's drift toward war and began to press for a definitive legislative determination of the question, hoping thereby to avert the conflict. A resolution was proposed declaring it inexpedient "to resort to war" with France.[39] Any chance that the resolution might pass was destroyed, however, after Republicans successfully pressed Adams to reveal the XYZ Papers. These dispatches shifted sentiment sharply against France, and Congress proceeded to grant Adams the means and authority he sought without a formal declaration.[40]

Even as the war raged, the case of *Bas v. Tingy* reached the Supreme Court, and the Justices unanimously made known their view that "imperfect" war, as they called it, was constitutionally permissible.[41] The Court held that the Act of March 2, 1799, which authorized an award of one-half the value of any American vessel seized from an "enemy," was applicable to a seizure from a French privateer, even though Congress had not declared war. France was an "enemy," ruled the Court, because war existed in fact and because Congress had France in mind when it passed the law in question. War did not come in just one variety, wrote Justice Bushrod Washington: "[E]very contention by force, between two nations, in external matters, under the authority of their respective governments, is not only war, but public war."[42]

Instead of perceiving danger in allowing Congress to authorize military action without the public acquiescence that would usually be necessary to engineer a declaration, Justice Chase praised Congress for proceeding piecemeal in the face of public opposition:[43]

> The acts of congress have been analyzed, to show, that a war is not openly denounced against France, and that France is nowhere expressly called the enemy of America: but this only proves the circumspection and prudence of the legislature. Considering our national prepossessions in favor of the French republic, congress had an arduous task to perform, even in preparing for necessary defence and just retaliation. As the temper of the people rose, however, in resentment of accumulated wrongs, the language and the mea-

37. See Letter from James McHenry to John Adams (Mar. 14, 1798), in *id.* at reel 387, item 270.
38. *See* 8 ANNALS OF CONG. 1271-72 (1798).
39. *See id.* at 1319.
40. *See* the cluster of statutes in 1 Stat. 552-65.
41. 4 U.S. (4 Dall.) 37 (1800).
42. *Id.* at 40.
43. *Id.* at 45.

> sures of the government became more and more energetic and indignant; though hitherto the popular feeling may not have been ripe for a solemn declaration of war; and an active and powerful opposition in our public councils, has postponed, if not prevented, that decisive event, which many thought would have best suited the interest, as well as the honor, of the United States.

He even compared "the progress of our contest with France" with "the progress of our revolutionary contest; in which, watching the current of public sentiment, the patriots of that day proceeded, step by step," from supplication to "the bold and noble declaration of national independence."[44]

In conclusion, the Quasi War was undeclared by design. It was undeclared primarily because of the executive's need to avoid the risk of alienating a large segment of Congress and the American people. Congress eventually went along with the President, and the Supreme Court approved the constitutionality of "imperfect" war, stating that Congress could make war by degrees if it chose to do so.

III

THE INGLORIOUS "REVOLUTION OF 1800"

Thomas Jefferson hailed his victory over John Adams as the "Revolution of 1800." This dramatic phrase was used to symbolize the triumph of Republican over Federalist ideology.

In addition to advocating strict construction of all powers conferred upon the federal government and leaving matters other than foreign affairs to the states, Republicans called for a reallocation of power from the federal executive to Congress. They had objected, during the period of Federalist control, to executive planning and to statutes assigning broad powers to the President to conduct military and foreign affairs. They had battled for greater control of expenditures through specific appropriations. They had insisted on Congress' right to information in the President's control. Many of them had claimed that Congress should be consulted as soon as possible on issues relating to its specifically assigned powers, including the power to declare war. The election of 1800 swept these Republicans into control of the nation and therefore promised a major overhaul in the pattern of executive-congressional relations established under Washington and Adams.

Events during Jefferson's two terms clearly demonstrate that the allocation of power between Congress and the executive changed little, if at all, from the pattern established in the first two administrations. As Leonard White says in his excellent work, *The Jeffersonians*, "Jefferson fully maintained in practice the Federalist conception of the executive power."[45] In fact, it seems fair to

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44. *Id.*

45. L. WHITE, THE JEFFERSONIANS, A STUDY IN ADMINISTRATIVE HISTORY, 1801-1829, at 30 (1959).

say that Jefferson's commitment to Republican doctrine may have been partly responsible for his adopting and advancing practices far more dangerous to the balance of power among the branches than conventional Federalist ideology.

Executive planning continued unabated.[46] The House initiated an investigation of spending practices, but no attempt to reform those practices was made; deficit spending became a way of life for the armed services.[47] Jefferson went further than his predecessors in this regard after the attack on the American frigate *Chesapeake* by the British warship *Leopard*. He ordered purchases of arms and ammunition even though Congress had neither approved such expenditures nor appropriated funds for the purpose. He considered, but decided against, calling Congress back into session, undoubtedly because he wished to avoid a legislative drive for immediate war against Britain.[48] The similarity to Washington's failure to call a special session in 1793 is apparent. Jefferson added a new element, however. Rather than attempting to legitimize his orders under the Constitution, he justified the purchases on the ground of emergency, trusting in the legislature to condone his conduct. Congress overwhelmingly appropriated the funds to cover the purchases, some noting, in effect, that "the safety of the nation is the supreme law."[49] John Randolph sought to remind his Republican colleagues that Jefferson should have called Congress into session while "they would have felt a deep and particular sense of national indignity,"[50] but others condoned Jefferson's postponing the meeting "till the fermentation should have subsided."[51]

Broad delegations continued to be made, causing Republican Representative Richard Stanford, of North Carolina, to "ask how it will be possible, in a

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46. On December 22, 1801, for example, John Randolph moved that the House direct the Secretary of War to prepare a statement of the present military establishment, along with an estimate of necessary posts and men for each garrison. The House agreed without opposition. *See* 11 ANNALS OF CONG. 348-49 (1801). Similar motions had been intensely opposed during Washington's administration.

47. *See generally* L. WILMERDING, *supra* note 17, at 26; L. WHITE, *supra* note 45, at 115-16. *See also* 11 ANNALS OF CONG. 1285 (1802); 12 ANNALS OF CONG. 290 (1802), after which the investigation lapsed.

48. *See* 17 ANNALS OF CONG. 14-18 (1807).

49. *Id.* at 848 (Gardenier). *See also id.* at 832 (Montgomery), 840 (Alston).

50. *Id.* at 830. Referring to Representative Montgomery's argument based on emergency, Randolph said: "The more he magnified the danger of the crisis, to justify an illegal and unconstitutional expenditure of the public money, the more clearly did he demonstrate the necessity for convening Congress." *Id.* at 837.

51. *Id.* at 826 (Smilie). Smilie said he was more temperate than Randolph, and "alluded to an ancient nation, who were wont to discuss great national questions twice, once when they were drunk, that they might not want spirit, and once when they were sober, that they might not be deficient in prudence." He suggested that Jefferson's decision had saved them from being "under the immediate influence of passion." *Id.* at 830. W. Alston concurred: "We are now better prepared to decide . . . and if by this prudent course war had been averted, the voice of the nation would approve it." *Id.* at 840.

few years, for any political observer or historian to draw a line of distinction between parties."[32] Jefferson's legislative leader, William Branch Giles, responded by citing precedents, many of which he and other Republicans had previously opposed, and observing that the line between executive and legislative power was impossible to fix. He described the delegation issue as "an old and abstract question, often heretofore brought into view, and leads to endless discussion." He was "unwilling to look into retrospection; it could only produce an unpleasant and unprofitable examination. . . . I would rather follow the example of a celebrated Roman conqueror. It was his maxim always to forget the last defeat, and to turn his whole thoughts upon the best means of obtaining victory in the next battle."[33]

Jefferson on several occasions indicated his belief that he could withhold information from Congress if its disclosure would harm the nation,[34] but he never explicitly refused Congress material, except where the relevant request was qualified to allow withholding.[35] His behavior in this regard cannot, however, be attributed to any conviction on his part that Congress was entitled to all important information in his control. One reason he was able to avoid invoking some form of "executive privilege" was the enormous control he exercised over Congress through his party leadership. Motions to request information on sensitive or potentially embarrassing subjects were repeatedly voted down by the Republican majorities in both Houses.[36] The other reason

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52. 18 ANNALS OF CONG. 1946 (1808). Rep. Richard Stanford, of North Carolina, said: "It was once a fashion with us to object to that of giving the President discretion to raise, or not raise, an army." *Id.* at 1950.

53. 19 ANNALS OF CONG. 259 (1808).

54. For example, Jefferson wrote to William Giles that he regarded a resolution that would have requested his reasons for refitting the French vessel *Berceau* as improper, and said if a resolution "is passed on ground not legitimate, our duty will be to resist it." Letter from Thomas Jefferson to William Giles (Apr. 6, 1802), in 8 WRITINGS OF THOMAS JEFFERSON, *supra* note 28, at 142. The House, on January 11, 1808, passed a request for material relating to whether any officer of the United States had received money from any foreign government, after Josiah Quincy unsuccessfully objected to the lack of a qualification allowing the President to withhold "confidential" correspondence. *See* 18 ANNALS OF CONG. 1460 (1808). Jefferson responded on January 15 that "he would give to the House such information not improper to be disclosed." *Id.* at 1464. In responding to requests from both Houses of Congress for copies of all decrees and acts promulgated since 1791 by the belligerent European powers affecting the commercial rights of the United States, Jefferson sent the decrees that could be obtained "and are supposed to have entered into the views of" each House. 19 ANNALS OF CONG. 299, 908 (1808). See also the several claims by Jefferson of power to withhold material from the court in the Burr conspiracy trial, discussed in Freund, *Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 24 n.60 (1974), and authorities cited therein.

55. *See, e.g.*, 15 ANNALS OF CONG. 67-68, 70-71 (1806) (Senate motion requesting President to supply copy of letter from Monroe to Madison, amended January 21, 1806, to specify date and to qualify request for disclosure "if he shall judge the same to be proper"); *id.* at 71 (letter provided); 16 ANNALS OF CONG. 336 (1807) (House request for information relating to Burr conspiracy "in possession of the Executive, except such as he may deem the public welfare to require not to be disclosed"); *id.* at 39-43 (much information withheld).

56. *See, e.g.*, 13 ANNALS OF CONG. 200-62 (1803) (Senate refusal to request information on measures taken by President pursuant to law authorizing military action, cost of same, and the

he avoided confronting Congress with a claim of privilege was, simply stated, his readiness to withhold material without letting the legislature know of its existence. He established a system of dual correspondence that went far beyond anything his predecessors practiced, under which public, official communications were classified as "private" in order to keep them out of official files.[57] He promised confidentiality to his informants and never materially breached the confidence they placed in him.[58] When subpoenaed during the trials of Aaron Burr, he not only sought to invoke a discretion to withhold information, he also secretly withheld material potentially useful to Burr without even informing his own lawyers of its existence.[59]

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further legislation necessary to end war with Tripoli); *id.* at 385-419 (House refusal to request copies of treaties between France and Spain, and available correspondence, tending to determine whether France had acquired title to Louisiana).

57. Soon after taking office, Jefferson sent the American Minister in France, Robert R. Livingston, a code for deciphering future messages. Why a cipher between us, asked Jefferson rhetorically, since official things go naturally to the Secretary of State and things not political need no cipher? Because, Jefferson explained, information falls into three categories:

> 1. [M]atters of a public nature, and proper to go on our records, should go to the secretary of state. 2. [M]atters of a public nature not proper to be placed on our records may still go to the secretary of state, headed by the word "private." But 3. there may be matters merely personal to ourselves, and which require the cover of a cipher more than those of any other character. [This latter category,] and others which we cannot foresee may render it convenient and advantageous to have at hand a mask for whatever may need it.

This letter of April 18, 1802, was apparently one for which the cipher would normally be used; but "writing by Mr. Dupont I need no cipher," Jefferson said. Letter from Thomas Jefferson to Robert Livingston (Apr. 18, 1802), in 8 WRITINGS OF THOMAS JEFFERSON, *supra* note 28, at 143-45.

The categories outlined by Jefferson in this extraordinary letter are susceptible to his labels of "public," "private," and "personal" only if the words are deprived of ordinary meaning. The letter itself makes clear that some matters of a "public nature" should be marked "private" and kept out of "our records." And in calling matter in the third category "merely personal," Jefferson seems clearly to have been referring to the fact that he wanted such information kept strictly between Livingston and himself, rather than attempting to describe the nature of the information in the letters. The April 18 letter most assuredly dealt with "public" rather than "personal" matters. It noted that Madison had written fully to Livingston concerning the question of Louisiana, but continued that Jefferson could not "forbear recurring to it personally." He told Livingston —in a now famous phrase—that the nation that holds New Orleans is "our natural and habitual enemy," and if France takes possession, it might force the United States to ally with Britain. This prediction of war, meant to guide Livingston, was certainly not "personal" in the ordinary sense. It was an official letter, about an important public matter, that Jefferson wanted kept secret.

58. For example, in a letter to Joseph Daveiss, the federal attorney for Kentucky, on February 15, 1806, Jefferson requested additional information concerning Aaron Burr's alleged activities and promised to keep such communications secret, at least until arrest became necessary, and even then Jefferson pledged to withhold the source of his information. *See* 10 THE WRITINGS OF THOMAS JEFFERSON 231-32 (Fed. ed. 1904).

59. Chief Justice John Marshall issued a subpoena on June 13, 1807, at Burr's request, calling upon Jefferson and others to submit a letter from General James Wilkinson to Jefferson, dated October 21, 1806, to which Jefferson had referred in his message to Congress of January 22, 1807. *See* 16 ANNALS OF CONG. 39-43 (1807). A major dispute erupted over Jefferson's obligation to produce the letter explicitly described in the subpoena, which has been widely discussed. The subpoena also called, however, for "the documents accompanying the same letter," as well as any reply. Subpoena *duces tecum In re* United States v. Aaron Burr (E.D. Va.) (kindly supplied to the author, and on file with, Professor Dumas Malone, Alderman Library, University of Virginia).

Jefferson's most important military involvements concerned the so-called Barbary States. Repeated seizures of American commerce by the pirates of Tripoli, Morocco, and other Mediterranean powers led Jefferson to follow Adams' example by dispatching a squadron of public vessels to the area. Anticipating that one or more of these nations might declare or make war upon Americans, Jefferson asked his cabinet what form of instructions he should issue to the squadron's commander, Richard Dale. The cabinet almost unanimously agreed that, if war was either declared or made upon Americans, Dale could be permitted to act offensively against the nation that had declared or made war.[60] Instructions were issued authorizing Dale to sink, burn, capture, or destroy vessels attacking Americans,[61] and Dale ordered the commanding officers in his squadron to act accordingly.[62]

The specific orders Dale issued to one of his officers, Lieutenant Andrew Sterrett, have taken on special historical significance. Sterrett commanded the *Enterprise*, a twelve-gun schooner that acted as tender vessel to Dale's squadron. Sterrett was told on July 30, 1801, after Tripoli had declared war, to sail to Malta from nearby Tripoli to obtain water. Dale knew Sterrett might meet and engage Tripolitan vessels. He therefore issued instructions that ordered Sterrett to disarm and release vessels Sterrett was able to conquer on the way to Malta, but that allowed Sterrett to seize such vessels on his way back from Malta.[63] Sterrett met and defeated a fourteen-gun Tripolitan cruiser on his way to Malta and, acting in accordance with Dale's instructions, disarmed and released it.[64]

Jefferson had received a full report of Sterrett's victory by December 8, 1801, when he delivered his first annual message to Congress.[65] He reported

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Jefferson failed to reveal that the letter had, in fact, been accompanied by another, "confidential" letter of the same date and a memorandum purporting to discuss the conspiracy, both of which would have been useful to Burr in undermining Wilkinson's credibility. These documents appear in 2 J. WILKINSON, MEMOIRS OF MY OWN TIMES app. xcv (1816). See discussion in 3 D. MALONE, JEFFERSON AND HIS TIME, SECOND TERM 1805-1809, at 248-49, 325 n.35 (1974).

60. *See* 1 WRITINGS OF THOMAS JEFFERSON, *supra* note 58, at 365-66. The sole dissenter was Levi Lincoln.

61. *See* 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WARS WITH THE BARBARY POWERS 465-67 (1939) [hereinafter cited as NAVAL DOCUMENTS].

62. *See, e.g.*, Orders from Richard Dale to Samuel Barron, July 4, 1801, in 1 NAVAL DOCUMENTS 500, and July 9, 1801, in *id.* at 505; Orders from Richard Dale to Andrew Sterrett, July 5, 1801, in *id.* at 503, and July 30, 1801, in *id.* at 534-35.

63. Dale wrote Sterrett that he should return from Malta "as soon as possible" and "not chace out of your way particularly in going, as you have not much water on board." *Id.* at 534. Dale continued that if Sterrett fell in with a Tripolitan corsair on his way to Malta that he could manage, he should heave its guns overboard, cut its masts, and leave it just able to manage to get to port. If the encounter occurred on the way back from Malta, Sterrett was to "bring her with you if you think you can doe it with safety but on no account run any risque of your vessel or the health of your Crew." *Id.* at 535.

64. R. IRWIN, THE DIPLOMATIC RELATIONS OF THE UNITED STATES WITH THE BARBARY POWERS 109-10 (1931).

65. Sterrett had returned to Washington City, as it was then called, by November 17, with

on Sterrett's encounter in a repeatedly quoted passage, attributing the release of the Tripolitan vessel to constitutional rather than tactical considerations:[66]

> Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offence also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that, in the exercise of this important function confided by the Constitution to the Legislature exclusively, their judgment may form itself on a knowledge and consideration of every circumstance of weight.

Most commentators have accepted this famous statement of deference to Congress' power as accurate and made in good faith.[67] Actually, as we have seen, the cabinet had authorized offensive actions, and Dale had been instructed accordingly. Sterrett had released the corsair only because he was on his way to Malta, rather than on his way back, as he had been instructed by Dale. This fact would have been clear to Congress had Jefferson indeed communicated "all material information," as he said he would. By the time of his message, Sterrett had returned to the United States and had provided the full story of his encounter, including the true reasons he had released the corsair.[68] This part of the story was withheld from Congress.

These facts undermine the importance so widely attributed to Jefferson's statement to Congress regarding Sterrett's conduct. But the orders issued to Dale, even as broadly construed, seem constitutionally defensible under even a relatively narrow view of executive power. One can reasonably infer from the power to defend against attacks on the United States—universally held to be granted by the framers—a power to act offensively against any nation that declared or made war. This was the view adopted by both Gallatin and Hamilton, and probably by Madison as well.[69]

We should well ask, therefore, why Jefferson suggested to Congress that he lacked authority to act offensively against a nation that had, in fact, both declared and made war on the United States.

Jefferson's message suggests an answer. He specifically asked for authority

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dispatches and a report on the incident. See article from the *National Intelligencer*, *reprinted in* 1 NAVAL DOCUMENTS 538-39, attributing Sterrett's release of the vessel to his sense of mercy.

66. 11 ANNALS OF CONG. 12 (1801).

67. *See, e.g.*, C. BERDAHL, THE WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 63 (1921); R. BERGER, *supra* note 4, at 80; E. CORWIN, *supra* note 4, at 131-33; 4 D. MALONE, JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805, at 98-99 (1970); Note, 81 HARV. L. REV. 1771, 1779 (1968).

68. Jefferson sent Congress, after some delay, the instructions issued to Dale, and Sterrett's description of the encounter, but not the latter's orders from Dale. *See* 12 ANNALS OF CONG. 701, 734-39 (1801).

69. *See* Letter from Albert Gallatin to Thomas Jefferson (Dec. 1802), in 1 WRITINGS OF ALBERT GALLATIN 104-05 (H. Adams ed. 1960); 7 WORKS OF ALEXANDER HAMILTON, *supra* note 27, at 746-47; 1 WRITINGS OF THOMAS JEFFERSON, *supra* note 28, at 366.

for "measures of offense," the granting of which he undoubtedly realized would enable him to dispatch expeditions such as Dale's without basing their legality on the mere fact that vessels of war had been constructed and placed within his power to utilize.[70] In this manner, he could also share with Congress responsibility for the increased intensity with which the war was to be conducted.

If Jefferson's description of Sterrett's conduct was intended to cause Congress to authorize offensive actions, he certainly succeeded. After meager debate, Congress adopted an act that gave explicit authority to the President to capture and make prizes of any Tripolitan vessel, and in sweeping terms "to cause to be done all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require."[71] Congress thereby continued, this time without recorded objection, the practice adopted during the Quasi War of authorizing hostilities without formally declaring war. And the authorization concerning Tripoli was surely as broad and as vague as the Gulf of Tonkin Resolution, passed after questionable executive representations in 1964.[72]

It was not long before Jefferson used the power delegated to him by Congress to implement a plan that could not have been anticipated when the delegation was made. The plan has an eerie familiarity today. But in 1801, it was unprecedented. An elder brother of the Pasha of Tripoli, it seems, was willing to promise great concessions if the United States were to assist him in obtaining the throne. James L. Cathcart, American consul at Tripoli, suggested to Madison, in a letter dated July 2, 1801, the possibility of "dethroning the present Bashaw, and effecting a revolution in favor of his brother Hamet, who is at Tunis, and thereby insure the United States the gratitude of him and his successors."[73] Implementation of the plan was delayed for over a year, because Hamet was temporarily reconciled with his brother. William Eaton, consul at Tunis, convinced Hamet to switch allegiances, however, and by August 1802 Madison was called upon to decide whether to allow the plan to go forward.

Madison noted in a letter to Cathcart how difficult it would be to judge and manage the project from so great a distance. He also added that "it does not accord with the general sentiments or view of the United States to intermeddle with the domestic controversies of other countries." But he could not

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70. *See* 11 ANNALS OF CONG. 12 (1801). The cruise was justified by the Secretary of the Navy to Dale under the law "providing for a Naval Peace Establishment," apparently on the assumption that at least a training exercise was implicitly authorized by legislation merely providing the forces. *See* Act of Mar. 3, 1801, ch. 20, § 2, 2 Stat. 110; Order from Samuel Smith to Richard Dale (May 20, 1801), in 1 NAVAL DOCUMENTS 463, 465.

71. Act of Feb. 6, 1802, ch. 4, § 2, 2 Stat. 129, 130.

72. *See generally* Joint Resolution of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384.

73. 16 ANNALS OF CONG. 704 (1807).

resist the opportunity—"it cannot be unfair, in the prosecution of a just war, or the accomplishment of a reasonable peace, to take advantage of the hostile cooperation of others," he wrote. "As far, therefore, as the views of the brother may contribute to our success, the aid of them may be used for the purpose." He anticipated the possibility that Hamet's object might be unattainable, and stated that the honor of the United States and "the expectations he will have naturally formed" would require America "to treat his disappointment with much tenderness; and to restore him, as nearly as may be, to the situation from which he was drawn."[74] Hamet, in other words, was to be used for "our success," but, as Secretary of the Navy Smith ordered Commodore Morris on August 28, Hamet was not to be an obstacle to achieving an acceptable peace with Tripoli.[75]

After considerable delay, the plan was put into operation with full cabinet approval.[76] Commodore Samuel Barron, in charge of the Mediterranean squadron, ordered Captain Isaac Hull in writing to take his vessel, the *Argus*, to Alexandria for refitting and other innocuous purposes. Actually, Hull's true orders were verbal, the written ones being "intended to disguise the real object of your expedition," said Barron, "which is to proceed with Mr. Eaton to Alexandria, in search of Hamet—and to convey him and his unit" to such "place on the coast as may be determined the most proper for cooperating with the naval force under my command." Hull was authorized to assure Hamet of Barron's "most effectual" cooperation "against the usurper" and in reestablishing Hamet as Pasha.[77]

The army Eaton and Hamet put together consisted of a handful of Americans, some Greek mercenaries, and about two thousand Arabs, with their women and children, all hired for the purpose. This motley conglomeration managed to conquer Derne, but Eaton reported that he had already spent $30,000, or $10,000 more than had been authorized by the administration. Eaton felt victory was certainly obtainable, but cautioned Barron that Hamet and his men lacked the ability, following, and resources to take Tripoli without further, substantial American military and fiscal support.[78]

Hamet's expedition apparently convinced his brother Joseph to seek peace, and Barron decided to dump Hamet in exchange for a favorable treaty.[79] Eaton managed, however, to evacuate Hamet and his retinue, the

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74. Letter from James Madison to James Cathcart (Aug. 22, 1802), in *id.* at 709.

75. Letter from Secretary of Navy Robert Smith to Commodore Richard Morris (Aug. 28, 1802), in R. MORRIS, A DEFENSE OF THE CONDUCT OF COMMODORE MORRIS DURING HIS COMMAND IN THE MEDITERRANEAN 45 (1804).

76. *See* 1 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 58, at 382.

77. Letter from Samuel Barron to Isaac Hull (Sept. 13, 1804), and transcription of verbal orders of Barron to Hull (Sept. 15, 1804), in 16 ANNALS OF CONG. 713-14 (1807).

78. Letter from William Eaton to Samuel Barron (Apr. 29 and May 1, 1806) (extract and date in error), in *id.* at 731-34.

79. *See* R. IRWIN, *supra* note 64, at 149-53.

Greeks and the Americans, in a scene that, as Eaton described it, brings to mind recent events at the United States consulate in Saigon:[80]

> [A]ll the Constellation's boats were laid along side our wharf. I ordered the Captain of cannoniers to embark his company with the field pieces and a ten inch howitzer which fell into our hands on the 27th of April; and after them the Greek company. This was executed with silence and alacrity; but with astonishment. The marines remained at their posts. When the boats were seen returning I sent a messenger to the Bashaw requesting an interview. Understanding the purport of this message, he immediately repaired to the fort with his retinue; dismounted, and embarked in the boats. The marines followed with the American officers. When all were securely off, I stepped into a small boat which I had retained for the purpose, and had just time to save my distance when the shore, our camp, and the battery, were crowded with the distracted soldiery and populace; some calling on the Bashaw; some on me; some uttering shrieks; some execrations! Finding we were out of reach, they fell upon our tents and horses, which were left standing; carried them off, and prepared themselves for flight.

Eaton returned to America a hero, and was handsomely rewarded. Hamet applied to Jefferson for relief, basing his claim in part on an alleged commitment to place him on the throne. After considerable debate, Hamet received a small payment.[81] No legislator questioned the legality or propriety of the joint action with Hamet. Everyone apparently assumed that the sweeping delegation, granted in response to Jefferson's report of Sterrett's encounter, extended to the plan to make Hamet the Pasha. The only significant complaint heard in Congress was that the President had reneged on his alliance with Hamet, not that he had made one.[82]

We can therefore say, in retrospect, that the doctrinal differences that separated Jefferson and his party from the Federalists failed to deter the former from exercising power in the same manner as a strong Federalist president, backed by a legislative majority. Vigorous, inventive leadership was part of Jefferson's nature. By 1807, he had arrived at a construction of the executive clause that amounted to a complete justification for adopting any measure necessary to accomplish a legitimate end: "[I]f means specified by an act are impracticable," he said, "the constitutional power to carry laws into execution remains, and supplies them."[83]

We should hardly complain, however, that he largely ignored the constitutional straight-jacket he had inflicted upon himself. His achievements were substantial and of lasting value. But his doctrinal leanings may well have ac-

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80. Letter from William Eaton to Commodore John Rodgers (June 13, 1805), in C. PRENTISS, THE LIFE OF THE LATE GENERAL WILLIAM EATON 362-63 (1813).

81. R. IRWIN, *supra* note 64, at 160; 15 ANNALS OF CONG. 1106 (1806) (bill authorizing payment to Hamet of $2,400); *id.* at 185-88 (report critical of abandoning Hamet).

82. 15 ANNALS OF CONG. 185, 187-88 (1806).

83. Letter from Thomas Jefferson to Gov. William H. Cabell (Aug. 11, 1807), in 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 58, at 441 n.

counted in part for the creation of new practices and claims that constitute a heritage of questionable value. Thus, instead of openly assuming and exercising a power to withhold material for public considerations, as Washington had done, Jefferson seems to have preferred to avoid potential doctrinal confrontations and legislative interference by simply keeping Congress—and in the Burr trial, a federal court—ignorant of information within his possession or control. And, instead of modifying Republican doctrine to legitimize his conduct after the *Chesapeake* affair, or the legislative absorption of the Louisiana Territory,[84] he applied the doctrine of emergency power in a manner that allowed an escape from virtually all constitutional restraints. These new developments may have had little real importance in Jefferson's time, since most of his conduct could be rationalized under a more robust, but precedented, view of executive authority. Nothing prevented future Presidents, however, from using the powers developed by Jefferson in situations far less conventional than those in which he had invoked them.

IV

EXECUTIVE WAR MAKING, 1809-1812

The administrations of James Madison and James Monroe are even richer in material relating to war making than those of their predecessors. Close scrutiny of all that material is unnecessary in this presentation. These are famous Presidents, whose terms covered a period during which the United States grew and became stronger. Madison and Monroe properly reap the credit due them for the important developments that took place under their stewardship. We have lost much of the flavor of these men, however, in the adulatory descriptions with which most historians have provided us. A brief look at some of their activities in the Floridas should contribute to filling out our understanding of them as wielders of executive power.

A. West Florida

Jefferson had claimed that West Florida—roughly the area to the west of present-day Florida and to the east of Baton Rouge—had been transferred to the United States as part of the Louisiana Purchase. Congress authorized Jef-

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84. In connection with his departure from his own scruples concerning the absorption of Louisiana, Jefferson said:

> A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but is not *the highest*. The laws of necessity, of self preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.

Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 9 WRITINGS OF THOMAS JEFFERSON, *supra* note 28, at 279. *See also id.* at 281.

ferson, in general terms, to take possession of the area ceded by France.[85] He was prepared at the time to seize at least parts of West Florida, if Spain refused to surrender New Orleans.[86] Spain ceded New Orleans, however, and was left in control of the contested area. In 1804 Congress authorized Jefferson, when he deemed it expedient, to establish a customs district at Mobile, at the very heart of West Florida.[87] Spain became acutely concerned, and Secretary of State Madison assured them that the act would be applied only within "the acknowledged limits of the United States," unless Spain itself agreed to cede the territory.[88] Despite these conciliatory gestures, Jefferson was privately resolved to acquire not only West Florida but East Florida as well, "probably" Cuba, and apparently even Mexico.[89]

Soon after Madison became President, William Claiborne, Governor of the Orleans Territory, reported that West Florida was ripe for acquisition by the United States.[90] During the summer of 1810, Claiborne travelled to the national capitol, apparently for discussions with Madison and Robert Smith, Secretary of State. From Washington, Claiborne wrote an extraordinarily important letter on June 14 to William Wykoff, Jr., a judge of the parish at West Baton Rouge, describing America's acquisition of West Florida as inevitable. He was "persuaded under present circumstances," however, that "it would be more pleasing that the taking possession of the Country, be preceded by a Request from the Inhabitants. —Can no means be devised to *obtain such Request*?" He told Wykoff that while "the most eligible means of obtaining an expression of the wish of the Inhabitants of Florida, can best be determined by themselves," it would be "more satisfactory" if done through the medium

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85. Act of Oct. 31, 1803, ch. 1, 2 Stat. 245.

86. Jefferson had, in fact, prior to congressional passage of the authorizing Act of Oct. 31, 1803, ordered, by his Secretary of War, that preparedness measures be taken should any "serious opposition take place"; that in furtherance of this object "Boats, provisions, field Pieces, [etc. to be placed] in readiness; not only for regular Troops in the Terr[y] but also for at least 500 of the best militia (who if necessary should be engaged for 3 months)." He did acknowledge that nothing could be done relating to the militia, "excepting the forming a system." Letter from Secretary of War Henry Dearborn to James Wilkinson (Oct. 5, 1803), in 9 TERRITORIAL PAPERS OF THE UNITED STATES 71 (C. Carter ed. 1940). Orders were also sent to the commanding officer at Chickasaw Bluffs on the same date to be ready to move down, at the shortest notice. *Id.* at 71 n.86. Additional orders, of the same date as the authorizing act, instructed Wilkinson to take Baton Rouge, an area only disputably encompassed by the Louisiana Purchase, if he encountered opposition from Spain on his trip to New Orleans to take possession under the recent treaty. Letter from Secretary of War Henry Dearborn to James Wilkinson (Oct. 31, 1803), in *id.* at 97-98.

87. Act of Feb. 24, 1804, ch. 13, § 11, 2 Stat. 251, 254.

88. 4 I. BRANT, JAMES MADISON 198 (1953).

89. *See, e.g.*, Memorandum to Cabinet (Aug. 12, 1808), in 11 WRITINGS OF THOMAS JEFFERSON, *supra* note 58, at 42-43; Letter from Thomas Jefferson to James Bowdoin, Minister to France, (Apr. 2, 1807), in 6 BOWDOIN AND TEMPLE PAPERS 371-73 (66 Mass. Hist. Soc'y Coll., 7th ser. 1907).

90. Letter from William Claiborne to Secretary of State Robert Smith (Mar. 19, 1809), in 4 OFFICIAL LETTER BOOKS OF W.C.C. CLAIBORNE, 1801-1816, at 333 (D. Rowland ed. 1917).

of a "Convention of Delegates," at which "every part of the District as far at least as the Perdido be represented." He urged Wykoff "to prepare for the occasion the minds of the more influential characters in the vicinity of Mobile," keeping "this letter as confidential."[91]

The available evidence overwhelmingly proves that Claiborne's letter and plan were authorized by the President, as Claiborne himself reportedly claimed on June 20, in a letter to Governor David Holmes of the Mississippi Territory.[92] Thus, also on June 20, Secretary of State Smith wrote to Wykoff, officially authorizing his mission.[93] On July 17, Madison wrote Smith concerning a letter Smith had sent him from Governor Holmes. Madison said Holmes should be encouraged to continue his reports, and to keep his militia ready in case "of foreign interference with W.F. or of internal convulsions." He then concluded by asking Smith: "Will it not be advisable to apprize Gov. H. confidentially, of the course adopted as to W.F. and to have his co-operation in diffusing the impressions we wish to be made there?"[94] Though no response from Smith to Madison has been found, Smith wrote again to Holmes on July 21, passing on Madison's instructions regarding the militia. In order that Holmes "be fully apprized of the course adopted as to the Floridas," Smith added, "and therefore the better able to co-operate in diffusing the impression we wish to make there, I deem it proper to send you the enclosed copy of instruction . . . and extracts of a letter from Governor Claiborne to Col. William Wykoff, written under a sanction from the President. . . . The instructions contained in this letter are entirely confidential," he added, "and are to be executed in a manner the least calculated to incite alarm."[95]

Events proceeded in accordance with the administration's plan. The rebels called a convention with delegates from the entire area, adopted a constitution, declared their independence, and invited the United States to assume control. At that point, however, Madison realized that to accept the rebels' invitation would constitute an act of war against Spain, and would implicitly suggest an abandonment of America's claim to the area. He therefore issued a proclamation on October 27, 1810, declaring that events in West Florida had made it necessary that the United States exercise its right to the territory, and ordering Claiborne to assume control of certain areas.[96] The proclamation recited that the area would be held subject to negotiations with Spain, but when Madison revealed its issuance to Congress, well over one month later, he urged that the territory be accepted into "the bosom of the American

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91. 5 *id.* at 31-33.

92. *See* Padgett, *The West Florida Revolution of 1810*, 21 LA. HIST. Q. 177 n.227 (1938), reporting that Claiborne wrote Holmes that he had persuaded President Madison to accept his plan.

93. 9 TERRITORIAL PAPERS OF THE UNITED STATES, *supra* note 86, at 883-84.

94. 8 THE WRITINGS OF JAMES MADISON 105-06 (G. Hunt ed. 1908).

95. DOMESTIC LETTERS OF DEP'T OF STATE, Nat'l Archives microfilm, M-40, reel 13.

96. 1 MESSAGES AND PAPERS OF THE PRESIDENTS 465-66 (J. Richardson ed. 1897).

family."[97] Irving Brant correctly notes that, by keeping the proclamation secret until it had been implemented, Madison was able to present Spain, Britain, and France with a fait accompli.[98] But one must add that he thereby presented the same accomplished fact to Congress as well.

The takeover of West Florida led to some interesting debates in Congress on its legality and propriety. Henry Clay termed it "propitious," and said that, had Madison failed to act, "he would have been criminally inattentive to the dearest interests of this country."[99] Senator Outerbridge Horsey unhappily predicted that, before the close of the session, a bill might well be introduced to take possession of East Florida as well.[100] Clay hardly regarded this possibility as unwelcome, declaring his "hope to see, ere long, the *new* United States . . . embracing not only the old thirteen States, but the entire country east of the Mississippi, including East Florida, and some of the territories to the north of us also."[101]

B. East Florida

Horsey's prediction was fulfilled sooner than even he expected. On January 3, 1811, Madison communicated "in confidence" letters from Vicente Folch, Spanish Governor of the Floridas, indicating Folch's conditional resolve to deliver "this province to the United States under an equitable capitulation." Madison recommended "a declaration that the United States could not see, without serious inquietude," the transfer of East Florida "from the hands of Spain into those of any other foreign Power." He also asked Congress to authorize him "to take temporary possession of any part or parts of the said territory," if voluntarily surrendered, and left it to "the wisdom of Congress" to determine "how far it may be expedient to provide for the event of a subversion of the Spanish authorities within the territory in question, and an apprehended occupancy thereof by any other foreign Power."[102]

Madison's message made East rather than West Florida the chief subject of the Senate's further deliberations. He gave the impression by this message that he was treating East Florida very differently than he had treated West Florida. His actions in West Florida could be justified as based on a claim to that territory, whereas the United States had made no claim to East Florida.

In reality, and unknown to Congress, the administration had sought to bring about an internal upheaval in East Florida at the same time it did so in the western area. On the same day that Smith made Wykoff a special agent

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97. 22 ANNALS OF CONG. 13 (1810).
98. 5 I. BRANT, *supra* note 88, at 189. *See also id.* at 500-01, discussing Madison's failure to call back Congress earlier than scheduled.
99. 22 ANNALS OF CONG. 62 (1810).
100. *Id.* at 45.
101. *Id.* at 64.
102. *Id.* at 125-52, 1259.

for West Florida, he asked Senator William Crawford of Georgia to pick another agent to bring about the same result in East Florida.[103] Crawford picked George Mathews, who actively pursued his task. With this background, we can appreciate more completely why Madison asked for authority to take East Florida in the event of internal "subversion."

Congress passed the declaration Madison sought, but did not authorize a takeover for internal subversion. The act passed did, however, allow a takeover of any territory surrendered by agreement of the "local authorities," a phrase significantly more general than the surrender from Spain that Madison had mentioned in his message.[104]

Once Congress acted, Madison formally appointed Mathews as commissioner to negotiate the capitulation of East Florida. Military personnel in the area were ordered to cooperate with him.[105] When the Spanish finally refused to cede the area, Mathews sought to achieve his objective by encouraging a revolt. He reported on August 3, 1811 to Monroe, by then Secretary of State, that the inhabitants were ripe for revolt, but unable "to effect a thorough revolution without external aid." He suggested channeling arms to them from local American troops, and promised to "use the most discreet management to prevent the United States being committed."[106] Monroe received Mathews' letter, but chose not to reply. Mathews then went ahead with his plan, and provided both arms and men to the so-called "patriots." He arranged to follow the patriots across West Florida, helping them take over each post, and then receiving the post from them as the "local authorities." Mathews apparently hoped thereby to comply with the letter of his instructions and with the law passed by Congress at Madison's request.[107]

The patriots took control of several posts, including Amelia Island, which they dutifully turned over to Mathews. But the refusal of a local American officer to cooperate prevented them from taking St. Augustine. At this point, in April 1812, the administration determined that Mathews was a liability and removed him. Monroe claimed that Mathews had exceeded his instructions,[108] yet he picked the Governor of Georgia, David B. Mitchell, as Mathews' re-

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103. Letter from Robert Smith to William Crawford (June 20, 1810), in DOMESTIC LETTERS OF DEP'T OF STATE, *supra* note 95, at M-40, reel 13. When Smith heard that Crawford had chosen Mathews, he wrote taking "great pleasure" in assuring Crawford that the President was "perfectly satisfied" with Crawford's choice; Mathews, he added, "well understanding the views of the executive, cannot but be happy in promoting them." Letter from Robert Smith to William Crawford (Oct. 2, 1810), in *id.*

104. Act of Jan. 15, 1811, 3 Stat. 471.

105. Letters from Secretary of War William Eustis to Brigadier General Wade Hampton and Colonel Thomas Cushing, respectively (Jan. 24, 1811), in LETTERS SENT BY SECRETARY OF WAR RELATING TO MILITARY AFFAIRS (1800-1889), Nat'l Archives microfilm, M-6, reel 5.

106. FLORIDA TERRITORIAL PAPERS OF DEP'T OF STATE, Nat'l Archives microfilm, M-116, reel 1.

107. J. PRATT, EXPANSIONISTS OF 1812, at 101 (3d ed. 1957).

108. Letter from James Monroe to George Mathews (Apr. 4, 1812), in 3 AMERICAN STATE PAPERS, FOREIGN RELATIONS 572 (1832).

placement. Mitchell was openly committed to the acquisition of East Florida, and reacted strongly to the suggestion in Monroe's instructions that the area taken by Mathews would have to be surrendered.[109] Monroe in effect assured him that a withdrawal was not intended, since he made it conditional on a guarantee of the safety of the patriots.[110] Colonel Ralph Isaacs, who carried messages between Monroe and Mathews, wrote to Monroe in July 1814 (as part of an application for payment) that "when you had finish'd your instructions to Gov'r. Mitchell after reading the '*sine qua non*' that render'd the restoration of the Province utterly impracticable, you said to me—Gov'r. Mitchell will understand this wont he? to which I replied—he is not dull of comprehension Sir! . . . Nor can you forget," Isaacs added, "that at every interview I was assured that government were concerting (to use your own words) measures to keep the Province & save harmless the Patriots."[111]

In fact, Mitchell stayed in East Florida. Madison sought legislative approval of the occupation, but the Senate narrowly denied authority.[112] Monroe was disappointed, but wrote to Mitchell that the earlier act still applied, and the occupation continued.[113] The administration then decided to move in earnest to take over the entire area. General William Pinckney was appointed to replace Mitchell, and the local garrisons were reinforced for offensive action.[114] Among the new units was one under the command of Andrew Jackson, who assured Monroe that his men had "no constitutional scruples," and were eager to take the province.[115]

Madison and Monroe sought once more to obtain Congress' approval to assume control of East Florida. Once again, the Senate balked, though they did authorize the take-over of Mobile, then in Spanish hands.[116] Even after

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109. Mitchell had written to Secretary of War William Eustis on April 20, 1812, urging the government to adopt a "prompt and decisive course" in East Florida, and pledging his state's zealous cooperation. J. PRATT, *supra* note 107, at 117-18. See his reaction to Monroe's letter of appointment (May 2, 1812), in FLORIDA TERRITORIAL PAPERS, *supra* note 106, at M-116, reel 2.

110. He made explicit his earlier suggestion that Mitchell was not to withdraw the troops "unless you find that it may be done consistently with their safety." Letter from James Monroe to David Mitchell (May 27, 1812), in 3 AMERICAN STATE PAPERS, *supra* note 108, at 573.

111. Letter from Ralph Isaacs to James Monroe (July 3, 1814), in MISC. LETTERS OF DEP'T OF STATE, Nat'l Archives microfilm, M-179, reel 30.

112. The bill was defeated in the Senate, fourteen to sixteen. 23 ANNALS OF CONG. 326 (1812).

113. The "authority of the Executive remains unchanged," he said. He continued that the President thought it "most advisable" that the troops be withdrawn, but added conditions and said that the administration would probably ask Congress for authority to take possession in the next session. Letter from James Monroe to David Mitchell (July 6, 1812), in 9 STATE PAPERS AND PUBLICK DOCUMENTS OF THE U.S. 161-64 (T. Wait ed. 1817). Mitchell replied that various circumstances made it impossible to withdraw the troops, and Monroe did not answer. Letter from David Mitchell to James Monroe (July 17, 1812), in *id.* at 164-65.

114. Letter from James Monroe to Thomas Pinckney (Dec. 8, 1812), in *id.* at 188-91; Letter from William Eustis, Secretary of War to Thomas Pinckney (Dec. 2, 1812), in J. PRATT, *supra* note 107, at 211, 217.

115. 1 J. PARTON, THE LIFE OF ANDREW JACKSON 372 (1860).

116. The vote was nineteen to sixteen against authorizing the President to take possession of

this further rejection of administration policy, Monroe would have preferred at least to hold the territory acquired by Mathews. The issue became part of the negotiations to settle the War of 1812, however, and Madison finally ordered a withdrawal at the insistence of the American negotiators.[117]

Much more remains to be said about executive war making, especially under Monroe. The full story of each adventure is unnecessary for present purposes. In general, though, it can be said that the early Presidents continued aggressively and secretly to work to acquire territory in the South and West. The great negotiated acquisition of the Adams-Onis Treaty was largely the product of pressure placed upon Spain through the legislatively unauthorized Seminole War.[118]

CONCLUSION

The presidency was powerful, in a very modern sense, by the end of George Washington's administration. During those eight years, many of the practices we associate with executive power generally, and more particularly in foreign affairs, were established, and with a high degree of awareness as to the potential consequences. By 1800, John Adams had intentionally led the nation into its first major war without seeking a formal declaration. Jefferson and the Republicans promised change, a return to proper principles and legislative government. Actually, they expanded executive power, systematized secrecy in government, and expounded the notion that emergencies justify departures from the Constitution. They also succeeded in obtaining the earliest analogue to the Gulf of Tonkin Resolution, and used it as authority for the nation's first effort to subvert a foreign government from within. Under Madison, these powers and practices coalesced so that the administration proceeded secretly and unilaterally to plot and support revolutions in West and East Florida, and in effect to make war without prior legislative approval.

One is naturally led by all these facts to ask whether anything has changed since those early times. Despite the strength and independence of our early Presidents, the answer is definitely yes. Perhaps the most obvious difference is in rhetoric. Our first Presidents were overtly deferential to Congress, whereas more recent Chief Executives have been condescending or challenging at best. More significantly, our early Presidents at no time asserted at least two claims heard frequently of late. The first is that the President may use whatever raw power he has—monetary, diplomatic and military—in the national interest. Even Jefferson's rationale for escaping the Constitution required an

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East Florida. 25 ANNALS OF CONG. 130 (1813). The bill authorizing possession of Mobile passed within days. *Id.* at 132.

117. *See* J. PRATT, *supra* note 107, at 236.

118. This point is generally supported in S. BEMIS, JOHN QUINCY ADAMS AND THE FOUNDATIONS OF AMERICAN FOREIGN POLICY 313-16 (1956). See also the specific suggestion that territory taken be retained to help in later bargaining with Spain. 4 MEMOIRS OF JOHN QUINCY ADAMS 35-36 (C. Adams ed. 1875); W. CRESSON, JAMES MONROE 297-99 (1946).

emergency. The second is that the President's so-called inherent powers as Chief Executive and Commander in Chief do not merely authorize actions in the absence of legislative directions, but are beyond legislative control. No early President suggested that Congress was significantly limited in the control it potentially had over assigned executive powers. The Supreme Court, in fact, upheld the legality of undeclared war because Congress had chosen to proceed in that manner, not because of any executive power. Furthermore, the Court specifically declared that Congress could control the conduct of war even to a high degree, and that when it did so the executive acted unlawfully if it exceeded the legislature's limits.[119] In the area of executive privilege, by analogy, though early Presidents claimed authority to withhold information, they never asserted that Congress lacked constitutional power to use whatever means at its disposal to compel production of the information involved, or to punish for its nonproduction.

Another, more substantive, difference is found in the conduct of our early Presidents. In questioning the hypothesis that the framers deferred to legislative power, I have stressed their initiatives and the least deferential aspects of their conduct. The full picture contains very substantial evidence of their concern for both the legislative and the popular will. Washington implemented neutrality, for example, with great caution, to appear evenhanded in treating Britain and France.[120] Adams avoided a declaration of war, but sought legislative authority at each stage in the nation's movement toward war with France. Jefferson conducted diplomacy with vigor and secrecy, but moved conservatively in military matters, even when he could have claimed that Congress had approved a full-scale military effort to take West Florida. Madison and Monroe defy simplification; but it can be said of their adventures in the Floridas that they were pursuing popular objectives with minimal commitment of material and military resources. Their efforts cannot be equated with the unpopular, massive engagements in Korea and Vietnam. Furthermore, the fact that they acted in secret strongly suggests that they regarded their own activities as constitutionally questionable if not improper, and deprives those activities of the precedential weight they might have had if fully revealed to Congress.

Despite the vigor and initiative of the early Presidents, a case can therefore be made for the constitutional impropriety of at least some aspects of recent presidential rhetoric and conduct. But the nation's history suggests that

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119. The two most important cases are Little v. Barreme, 6 U.S. (2 Cranch.) 170 (1804); and Brown v. United States, 12 U.S. (8 Cranch.) 110 (1814), discussed in L. HENKIN, *supra* note 10, at 96.

120. An excellent instance of Washington's conduct is his decision to adopt a nautical boundary for the United States that all nations had accepted. In this way, he avoided controversy, and left it for Congress to go further. *See* 6 WRITINGS OF THOMAS JEFFERSON, *supra* note 28, at 440-41. He said in his message to Congress when they reconvened that they, in effect, had the final say on neutrality and the system he had begun to implement. 4 ANNALS OF CONG. 10, 11 (1793).

the price of pressing this case too far may be great. The presidency has served as the focal point of this nation's aspirations. What Samuel Huntington said of the twentieth century is no less true of the first forty years: "[W]henever the American political system has moved systematically with respect to public policy, the direction and the initiative have come from the White House."[121] The notion that Congress should become more involved in making and implementing foreign policy is unassailable in theory. But Congress has consciously chosen other roles for itself, and may continue to do so. To enable Congress to increase its foreign policy role significantly would require fundamental revisions in the legislature's decision-making apparatus, as well as in the attitudes of individual legislators.[122] In short, without executive leadership we may have no leadership at all.

We can, of course, take this analysis one step further. So what if we lack "secrecy, despatch, and decision" in foreign affairs? These characteristics may have been confidently advanced as crucial to an effective executive in 1787,[123] but they remind many Americans today that our recent Presidents have been duplicitous, rash, and dogmatic. An allocation of governmental authority that facilitated geographic acquisitions and international respect between 1789 and 1829, despite our relative weakness, may be outmoded in an era when the costs of international influence by compulsion have become horrendous and when we are in danger of seeming brutish rather than weak. Our principal contribution to the world today may, as Daniel Bell suggests, be the very constitutionalism that prevents excess in a world that no longer can afford it.[124]

We no longer need a presidency capable of implementing a foreign policy based on "manifest destiny" or other outmoded notions. But so long as we have the power to defend ourselves, or an ally, or a principle, we bear the responsibility of deciding whether and how to do so. While Congress must be involved in these decisions, the executive will play an indispensable role in planning and implementing them until the very structure of American government is changed. Determining the proper extent of the President's role in this process is the truly difficult question. And we avoid both the question and its possible answers when we attribute the evils produced by our recent Presidents and Congresses to the violation of imagined norms allegedly established by the leaders of our constitutional period.

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121. Huntington, *The Democratic Distemper*, 41 PUB. INTEREST 9, 24 (Fall 1975). Huntington adds: "Probably no development of the 1960's and 1970's has greater import for the future of American politics than the decline in the authority, status, influence, and effectiveness of the Presidency." *See also* R. NISBET, TWILIGHT OF AUTHORITY (1975).

122. *See generally Symposium, Organizing the Government to Conduct Foreign Policy: The Constitutional Questions*, 61 VA. L. REV. 747 (1975); D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

123. 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON ADOPTION OF THE FEDERAL CONSTITUTION 107-08 (J. Elliot ed. 1861); THE FEDERALIST No. 64, at 392-93 (C. Rossiter ed. 1961) (J. Jay); *id.* No. 75, at 452 (A. Hamilton).

124. Bell, *The End of American Exceptionalism*, 41 PUB. INTEREST 193, 220-22 (Fall 1975).

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ARTICLES

THE WAR POWERS RESOLUTION REVISITED: HISTORIC ACCOMPLISHMENT OR SURRENDER?

WILLIAM B. SPONG, JR.*

The fact is that never in the history of this country has an effort been made to restrain the war powers in the hands of the President. . . . [I]t will make history in this country such as has never been made before.

—Senator Jacob Javits[1]

I wish to say . . . that I do not view this as a historic recapture; on the contrary I view it as a historic surrender.

—Senator Thomas Eagleton[2]

From 1969 to 1974 Congress considered various war powers proposals, following adoption of the Senate's National Commitments Resolution[3] and revival of suggestions for creation of a new joint congressional committee for consultation with the President regarding emergency military undertakings.[4] Reflecting unquestionably the divisiveness caused by the nation's long involvement in Southeast Asia, this legislative activity, which culminated in the enactment of the War Powers Resolution of 1973,[5] revealed a growing

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*LL.B., University of Virginia. General Counsel, Commission on the Organization of the Government for the Conduct of Foreign Policy; Cutler Lecturer in Law, The College of William and Mary. United States Senator from Virginia, 1967-73; Floor Manager for the War Powers Bill in the Senate, 1972.

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1. 119 CONG. REC. S18,966 (daily ed. Oct. 10, 1973).

2. 119 CONG. REC. S20,107 (daily ed. Nov. 7, 1973).

3. S. Res. 85, 91st Cong., 1st Sess. (1969); SENATE COMM. ON FOREIGN RELATIONS, REPORT ON NATIONAL COMMITMENTS, S. REP. No. 129, 91st Cong., 1st Sess. (1969).

4. *See Hearings on Separation of Powers Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 163 (1967) (testimony of Dr. Alfred de Grazia). *See also Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59 Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. (1971) (testimony of Professor Henry Commager and Congressman Frank Horton). Senator Hubert Humphrey and Congressman Clement Zablocki have long advocated a Joint Committee on National Security and have introduced bills to create such a joint committee.

5. Pub. L. No. 93-148 (Nov. 7, 1973) (codified at 50 U.S.C.A. §§ 1541-48 (Supp. 1975)).

consciousness in Congress of the domination of war powers by the executive branch during nearly a quarter of a century of after-the-fact consultation with Congress. This activity also represented a mounting determination within Congress to enact some mechanism to assure congressional participation in the decisions of war and peace, in keeping with the intent of the Founding Fathers and the public expectation, rooted in that intent, that elected representatives would participate in such decisions.

After identifying the issues addressed by the Resolution through a review of the process of compromise that produced it,[6] this Article will address some of the criticisms directed at the Resolution finally adopted and consider some potential constitutional problems. Ultimately, with an abundance of trepidation, some speculation regarding the efficacy of the Resolution will be offered in light of the flurry of events in Southeast Asia that drew attention to the Resolution in 1975.

Legislative History of the War Powers Resolution

On March 29, 1972, the Senate Foreign Relations Committee reported to the Senate floor a hybrid bill, the War Powers Act,[7] which combined prior proposals by Senators Jacob Javits,[8] Thomas Eagleton,[9] and John Stennis.[10] The proposals of these three Senators had common characteristics. Each sought to define the circumstances under which the President could commit the armed forces to hostilities.[11] Each required prior congressional authorization or a declara-

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The Resolution is reproduced as Appendix 1 of this Article. The House and Senate measures that were compromised to produce the Resolution as enacted appear as Appendix 6 and Appendix 7.

6. For review of war powers proposals considered by Congress in the years prior to 1972, see Spong, *Can Balance be Restored in the Constitutional War Powers of the President and Congress?*, 6 U. Rich. L. Rev. 1 (1971), *discussing* S. 1880, 92d Cong., 1st Sess. (1971) (introduced by Senator Bentsen); S. 731, 92d Cong., 1st Sess. (1971) (introduced by Senator Javits); S.J. Res. 95, 92d Cong., 1st Sess. (1971) (introduced by Senator Stennis); S.J. Res. 59, 92d Cong., 1st Sess. (1971) (introduced by Senator Eagleton); S.J. Res. 18, 92d Cong., 1st Sess. (1971) (introduced by Senator Taft); H.J. Res. 1, 92d Cong., 1st Sess. (1971) (introduced by Representative Zablocki). *See also* Reveley, *Constitutional Allocation of the War Powers Between the President and Congress: 1787-1788*, 15 Va. J. Int'l L. 73 (1974).

7. S. 2956, 92d Cong., 2d Sess. (1972). *See* 118 Cong. Rec. 11,021 (1972).

8. S. 731, 92d Cong., 1st Sess. (1971).

9. S.J. Res. 59, 92d Cong., 1st Sess. (1971).

10. S.J. Res. 95, 92d Cong., 1st Sess. (1971). *See also* 100 Cong. Rec. 6359, 2902 (1954).

11. S. 731, 92d Cong., 1st Sess. § 1(A) (1971); S.J. Res. 95, 92d Cong., 1st Sess. § 2 (1971); S.J. Res. 59, 92d Cong., 1st Sess. §§ 2, 3(a)-(c) (1971).

tion of war for the President to act, except in enumerated emergency circumstances which would permit commitment of armed forces for as long as 30 days without explicit congressional authorization.[12] All three proposals required the President to report to Congress shortly after he had initiated hostilities and periodically thereafter.[13]

During March and April of 1972, the Senate devoted two weeks of debate to the Committee's proposal. Despite numerous efforts to weaken or derail the bill,[14] alteration was limited to the adoption of three clarifying amendments offered by its sponsors.[15] These amendments concerned the emergency powers of the President to act in situations on the high seas involving a direct and imminent threat to the lives of American citizens, the right of the President as Commander-in-Chief to continue repelling enemy attacks after the 30-day period if in the course of bringing about a prompt disengagement of hostilities, and a provision that the Act should not be construed to require further statutory authorization for members of the armed forces to participate in the unified command structure of the North Atlantic Treaty Organization (NATO). On April 13 the Senate passed the War Powers Act.[16]

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12. S. 731, 92d Cong., 1st Sess. §§ 1(B)-(D) (1971); S.J. Res. 95, 92d Cong., 1st Sess. § 4(a),(b) (1971); S.J. Res. 59, 92d Cong., 1st Sess. § 4 (1971).

13. S. 731, 92d Cong., 1st Sess. § 1(B) (1971); S.J. Res. 95, 92d Cong., 1st Sess. § 5 (1971); S.J. Res. 59, 92d Cong., 1st Sess. § 5 (1971).

14. Opposition to war powers legislation was led by Senators Goldwater and Dominick among the Republicans and by Senator Gale McGee on the Democratic side. Senator Goldwater was constant in his opposition, beginning with the Senate hearings in 1971 and continuing through all debates and votes thereafter. His basic position was that Congress could not change the Constitution through legislation limiting the powers of the Commander-in-Chief as he believed the war powers bill would do. He believed that the only proper procedure was to amend the Constitution. *See* Goldwater, *The President's Constitutional Primacy in Foreign Relations and National Defense*, 13 VA. J. INT'L L. 463 (1973); Goldwater, *President's Ability to Protect America's Freedoms—The Warmaking Powers*, 1971 LAW AND SOCIAL ORDER 423.

Senator Dominick endeavored to substitute the language of a weaker House resolution for the Senate bill, *see* note 26 *infra*, and introduced an amendment to increase the President's retaliatory powers. 118 CONG. REC. 11,902 (1972) (rejection of the amendment by a 37-45 vote). Senator McGee proposed a national commission to examine foreign affairs commitments in war powers and to evaluate the continued viability of the Constitution. *See id.* at 11,752 (rejection of the McGee proposal, 19 to 57).

Another unsuccessful effort against the Senate bill in 1972 was that of Senators Ervin and Hruska, senior Members of the Judiciary Committee, to refer the bill to that Committee as an attempt to amend the Constitution. *See id.* at 11,764 (26 to 60 rejection of proposal). A study commission proposed by Senator Beall of Maryland was rejected also. *See id.* at 11,473 (rejection by 23-56 vote).

15. 118 CONG. REC. 11,610-17 (1972).

16. *Id.* at 12,610-11.

The Senate action followed by two years the adoption of a war powers resolution by the House of Representatives.[17] During the summer of 1970, the House Foreign Affairs Subcommittee on National Security Policy and Scientific Development considered 17 war powers bills and resolutions. After extensive hearings, the Subcommittee drafted a joint resolution,[18] which was reported favorably to the House by the Foreign Affairs Committee.[19] Introduced on August 13 by Congressman Clement Zablocki with 15 cosponsors,[20] the joint resolution passed the House on November 16 by a 289-39 vote.[21]

This resolution did not purport to define or change the constitutional war powers of either the President or Congress. Its most significant feature was its mandatory requirement for the President to report promptly and in writing to Congress about the circumstances, authority, and estimated scope of activity for any commitment of armed forces to conflict, commitment of armed forces abroad, or substantial enlargement of armed forces abroad.[22] No action having been taken regarding the resolution by the Senate before the end of the 91st Congress, however, the House proposal died upon adjournment.

When the 92d Congress convened, Congressman Zablocki wasted no time in reintroducing his resolution.[23] After additional hearings, the House Committee on Foreign Affairs unanimously reported the resolution to the House, which passed it by voice vote on August 2, 1971.[24] The Senate Foreign Relations Committee, having elected to move toward codification of the circumstances and time limits under which a President might commit armed forces to hostilities without congressional authorization, was not receptive to the Zablocki resolution and, following Senate enactment of its own more comprehensive bill,[25] reported the Zablocki resolution adversely on April 20.[26] Upon receipt of the Senate bill, the House Foreign Affairs

17. H.R. Res. No. 1547, 91st Cong., 2d Sess. (1970).
18. H.R.J. Res. 1355, 91st Cong., 2d Sess. (1970).
19. 118 Cong. Rec. 26,645 (1972).
20. *See* 116 Cong. Rec. 28,887 (1970).
21. *Id.* at 37,407-08.
22. H.R. Rep. No. 1547, 91st Cong., 2d Sess. 7-8 (1970).
23. H.R.J. Res. 1, 92d Cong., 1st Sess. (1971).
24. 117 Cong. Rec. 28,878 (1971).
25. S. 2956, 92d Cong., 2d Sess. (1972).
26. S. Rep. No. 755, 92d Cong., 2d Sess. (1972). On April 12, 1972, Senator Dominick introduced an amendment, *see* 118 Cong. Rec. 12,456 (1972), to substitute the text of H.R.J.

Committee, substituted the title and text of the Zablocki resolution in order that the Senate and House approaches to war powers legislation might be brought to a conference committee. The House passed the substitute overwhelmingly,[27] and the Senate agreed to a conference committee.[28] With Congressmen poised to leave the Capitol for the 1972 elections, however, the conferees recessed after one rather desultory meeting, leaving war powers legislation for another session of Congress.

It appears unlikely, however, that more prolonged conference sessions could have produced an acceptable compromise because the two proposals had little in common. The Senate majority viewed the Zablocki resolution as too weak, while the House majority believed that going beyond a mere reporting requirement could tie the President's hands in emergency situations. Nonetheless, the House hearings of 1970 and the Senate hearings of 1971 produced a serious examination of constitutional war powers.[29] Following such prolonged ventilation of the various arguments, it appeared likely that the 93d Congress would consider war powers legislation early and explore methods of reconciling the House and Senate views to avoid the unproductive deadlock of the 92d Congress. The long-running Watergate controversy and the public reaction to the heavy bombing of North Vietnam during Christmas 1972 lent impetus to the

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Res. 1, the Zablocki resolution, for the text of the Senate bill. It was rejected by vote of 53 to 24. 118 CONG. REC. 12,458 (1972).

27. 118 CONG. REC. 28,079-83 (1972) (approval by a 345-13 vote).

28. *Id.* at 28,792-93. The conferees were Senators Fulbright, Church, Spong, Case, and Javits, and Congressmen Morgan, Zablocki, Hays, Fascell, Mailliard, Findley, and Frelinghuysen.

29. The debate on the floor of Congress and in the committee rooms was augmented by scholarly commentary. *See* Berger, *War-making by the President*, 121 U. PA. L. REV. 29 (1972); Bickel, *The Constitution and the War*, 54 COMMENTARY 49 (1972); Eagleton, *Congress and War Powers*, 37 MO. L. REV. 1 (1972); Emerson, *War Powers Legislation*, 74 W. VA. L. REV. 53 (1971); Fulbright, *Congress, the President and the War Power*, 25 ARK. L. REV. 71 (1971); Goldwater, *President's Ability to Protect America's Freedoms—The Warmaking Powers*, 1971 LAW AND SOCIAL ORDER 423; Javits, *Congress and the President: A Modern Delineation of the War Powers*, 35 ALBANY L. REV. 632 (1971); Lofgren, *War-making Under the Constitution: The Original Understanding*, 81 YALE L. REV. 672 (1972); Rogers, *Congress, the President, and the War Powers*, 59 CALIF. L. REV. 1194 (1971); Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEXAS L. REV. 833 (1972); Spong, *Can Balance Be Restored in the Constitutional War Powers of the President and Congress?*, 6 U. RICH. L. REV. 1 (1971); Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1 (1972); Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CALIF. L. REV. 623 (1972).

determination of the 93d Congress to fashion a legislative check upon Presidential warmaking.

On the first day of the new Congress, Congressman Zablocki, with 11 cosponsors, introduced a stronger and broader version of his reporting resolution.[30] Among the new features were a specification of the circumstances which might permit emergency use of the armed forces without a declaration of war,[31] a call for immediate congressional consideration of any report submitted to Congress under the provisions of the resolution,[32] and a recitation that the resolution was not intended to acknowledge that Presidential action alone could satisfy the constitutional process requirements of national security treaties.[33] Increased sentiment in the House for a stronger resolution and the desire of the sponsors for serious bargaining with the Senate prompted the stiffening additions.[34] The Zablocki subcommittee conducted hearings in March, with the result that a new committee resolution was introduced on May 3,[35] reported by the Foreign Affairs Committee on June 15,[36] and passed by the House with amendments on July 18 by a 244-170 vote.[37] This House resolution eliminated from Congressman Zablocki's modified proposal the specification of emergency uses of the armed forces,[38] itemized procedures for congressional response to a Presidential report,[39] and provided for priority consideration of any resolution or bill resulting from such a report.[40] It also strengthened the consultation language[41]

30. H.R.J. Res. 2, 93d Cong., 1st Sess. (1973).
31. *Id.* § 3.
32. *Id.* § 6.
33. *Id.* § 7.
34. T. EAGLETON, WAR AND PRESIDENTIAL POWER 146-47 (1974).
35. H.R.J. Res. 542, 93d Cong., 1st Sess. (1973).
36. 119 CONG. REC. H4852 (daily ed. June 15, 1973).
37. 119 CONG. REC. H6283-84 (daily ed. July 18, 1973).
38. H.R.J. Res. 2, 93d Cong., 1st Sess. § 3 (1973). *See Hearings on War Powers Before the Subcomm. on National Security Policy and Scientific Development of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. 80, 87 (1973) [hereinafter cited as *Hearings on War Powers*].
39. H.R.J. Res. 542, 93d Cong., 1st Sess. § 4 (1973).
40. *Id.* § 5.
41. It is interesting to note the changing tone of the language concerning consultation with Congress in the House resolutions from 1970 to 1973. The first resolution stated that it was the sense of Congress that the President should seek consultation with Congress, "when feasible." *See* note 17 *supra*. The second resolution eliminated the words "when feasible." *See* note 23 *supra*. The third stated that the President should seek appropriate consultation. *See* note 30 *supra*. The final House version provided: "The President in every possible instance shall consult with the leadership and appropriate committees of the Congress . . . ." *See* Appendix 6, § 2.

and set a 72-hour limit for the President to report on military actions initiated without a declaration of war.

The most significant additions to the Zablocki resolution, however, were sections 4(b) and 4(c). The former provided that the President must terminate hostilities within 120 days unless Congress had declared war or otherwise specifically authorized use of armed forces.[42] Section 4(c) provided that forces engaged in hostilities outside the territorial limits of the United States or its possessions or territories without a declaration of war or other specific congressional authorization could be disengaged by Congress through concurrent resolution.[43]

Narrowly rejected by the House was an attempt by Congressman Whalen to amend section 4(b) to force an affirmative congressional response to the Presidential use of force.[44] As reported by the Foreign Affairs Committee, the section required withdrawal of committed forces or reduction of force enlargements within 120 days unless Congress authorized the action or declared war.[45] The practical effect of this provision was to require the President to terminate hostilities if Congress did not act. Congressman Whalen argued that Congress should not be permitted to make such an important policy decision by inaction and that his amendment would make Congress face its responsibility for questions of war and peace.[46] Defenders of the Committee's version of section 4(b) argued that it would prevent thwarting of the will of a majority in favor of disengagement by disagreement between the House and Senate, by

42. *See* Appendix 6, § 4(b). The Senate 30-day cutoff period in its 1972 bill had been the focal point of much of the House opposition. The inclusion of a cutoff represented a change of position by the House and provided an area for Senate-House reconciliation.

43. *Id.* § 4(c). Concurrent resolutions are not subject to Presidential veto and do not require the President's signature. They traditionally have been used as a means to control or recover powers delegated to the President by Congress. *See* notes 134-40 *infra* & accompanying text.

44. 119 CONG. REC. H6263 (daily ed. July 18, 1973).

45. The language of the Whalen amendment was as follows:

> (b) Within one hundred and twenty calendar days after a report is submitted or is required to be submitted (whichever is earlier) pursuant to Section 3, the Congress, by a declaration of war or by the passage of a resolution appropriate to the purpose, shall either approve, ratify, confirm, and authorize the continuation of the action taken by the President and reported to the Congress, or shall disapprove such action in which case the President shall terminate any commitment and remove any enlargement of United States Armed Forces with respect to which such report was submitted.

Id.

46. *Id.* at H6263-65.

a Senate filibuster, or by a Presidential veto that could be upheld by a mere one-third of either House; the amendment would create an undesirable presumption in favor of Presidential action, they argued.[47] By a slim 211-200 margin, the House rejected the Whalen amendment.[48]

The Senate moved almost as rapidly as the House at the beginning of the 93d Congress. On January 18, Senator Javits, for himself and 57 other Senators, introduced a war powers bill, entitled the War Powers Act,[49] which was identical to the bill that had passed the Senate in April 1972. It was advocated by its chief sponsor as a constructive alternative to legislative control over the use of armed forces by means of the appropriations power, which was described as a "clumsy, blunt, and obsolescent tool."[50] Senators Stennis and Eagleton were again principal cosponsors of the bill, although the former's participation was limited during the early debate.[51] Despite Senator Eagleton's belief that the anticipated withdrawal of United States forces from South Vietnam justified removing the exemption the bill gave to Indochina hostilities,[52] the Foreign Relations Committee reported the bill unamended and without dissent to the Senate in June.[53]

Both the House and Senate war powers debates took place in July against a background that cannot be divorced from an account of legislative history. A complicated and continuing struggle over use of the ultimate congressional weapon, the power of the purse, to stop air operations over Cambodia had preceded the July war powers debate. These air strikes were ordered by the President in response to failure of the North Vietnamese to withdraw forces from Laos and Cambodia. Concurrently, further disclosures about the break-in at the Democratic Party headquarters at the Watergate were eroding

47. *Id.* at H6265-70.

48. *Id.* at H6263-72.

49. S. 440, 93d Cong., 1st Sess. (1973).

50. 119 CONG. REC. S871 (daily ed. Jan. 18, 1973). Senator Javits' introductory remarks included an observation that Congressman Zablocki's revised resolution contained "significant new elements bringing it closer to the Senate bill." *Id.*

51. In late January 1973, Senator Stennis was the victim of a robbery and assault during which he was shot. He recovered sufficiently to participate in the October and November 1973 debates concerning the conference report and override of the President's veto. Senator Stennis spoke for adoption of the conference report and for override of the veto. 119 CONG. REC. S20,096 (daily ed. Nov. 7, 1973); *id.* at S18,996-97 (daily ed. Oct. 10, 1973).

52. T. EAGLETON, *supra* note 34, at 147-48. Section 9 of the bill recited: "This Act shall . . . not apply to hostilities in which the Armed Forces of the United States are involved on the effective date of this Act."

53. 119 CONG. REC. S11,123 (daily ed. June 14, 1973).

public support for President Nixon. Nevertheless, despite the steady decline in his personal popularity and in his capacity to influence Congress, the President's veto power appeared secure.[54]

During a three-day debate, the Senate by voice vote accepted several perfecting amendments, including an Eagleton amendment to make the bill applicable to all hostilities as of its enactment. Two amendments offered by Senator Fulbright were rejected by voice vote.[55] The only controversial amendment introduced, debated, and defeated by recorded vote was an Eagleton amendment to limit the use of American civilian combatants in the same manner as the use of military force.[56] Opposed by Senators Javits, Muskie, and Stennis,[57] the amendment was rejected,[58] and the bill passed the Senate

54. Congress had sustained several vetoes by President Nixon during 1972 and 1973. *See, e.g.*, 119 CONG. REC. S19,763-68 (daily ed. Oct. 30, 1973) (veto of bill authorizing fiscal 1974 appropriations for the United States Information Agency (USIA) with a provision for congressional access to certain USIA documents); 119 CONG. REC. H5486-88 (daily ed. June 27, 1973) (veto of a supplemental appropriations bill with a provision barring use of funds for continued bombing of Cambodia); 119 Cong. Rec. S6509-38 (daily ed. Apr. 3, 1973) (veto of amendment to vocational rehabilitation bill).

55. One amendment would have authorized Congress to prohibit peacetime deployment of troops outside of the United States; another would have changed the conditions under which the President would be permitted to make emergency use of the armed forces. 29 CONG. Q. ALMANAC 914 (1973). Both amendments were consistent with positions taken by Senator Fulbright in the supplemental views stated by him when the Committee reported to the Senate. *See* S. REP. No. 220, 93d Cong., 1st Sess. 33-38 (1973).

56. Senator Eagleton referred to this as his "CIA Amendment." It was prompted, in large measure, by CIA activities in Laos. Senator Eagleton feared that such operations would be encouraged in the future so long as the fact of civilian control was sufficient to take them outside the scope of the Resolution. 119 CONG. REC. S14,187-88 (daily ed. July 20, 1973).

57. Senators Javits and Muskie sympathized with the purpose behind the Eagleton amendment concerning CIA operations, but both feared that the amendment could impair chances for passage of the Resolution. During the debate, Senator Muskie introduced a letter he had received from Senator Stennis; portions of the Stennis letter read as follows:

> One amendment of substance [to the War Powers Bill] is by . . . Mr. Eagleton, who has done much work and has made a fine contribution to this important bill as it now stands. This amendment has a prohibition of using the C.I.A., or its funds, in war activities of the type we have used in Laos. The experience of the C.I.A. in Laos, as well as more recent disclosures of matters here at home have caused me to definitely conclude that the entire C.I.A. Act should be fully reviewed.
>
> Accordingly, I already have in mind plans for such a review of the C.I.A. Act by the Senate Armed Services Committee and have already started some staff work thereon. All proposed changes, additions or deletions can be fully developed and hearings held thereon at that time. I have already completed, but have not yet introduced some amendments of my own. The proposal by the Senator from Missouri, Mr. Eagleton, to explicitly prohibit any action by the C.I.A. of the type we have had in Laos, or any other activity of that kind could & would

with three floor amendments by a 72 to 18 vote.[59]

Since the House had passed the revised Zablocki resolution two days previously,[60] the way was clear for a conference committee[61] that had better prospects than its predecessor. In the words of one conferee, "a sense of historic opportunity and responsibility pervaded."[62] Elements of both measures provided a basis for discussion and compromise; though the approaches of each body differed, they were not as irreconcilable as they had been in 1972. Both Houses had embraced a proposal to terminate the President's authority to use forces abroad, the Senate allowing 30 days[63] and the House, 120.[64] Each House also had empowered Congress to order earlier cessation of combat activity or deployment, the Senate utilizing a joint resolution and the House, a concurrent resolution.[65]

The most fundamental difference to be resolved concerned the triggering of the 30- or 120-day period allowed for the President to obtain congressional approval for his deployment of the armed forces. From the first war powers legislation introduced by Senator Javits,[66] the Senate consistently had specified the emergency situations which would permit Presidential commitment of forces without particular congressional authority. Congressman Zablocki's brief flirtation with this so-called "authority" approach had re-

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be fully considered by the committee at that time. I could support some major points in that particular amendment as a part of a bill on the subject, but fully oppose the amendment presented as a part of the War Powers Bill.

The bill now before the Senate, as finally written and improved by the Foreign Relations Committee, is an excellent bill and is confined to the Constitutional subject of actually committing the nation to war.

I believe this bill, if confined to its proper subject matter will pass the Senate by a large vote and will emerge from the Conference Committee as a bill with meaning. . . . If we clutter the War Powers Bill with other matters we would probably kill what is otherwise a good chance to override a possible veto.

119 CONG. REC. S14,190 (daily ed. July 20, 1973).

58. *Id.* at 14,200 (rejected by 34-18 vote).

59. *Id.* at 14,226.

60. *See* note 37 *supra*.

61. The conferees were Senators Fulbright, Mansfield, Symington, Muskie, Aiken, Case and Javits, and Congressmen Zablocki, Morgan, Hays, Fraser, Fascell, Mailliard, Findley, and Broomfield. 119 CONG. REC. H8657 (daily ed. Oct. 4, 1973).

62. 119 CONG. REC. S18,986 (daily ed. Oct. 10, 1973) (remarks of Senator Javits).

63. S. 440, 93d Cong., 1st Sess. § 5 (1973).

64. H.R.J. Res. 542, 93d Cong., 1st Sess. § 4(b) (1973).

65. S. 440, 93d Cong., 1st Sess. § 6 (1973); H.R.J. Res. 542, 93d Cong., 1st Sess. § 4(c) (1973).

66. S. 3964, 91st Cong., 2d Sess. (1970). There were no hearings on the bill during the 91st Congress.

ceived short shrift from his committee colleagues in the House[67] who favored a "performance" test. Under the House test the 120-day period would begin to run when the President reported to Congress within 72 hours after having deployed the armed forces, whereas under the Senate's "authority" test the 30-day period would begin to run upon deployment of the troops. The House conferees argued that an attempt to delineate the President's warmaking powers specifically was "constitutionally questionable and from a practical standpoint unwise"[68] and that language in the Senate bill giving the President the right to forestall an attack could license preemptive war.[69]

The compromise version reported to the respective bodies by the conferees[70] embraced the House method of triggering a 60-day period during which the President might commit United States forces without specific congressional authorization, and allowed a 30-day extension if the President certified in writing that the time is needed for the safety of the troops.[71] The time within which the President must report to the Speaker and President Pro Tempore of the Senate was set at 48 hours.[72] The conferees retained the provision that would empower Congress to terminate a Presidential action within the 60-day period by concurrent resolution. The cutoff period does not begin to run unless the President's report is made pursuant to the introduction of troops into actual or clearly imminent hostilities. Priority consideration was authorized for joint and concurrent resolutions to extend or shorten the 60-day period, and the language interpreting provisions of the resolution was compromised.

Most difficult to compromise was the Senate's desire to enumerate the emergency exercises of the President's war powers that would trigger the need for Congressional approval.[73] After the House conferees rejected the Senate's definition of those powers,[74] Senator Javits proposed new language to preserve the Senate's minimum essentials[75]:

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67. *See* note 38 *supra* & accompanying text.
68. 119 CONG. REC. H8948 (daily ed. Oct. 12, 1973).
69. *Id.* at H8949.
70. H.R.J. Res. 542, 93d Cong., 1st Sess. (1973).
71. 119 CONG. REC. H8656 (daily ed. Oct. 4, 1973).
72. *Id.*
73. *See* 119 CONG. REC. S18,985 (daily ed. Oct. 10, 1973) (statement of Senator Fulbright, conference chairman).
74. *See* Appendix 7, § 3.
75. T. EAGLETON, *supra* note 34, at 201.

> The emergency powers of the President to introduce the United States Armed Forces into hostilities or situations likely to lead to hostilities being to (1) repel attacks upon the United States, its territories and possessions; (2) defend the United States Armed Forces abroad from attack; (3) rescue citizens and nationals of the United States; in any case in which the United States Armed Forces without a declaration of war by the Congress, or specific prior statutory authorization are introduced.[76]

Finding the new Javits language unacceptable, the conferees compromised by placing the following language in section 2, the "Purposes and Policy" section:

> (c) 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 (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.[77]

Arguments from earlier debates were revived in the course of obtaining Senate and House approval of the conference report. Among the Congressmen opposed to the report was the House Minority Leader, Gerald R. Ford, who decried the lack of a requirement for Congress to act affirmatively, stating: "We will stop a war by sitting on our hands and doing nothing."[78] Notably, the then Representative Ford also stated that he saw validity to the argument that the report expanded the President's warmaking authority.[79] Another opponent of the report was one of the architects of war powers legislation, Senator Eagleton, who objected that placing the language of section 2(c) into the "Purpose and Policy" section rendered the language precatory, meaningless, and "the pious pronouncement of nothing."[80] He argued that the conferees intended this effect, citing the following statement from the conference report: "Subsequent sections of the joint resolution are not dependent upon the language of [section 2(c)], as was the case with a similar provision of the

76. *Id.*
77. 119 CONG. REC. H8656-57 (daily ed. Oct. 4, 1973).
78. 119 CONG. REC. H8957 (daily ed. Oct. 12, 1973).
79. *Id.*
80. 119 CONG. REC. S18,992 (daily ed. Oct. 10, 1973).

Senate bill . . . ."[81] He reasoned that if section 2(c) was nonoperative, then the President was free to define his own war powers, the Resolution thereby effectively sanctioning a period of 60 to 90 days of war declared by the President and creating a legal base for the President to take the nation to war without prior congressional authorization.[82] The Senate, nevertheless, agreed to the conference report on October 10 by a substantial majority of 75 to 20,[83] the House concurring two days later by a 238-123 vote.[84]

On October 24, to no one's surprise, President Nixon vetoed the War Powers Resolution.[85] In a telegram introduced during the House debate of the Zablocki resolution on July 18 by then House Minority Leader Ford, President Nixon had stated that he was "unalterably opposed to and must veto any bill containing the dangerous and unconstitutional restrictions found in sections [5(b) and 5(c)] of this bill."[86] Since these sections had survived the conference substantially intact, President Nixon's veto only fulfilled the general expectation that any war powers legislation containing more than a reporting requirement probably would be vetoed.

Although that prospect had presented little problem in the Senate where the key votes in 1972 and 1973 all had indicated sufficient support for war powers legislation to override a veto,[87] supporters of the measure had urged the President to consider a veto cautiously. Senator Hubert H. Humphrey had contended: "If vetoed, all of the pious words about bipartisanship and shared power will be lost in a Presidential pronouncement reinforcing the concept of unchecked power."[88] Nevertheless, the President's veto message stated that the War Powers Resolution "would attempt to take away . . . authorities which the President has properly exercised under the Constitution for almost 200 years."[89] He objected specifically to section 5(b) which "would automatically cut off certain authorities after sixty

81. H.R. Rep. No. 547, 93d Cong., 1st Sess. 8 (1973).
82. 119 Cong. Rec. S18,993 (daily ed. Oct. 10, 1973).
83. *Id.* at S19,006.
84. 119 Cong. Rec. H8963 (daily ed. Oct. 12, 1973).
85. H.R. Doc. No. 171, 93d Cong., 1st Sess. (1973).
86. 119 Cong. Rec. H6241 (daily ed. July 18, 1973).
87. *See* 118 Cong. Rec. 12,611-12 (1972) (68-16 approval of Senate bill); 119 Cong. Rec. S14,226 (daily ed. July 20, 1973) (72-18 approval of Senate bill); 119 Cong. Rec. S19,006 (daily ed. Oct. 10, 1973) (72-18 approval of conference report despite the opposition of Senator Eagleton and the "House flavor" of the compromise).
88. 119 Cong. Rec. S18,989 (daily ed. Oct. 10, 1973).
89. 119 Cong. Rec. H9400 (daily ed. Oct. 25, 1973).

days unless the Congress extended them."[90] Another objection concerned section 5(c), which "would allow the Congress to eliminate certain authorities merely by the passing of a concurrent resolution—an action which does not normally have the force of law, since it denies the President his constitutional role in approving legislation."[91] In addition to his constitutional objections, the President asserted that the Resolution would undermine national foreign policy and criticized the absence of a requirement that the Congress act affirmatively in order to terminate the President's constitutional powers as Commander-in-Chief after 60 days.[92]

Because less than a two-thirds majority had voted for the conference report in the House,[93] there was a possibility that the House would sustain the veto. Despite opposition to the War Powers Resolution on the grounds that it either went too far or not far enough in checking the President's powers, however, background factors undoubtedly contributed to the House vote on the veto. Democrats had a political reason to override the veto to reassert their strength after the House had sustained five successive vetoes during 1973.[94] The vote also had been converted into a test of congressional against executive power by the public dissatisfaction with the continued struggle in Vietnam and Cambodia. Finally, the dismissal of Watergate Special Prosecutor Archibald Cox, the resulting resignation of Attorney General Elliot Richardson, and the growing White House tapes controversy fostered partisanship among Democrats while leading some House Republicans to want to disassociate themselves from the President.

The House overrode the President's veto by only four votes more than a two-thirds majority.[95] Fifteen members who voted for the conference report nonetheless voted to sustain, ten Republicans perhaps motivated by party loyalty and five Democrats.[96] On the other hand, 18 who had opposed the conference report voted to override the veto,[97] although some of these had been quite outspoken in oppo-

90. *Id.*
91. *Id.*
92. *Id.*
93. *See* note 84 *supra* & accompanying text.
94. *See* 29 CONG. Q. ALMANAC 28 (1973).
95. 119 CONG. REC. H9661 (daily ed. Nov. 7, 1973) (284-135 vote to override).
96. 29 CONG. Q. ALMANAC 906 (1973).
97. *Id.*

sition to war powers legislation.[98] While only 361 Congressmen had voted on the conference report, 419 voted on the veto, with a substantial majority of the 58 new votes contributing to the margin needed to override.

A long, complicated legislative battle ended when the House vote to override was followed, as expected, by Senate agreement.[99] For those who believed history had been made by the votes, the Resolution, despite its diverse origins, represented a major beginning toward restoring balance between the executive and legislative branches.[100] Adoption of the Resolution, nevertheless, did not answer forever some of the criticisms directed at the conference compromise. A review of these will facilitate evaluation of the efficacy of the Resolution.

The Legal Meaning and Effect of the War Powers Resolution

Statutory Interpretation of Section 2(c)

In examining the effect of section 2(c), it is appropriate to apply Justice Holmes' test: "We do not inquire what the legislature meant; we ask only what the statute means."[101] Language of the section presents no difficult problem, for the words are relatively clear and unambiguous; the placement of the language in the "Purposes and Policy" section of the Resolution, however, does raise a question as to its effect. Technically the "Purpose and Policy" section of the Resolution is not a preamble, since although it might have been drafted in the form of "whereas" clauses, it was not. It follows the enacting clause and, as part of the body of the Resolution, must be interpreted together with all other sections according to the maxim that the "separate effect of each individual part or section of an act [must be] made consistent with the whole."[102]

If section 2(c) is operative, it still is necessary to determine

98. An intensive effort was made by the Americans for Democratic Action to change the views of eleven Representatives who had voted against the War Powers Resolution when the House considered it initially and in the form of the conference report. Of the eleven, five, Representatives Abzug, Drinan, Hechler, Holtzman, and Patten, voted to override the veto. *Id.* at 906.

99. 119 Cong. Rec. S20,115 (daily ed. Nov. 7, 1973) (75-18 vote to override).

100. J. Javits, Who Makes War? at v-xi (1973) (forewords by Barbara Tuchman and Alexander M. Bickel).

101. O. Holmes, Collected Legal Papers 207 (1920).

102. 2A C. Sand, Statutes and Statutory Construction § 47.06, at 81 (4th ed. 1973) (footnote omitted).

whether it has a binding effect upon the President's actions as Commander-in-Chief. Ambiguities arise from the specific wording of the subsection, particularly as it relates to the other subsections of the "Purposes and Policy" section and to other sections of the Resolution. For instance, the words "are exercised" in section 2(c) are present-tense words followed by the congressional statement of the constitutional standards for the exercise of Presidential war-making powers. The words are stronger than words of "finding" ("the Congress finds that . . ."), yet they are not directive. The word "shall" is omitted, despite its appearance in every subsequent section of the Resolution. Moreover, the uniqueness of the subsection is emphasized by the fact that the language of the two preceding subsections[103] clearly is prefatory, subsection (a) stating the purpose of the Resolution and subsection (b) citing the "necessary and proper" clause of the Constitution as the legal basis for the Resolution. In contrast to this prefatory language is the phrase "are exercised only" in subsection (c) and the precision with which it delineates the situations when the President may introduce United States forces into hostilities.

Contrasting with the specificity of the enumeration of the emergency situations in which the President may commit forces is the absence from section 2(c) of any enforcing language and, more critically, the lack of any reference to section 2(c) by any other section of the Resolution.[104] Rather than limiting the President's use of force by reference to section 2(c), the enforcing provision of the Resolution, section 4, only requires the President to report to Congress upon the commitment of forces in certain enumerated situations. This lack of harmony between sections 2(c) and 4 is not resolved by the conference report observation[105] that subsequent sections of the Resolution are not dependent upon section 2(c),[106] for this observation merely states what is readily apparent from a reading of the Resolution. Moreover, the nondirective conference report observations could not overcome the following fundamental principle of

103. All three subsections obviously were drawn from sections 2 and 3 of the Senate bill, S. 440, 93d Cong., 1st Sess. §§ 2, 3 (1973). *See* Appendix 7.

104. The section defining emergency situations in the Senate bill was referred to as an integral part of the legislation in the other vital sections of the bill. *See* Appendix 7.

105. *See* note 81 *supra* & accompanying text.

106. The subsequent provisions of the Senate bill, on the other hand, were dependent upon section 3, the provision of the Senate bill that corresponded to section 2(c) of the joint resolution. *See* note 104 *supra*.

statutory construction: "[A] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole."[107] Furthermore, the question addressed, however successfully, by the conference report was whether other sections depend upon section 2(c), not the present question of whether the meaning of section 2(c) depends upon subsequent sections.

To Senator Eagleton's charge that section 2(c) is meaningless, Senator Javits merely adduced the litany that a statute is passed as a whole and each part should be construed with every other part to produce a harmonious whole.[108] A reading of section 2(c) with section 4 or any of the other procedural sections, however, makes harmonious interpretation difficult. Neither the language of the conference report nor the attempt to relate sections 2(c) and 4 resolves the effect of section 2(c) upon the President's authority as Commander-in-Chief. That question must be resolved by reexamination of the words of the subsection.

Conflicting possibilities for determining whether section 2(c) is mandatory are offered by the wording of the section. One rule of construction provides that mandatory statutes state both the activity prescribed and the consequence of failure to perform.[109] Application of this rule would suggest that 2(c) is not mandatory and thus not binding upon the President. Another rule, leading to a contrary conclusion, is that statutory language indicating that a prescribed course is to be exclusive is mandatory: "The rule is that if, by the language used, a thing is limited to be done in a particular form or manner, it includes a [requirement] that it shall not be done otherwise, and that an affirmative expression introductive of a new rule implies a negative of all that is not within its purview."[110] The use of the word "only" in section 2(c) thus could imply a basis for

107. 2A C. SAND, *supra* note 102, § 46.05, at 56 (footnote omitted).

108. He stated: "If this is a statute, every part means something, whether it is written in subsection (2)(c) or in section 3, as in the Senate bill." 119 CONG. REC. S18,994 (daily ed. Oct. 10, 1973). However, other statements made by Senator Javits during the debate that day made clear his preference for the Senate language: "I would prefer the Senate version. There is no question about it. . . . Unfortunately, that version could not pass both Houses." *Id.*

109. 2A C. SAND, *supra* note 102, § 57.08.

110. *Id.* § 57.09, at 427.

bringing the section within the ambit of the latter rule as a limit on executive power.

There is little or no support for an implied limitation in the legislative history of the Resolution, however. Courts also are unlikely to find implied limitations in legislation that could affect vitally the distribution of authority between the executive and legislative branches of government, particularly since the legislative history supports reading section 2(c) as only advisory to the President. Section 3 of the Senate bill used mandatory language in describing the authority of the Commander-in-Chief,[111] while the intended strength of the language of subsection 2(c), the product of conference compromise, is unclear and not accompanied by enforcement provisions. The difference between the two versions is significant, for "[w]here the history of the bill in the legislation shows that when it was originally introduced it contained a permissive verb, and that when finally passed it had been changed to one of mandatory import, or vice versa, it is clear that the verb used in the bill as it was finally passed was intended to carry its ordinary meaning."[112]

From its legislative history, section 2(c) must be viewed as the remnant of the Senate's long effort to define the President's war powers in emergency situations. That effort failed. It cannot be stated summarily that the section is inoperative, for it follows the "be it resolved" clause, but its effectiveness is limited to the advisory impact its words may have upon a President. It does not bind the President, but it stands as the only statement of what Congress believes the President's war powers authority to be.[113] There may be instances involving protection of American nationals abroad, international peace-keeping, or humanitarian rescue in which there is constitutional authority for the President to disregard the advisory language of section 2(c), but the language could influence a President to turn to Congress before acting even in emergency situations. The fact that Congress will have to approve a Presidential initiative

111. S. 440, 93d Cong., 1st Sess. § 3 (1973).

112. 2A C. SAND, *supra* note 102, § 57.05, at 419 (footnote omitted).

113. The Department of State, in response to a query from Senator Eagleton, had been prompt to state: ". . . Section 2(c) does not constitute a legally binding definition of the President's Constitutional power as Commander-in-Chief." 119 CONG. REC. S20,051 (daily ed. Nov. 7, 1973). *See* Letter from Senator Thomas Eagleton to Secretary of State Henry Kissinger and Reply from Marshall Wright, Assistant Secretary for Congressional Relations, *id.*

within 60 days and may disapprove it by concurrent resolution at any time should encourage the President to consult before acting.

Senator Muskie, floor manager of the Senate bill and a conferee, expressed the following view of the section:

> It is true, as [Senator Eagleton] has pointed out, that this language is not operative language.
>
> Why was it put into the bill?
>
> It was put into the bill as an indication that, in enacting a bill, Congress did not intend to surrender any of its constitutional powers with respect to the making of war.
>
> The remainder of the bill is a procedural bill, undertaken to insure consultation by the President with Congress and undertaking to put in the hands of Congress the procedure for terminating any hostilities into which the President may have plunged us, whether or not his action in so doing conformed with our view as to what his constitutional powers might be.[114]

The Constitutional Issues

The constitutional questions presented by the War Powers Resolution are easier to identify than to answer. They were raised during the war powers debates, both by those who argued that war powers legislation infringed upon the President's constitutional prerogatives and by those who believed that the legislation proposed would give the President greater authority in warmaking decisions than that granted by the Constitution. An evaluation of the Resolution in terms of these questions, however, must be shaded by an acknowledgment that the purpose of the Resolution accepted was not to define constitutional powers, but to establish procedures governing their exercise.[115]

The initial constitutional question concerns whether section 2(c)

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114. 119 CONG. REC. S20,112 (daily ed. Nov. 7, 1973).

115. Senator Muskie stated:

> The bill does not undertake to impose on the President a modification of his constitutional powers. It does not undertake to assert a restatement of Congress' view as to the President's role with respect to the warmaking power.
>
> What it undertakes to do is to establish a procedure for comity as to different views in the future, so that Congress can be brought in from the periphery of the warmaking power to its center in order to exercise its proper role.

Id. With this statement, Senator Muskie identified succinctly the basic difference between the Senate's authority approach and the House's performance approach. The latter approach, adopted by the conference, does not include binding constitutional definitions of war powers authority and, as a result, raises fewer constitutional questions.

infringes upon the President's authority to act in emergencies for the protection of American nationals abroad. One constitutional scholar, Professor Bickel, gave wide scope to this authority by terming it "somewhat extra-constitutional;"[116] nevertheless, he acknowledged that the delineation of that authority advocated by the Senate proposals comported with "the contemplation of the framers of the American Constitution and . . . the experience of nearly two centuries, including a quarter century of the nuclear age . . . ."[117]

In light of the procedural purpose of the Resolution, the concept of the President's authority reflected in section 2(c) as enacted does not infringe upon that authority, however it is defined. If it is correct to construe section 2(c) as advisory only, rather than mandatory, the power of the President to act unilaterally to protect American nationals is not questioned. The sections of the Resolution pertinent to the exercise of this power are those following section 2; the President's immediate duty is to consult, if possible, and to report to Congress, if section 4(1), (2), or (3) is applicable.[118] Moreover, the Senate bill's specific definition of the situations in which the President might make emergency use of the armed forces[119] accommodated cases decided in the 19th century which established the right of the President to use the armed forces abroad for the protection of American nationals.[120]

Another possible source of infringement upon Presidential power is the imposition by section 5(b) of a 60-day limitation upon the use of the armed forces without congressional sanction. The most eloquent opposition to this cutoff clause was that of Senator Sam Ervin:

> This measure is an absurdity. It says that when the United States is invaded, Armed Forces of the United States must get out of the fight against an invader at the end of 30 days if the Congress does not take affirmative action within that time to authorize the President to continue to employ the Armed Forces to resist the invasion. The bill is not only unconstitutional, but is also impractical of operation. In short, it is an absurdity.

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116. *Hearings on War Powers*, *supra* note 38, at 178 (testimony of Alexander Bickel).
117. *Id.*
118. Appendix 1, §§ 2, 4.
119. *See* S. 440, 93d Cong., 1st Sess. § 3 (1973); Appendix 7.
120. *In re* Neagle, 135 U.S. 1 (1890); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (dictum); Perrin v. United States, 79 U.S. (12 Wall.) 315 (1870).

> Under it, the President must convert Old Glory into a white flag within 30 days if Congress does not expressly authorize him to perform the duty the Constitution imposes upon him to protect the Nation against invasion.[121]

He added: "[I think] that the Founding Fathers were acting in great wisdom when they separated the powers of Government by making one public official, the President of the United States, the Commander in Chief of the Army and Navy of the United States, rather than 100 Senators and 435 Representatives."[122]

Senator Ervin's argument draws upon the extreme example of an invasion to question the validity of the Resolution. There is little doubt that the Founding Fathers intended one commander, rather than a collegium, to be responsible for the military and tactical decisions of war;[123] Elbridge Gerry's successful motion to insert the word "declare" in place of "make" in article I, section 8, clause 11 of the Constitution, pointedly left to the President the power to repel sudden attacks if Congress was not in session.[124] Embracing the Ervin argument fully, however, would lead to the conclusion that Congress does not have the authority to terminate hostilities in the United States, contrary to the wishes of the President, if it believes such termination in the best interests of the Nation. This conclusion clashes with the principle that the power vested in Congress to declare war includes the authority to choose peace instead of war.[125] To interpret the Constitution as providing the President with sole authority to terminate hostilities is to disregard the wisdom of James Madison's admonition: "Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued or concluded."[126]

Consideration of the 60-day cutoff provision requires a broader perspective than the extreme example of an invasion. The constitutional basis of war powers legislation for the entire Resolution, and particularly the cutoff provision, section 5(b), is recited in section 2(b):

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121. 119 CONG. REC. S14,201 (daily ed. July 20, 1973).

122. *Id.*

123. *See* Fleming v. Page, 50 U.S. (9 How.) 603, 615, 618 (1850); THE FEDERALIST No. 69 (A. Hamilton).

124. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 476 (1966).

125. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 107-08 (1972).

126. Helvidius Letter No. 1, ch. II, n.12, *quoted in* L. HENKIN, *supra* note 125, at 351 n.48.

> 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.[127]

Senator Muskie's view[128] and the language of the Resolution itself[129] suggests that the necessary-and-proper clause serves as the basis for creating a procedural mechanism for coordinating the constitutional authorities of the President and Congress. The Resolution also might be deemed a legislative attempt to fill the lacuna resulting from the constitutional structure that gives Congress the authority to declare war and to raise, organize, and support the armed forces, but that names the President as Commander-in-Chief. This procedure would provide an alternative to use of the congressional power of the purse to terminate hostilities and would encourage early consultation when hostilities are imminent. The procedure would permit the President to initiate hostilities unilaterally, but he must consult with Congress and, if the armed forces are employed in circumstances described in section 4(a),[130] report to Congress. If he reports pursuant to section 4(a)(1), the 60-day period begins to run for Congress to respond positively or negatively as to the necessity and wisdom of the President's action. Failure to act within the 60 days would constitute a negative response, and it must be assumed that both the President and Congress would be sensitive to the political risks of unilateral presidential action or congressional inaction.

Whether the 60-day cutoff infringes upon the President's constitutional authority is related to how one views the Commander-in-Chief. Is the President's role that of Hamilton's first general and admiral or the Abraham Lincoln of the *Prize* Cases[131] or an all-powerful commander who acts with unenumerated, extra-

127. Appendix 1, § 2(b); *cf.* U.S. CONST. art. I, § 8, cl. 18.

128. *See* note 115 *supra*.

129. Appendix 1, § 8(d)(1).

130. *Id.* § 4(a).

131. 67 U.S. (2 Black) 635 (1863) (acknowledging the limited authority of the President to recognize and react appropriately to the fact of territorial war despite his inability to initiate war). An even more confining interpretation of the President's authority as Commander-in-Chief would view him as simply the highest ranking military officer. *See* THE FEDERALIST No. 69 (A. Hamilton).

constitutional authority termed "inherent"? The conferees on the Resolution rejected the attempt to codify the constitutional war powers of the Commander-in-Chief, electing instead to recite in advisory language their view of what those powers comprise. Against that background, the cutoff provision is constitutional in concept, athough there may be occasions when its execution could be unconstitutional. Congress recognized the possibility of unconstitutional execution by including language in section 5 allowing the President to certify "unavoidable military necessity" in order to receive an additional 30 days for military operations if such continued use of the armed forces is necessary to protect the safety of forces during withdrawal.[132] The tactical duty of a commander to provide for the safety of the troops in the field could render the cutoff period unconstitutional were it not for the saving provision in the Resolution for a necessary extension to allow the Commander-in-Chief to perform this tactical duty.

Conversely, it has been argued that section 5(b) is an impermissible expansion, rather than restriction, of the President's constitutional authority as Commander-in-Chief since it might permit him to wage war unilaterally for 60 to 90 days. The basic purpose of the Resolution was to establish a procedure for the exercise of war powers by the President and Congress, not to reduce, expand, or even define in a binding fashion these powers. Although section 2(c) states in advisory language Congress' view of the President's war powers and does not bind the President to this view, actions taken beyond the parameters of section 2(c) under any of the circumstances enumerated in section 4 will require consultation and reporting pursuant to other provisions of the Resolution. If section 4(a)(1) provides the basis for requiring the report, the 60-day cutoff provision applies as well as the provision permitting congressional termination through concurrent resolution.

The Resolution does not add to the President's authority as Commander-in-Chief. Indeed, considering the expansion of that authority during the past quarter-century through custom, usage, and congressional acquiescence, there is little power to add. The Resolution does establish by law a methodology by which Congress may terminate hostilities it considers unwise or unconstitutional without resort to the ultimate legislative weapon of withholding

132. *See* Appendix 1, § 5(b).

funds, an unsuitably harsh remedy employed only reluctantly.

Opponents of the War Powers Resolution also asserted the existence of constitutional infirmities in the provision under section 5(c) for termination of hostilities by concurrent resolution, which does not require signature by the President and thus is not subject to veto. Arguing to sustain the President's veto, Senator Strom Thurmond stated:

> [The Resolution] eliminates certain authorities merely by the passage of a concurrent resolution. Now, what is a concurrent resolution? A concurrent resolution is one that merely takes the sense of the bodies. How can a concurrent resolution have the force and effect of law? How could the President of the United States be denied the right to veto a resolution that would carry such tremendous power as this concurrent resolution would apparently do?
>
> A joint resolution does have the force and effect of law, and the President has the chance to veto it, but for the Congress, through a concurrent resolution, to act in a matter on such a vast scale as this, affecting the Constitution of the United States, there is no parallel in history for such a procedure. There is no precedent in the history of this Government for such a procedure.[133]

Precedents exist, however, for the use of concurrent resolutions. Among notable pieces of legislation in which Congress or the Senate has provided for the use of such resolutions are the Executive Reorganization Acts of 1939[134] and 1949,[135] the Greek-Turkish Aid Act of 1947[136] the Foreign Assistance Act of 1961,[137] the Lend Lease Act,[138] one of Henry Cabot Lodge's reservations to the Versailles Treaty,[139] and ironically the Tonkin Gulf Resolution.[140] One of the possible exceptions to the authority of Congress to terminate hostilities concerns the defense against invasion by the President,[141] but

133. 119 CONG. REC. S20,108 (daily ed. Nov. 7, 1973).

134. Reorganization Act of 1939, ch. 36, § 5(a), 53 Stat. 562.

135. Reorganization Act of 1949, ch. 226, § 6(a), 63 Stat. 205.

136. An Act to Provide for Assistance to Greece and Turkey, ch. 81, § 6, 61 Stat. 105 (1947), *repealed by* Mutual Security Act, ch. 937, § 542(a)(1), 68 Stat. 861 (1954).

137. Pub. L. No. 87-195, § 617, 75 Stat. 444.

138. Ch. 11, § 3(c), 55 Stat. 32 (1941).

139. 58 CONG. REC. 8022 (1919) (Reservation No. 2).

140. Pub. L. No. 88-408, § 3, 78 Stat. 384 (1964).

141. *See* L. HENKIN, *supra* note 125.

it is acknowledged by section 5(c) which permits the concurrent-resolution procedure only when ". . . 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 . . . ."[142]

Use of a concurrent resolution, rather than a joint resolution, as a mode for terminating hostilities should be weighed constitutionally in terms of depriving the President of a voice in the termination decision that he otherwise would have through the right to veto a joint resolution. Such a joint resolution, however, would place the decision for war or peace in the hands of one-third of each house, since the President could continue to wage war until Congress achieved a two-third majority in both houses. Section 5(c) applies to situations in which the President has initiated hostilities without a declaration of war or other congressional sanction; its concurrent-resolution procedure assures that his intiative has approximately the same legislative support that would be required for engagement in hostilities if the time pressures of an emergency did not prevent seeking approval from Congress before committing troops.[143]

Case law provides some support for the use of concurrent resolutions, although the courts have not explicated the permissible use fully.[144] One early case held that a concurrent resolution not requiring approval by the President was a proper vehicle for a proposed amendment to the Constitution.[145] Professor Corwin, in his discussion of legislative delegation of powers, indicated approval of the use of concurrent resolutions, citing several uses of the device by Congress since adoption of the Constitution.[146] The weight of authority

142. Appendix 1, § 5(c) (emphasis supplied).

143. W. Taylor Reveley III and Raoul Berger provided an excellent discussion of this point at the hearing before the House Foreign Affairs Committee on March 15, 1973. *Hearings on War Powers, supra* note 38, at 256-57. Mr. Reveley pointed out that before the President has committed troops he has not yet exercised his half of the joint responsibility he shares with Congress over the involvement of the country in hostilities, but if he initiates hostilities without congressional concurrence or a declaration of war, the Congress has not yet exercised its responsibility and may properly do so by concurrent resolution. Mr. Berger concurred. *Id.*

144. Objections to the use of concurrent resolutions are based on the contention that these resolutions do not conform to article I, section 7 of the Constitution. *See generally* Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953).

145. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 299 (1798).

146. E. CORWIN, TOTAL WAR AND THE CONSTITUTION 45-47 (1970); E. CORWIN, THE PRESIDENT 168-70, 234-35 (1948).

thus appears to support use of concurrent resolutions to terminate hostilities in circumstances other than invasion and protection of troops during disengagement.

Another objection with constitutional overtones to the war powers legislation as enacted concerns the authority of Congress under section 5(b) to terminate hostilities at the end of 60 or 90 days simply by taking no affirmative legislative action.[147] Few supporters of this method of termination would argue against the desirability of affirmative action being taken to express legislative disapproval of the President's intiative. The Whalen amendment, however, which would have required affirmative action, stated that Congress should respond "by a declaration of war or by the *passage of a resolution appropriate to the purpose* . . . ."[148] The House sponsors objected that the word "appropriate" could be interpreted to require a joint resolution which would be subject to veto by the President.[149] Congressman Zablocki stated that he would support the Whalen amendment if it were altered to "provide that a resolution of approval be a concurrent resolution, and such a resolution was termed appropriate . . . for disapproval."[150]

Congressional silence, moreover, appears an unlikely response to the initiation of hostilities by the President. Particularly now that war powers legislation exists, silence would be a politically unacceptable alternative. Additionally, the likelihood of timely debate and a vote is enhanced by the provisions of sections 6 and 7 of the Resolution assuring priority consideration for any joint or concurrent resolution introduced pursuant to sections 5(b) and (c).

These political and procedural sources of pressure for a timely vote are sufficient to cause concern among those who believe that the Resolution broadens the President's war powers. Arguably, the political pressures would be such that Congress never would take action that could be interpreted as failing to support troops in the field, and the procedural pressures of the Resolution would be such that Congress would be unable to express disapproval by inaction. Nevertheless, there never before has been a statutory procedure requiring Congress to take a policy position immediately or requiring the President to consult with and report to the Congress so fully.

147. *See* note 46 *supra* & accompanying text.
148. 119 Cong. Rec. H6263 (daily ed. July 18, 1973) (emphasis supplied).
149. *See* note 47 *supra* & accompanying text.
150. 119 Cong. Rec. H6267 (daily ed. July 18, 1973).

These procedures, along with those assuring priority consideration of resolutions introduced pursuant to sections 5(b) and (c), should encourage consultation by the President with Congress before he commits armed forces.

The Practical Effect and Operation of the Resolution

On July 21, 1974, after the outbreak of hostilities in Cyprus and the subsequent invasion of the island by Turkey, the United States ambassador requested a military evacuation of American citizens. A naval task force of five vessels was ordered to the scene, and 22 helicopter sorties to the British base at Dhekelia, Cyprus, were dispatched from the U.S.S. *Inchon* on July 22. Nearly 400 Americans and approximately 80 foreign nationals were evacuated.[151] The following day, another 135 Americans and foreign nationals were evacuated from Kyenia, Cyprus, by a joint American-British effort.[152] No report of this action was made to Congress by President Nixon pursuant to section 4 of the War Powers Resolution.

Shortly thereafter, Senator Eagleton stated to the Senate that President Nixon had failed to pass the first major test of the law.[153] The authority of the President to evacuate American nationals from a hostile zone was not questioned, only that the circumstances, authority, scope, and duration of the Cyprus operations had not been reported. Along with copies of previous correspondence with the State Department,[154] Senator Eagleton included in the Congressional Record a letter from him to Speaker of the House Carl Albert and Senator James Eastland, President Pro Tempore of the Senate,

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151. N.Y. Times, July 24, 1974, at 15, col. 4.

152. N.Y. Times, July 25, 1974, at 13, col. 8.

153. 120 Cong. Rec. S13,851-53 (daily ed. July 31, 1974).

154. In addition to the correspondence from Assistant Secretary Wright, *see* note 113 *supra*, Senator Eagleton received a second letter, from Assistant Secretary Linwood Holton, which stated:

> With respect to the 48-hour notification requirement, it is our view that no particular new procedural measures within the Executive Branch are necessary. The notification requirement is well known in all the relevant Government agencies and there would appear to be no particular advantage either to the effective application of the legislation or to the efficiency of the Executive Branch in adopting procedures in addition to those regularly followed in responding to Congressional notification requirements. The particular nature and content of any such notice would of course have to await an actual event covered by the legislation, given the possible variety of actions covered.

120 Cong. Rec. S13,853 (daily ed. July 31, 1974).

asking that the President be advised that he had failed to comply with section 4 of the War Powers Resolution and calling for submission of the required report.[155]

Strict construction of the language of section 4(a)(1) could indicate that the circumstances of the Cyprus evacuation missions did not involve introducing forces "into hostilities or situations where imminent involvement in hostilities is clearly indicated."[156] In retrospect, the swiftness, dispatch, and success of the helicopter sorties would support a judgment that hostilities in fact were neither present nor imminent. Moreover, it is questionable whether sending helicopters on rescue missions to a British base in Cyprus constitutes the dispatch of armed forces "into the territory, airspace or waters of a foreign nation while equipped for combat . . . ." Nevertheless, the penetrating observation of Senator Eagleton should not be ignored: "If this very popular introduction of the Armed Forces goes unreported, can we assume that less popular, more dangerous uses of force will be faithfully reported?"[157]

No more than minimum compliance with the most narrow interpretation of the President's responsibility could have been anticipated. Nixon Administration witnesses had attacked the war powers legislation concept as unconstitutional.[158] President Nixon had vetoed the bill as an improper restriction upon his constitutional authority. Moreover, the response of the State Department to Senator Eagleton's queries hardly had pictured an Administration poised and eager to respond to more than its own interpretation of the letter of the law.[159]

President Ford filed two reports under the Resolution in April 1975. The first, transmitted to Congress on April 4, reported United

155. This letter was addressed to Speaker Albert and Senator Eastland because section 4 requires submission of a written report to the Speaker and President Pro Tempore within 48 hours whenever the President introduces armed forces into hostilities in the absence of a declaration of war. *See* Appendix 1.

156. There is no record of either the Speaker or the President Pro Tempore doing any more than referring the letter to the Foreign Affairs and Foreign Relations Committees. From the lack of further action by Congress, it might be inferred that those to whom the letter was referred concluded that the circumstances of the Cyprus invasion did not warrant submission of a report. *See* 120 Cong. Rec. S13,852 (daily ed. July 31, 1974).

157. 120 Cong. Rec. S13,852 (daily ed. July 31, 1974).

158. *Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59 Before the Senate Committee on Foreign Relations*, 92d Cong., 1st Sess. (1971) (testimony of Secretary of State William Rogers, May 14, 1971).

159. *See* note 154 *supra*.

States participation in an international humanitarian relief effort to transport South Vietnamese refugees from Da Nang, South Vietnam, utilizing American naval vessels and helicopters as well as approximately 700 marines.[160] The second report, transmitted on April 12, informed Congress of an evacuation of 82 Americans, 159 Cambodians, and 35 nationals of other countries from Phnom Phen, Cambodia; involved in the operation were 350 armed marines and 36 helicopters.[161] In addition to the fact that these reports were the first made to Congress pursuant to the Resolution, they were significant because both were made under section 4(a)(2), which does not trigger the 60-day period. If, as some evidence indicates inconclusively, hostile action was encountered at Phnom Phen,[162] a report under section 4(a)(1), which does trigger the subsequent portions of the Resolution, would have been appropriate because of the imminent possibility of involvement in hostilities. The evacuation having been completed, however, further consideration by Congress would have been moot.

One apparent factor in the submission of the two reports by the Ford Administration was the Church-Case amendment to the Continuing Appropriations Resolution for 1974.[163] Complementing six other statutes which contained specific prohibitions,[164] the Church-Case amendment was a general prohibition upon the expenditure of appropriated funds for direct or indirect suport of combat activities in, over, or from the shores of North or South Vietnam, Laos, or Cambodia.

In a major foreign policy address to a joint session of Congress on April 10, 1975, President Ford asked for clarification by Congress of the use of military forces in Southeast Asia and for prompt revision of the laws to permit evacuation of Vietnamese nationals.[165] This

160. *See* Appendix 2.

161. *See* Appendix 3.

162. News reports on April 12 were conflicting. In contrast to Associated Press reports that the last helicopter out was fired upon, Thomas Lippman of the *Washington Post* reported that no shots were fired. Washington Post, Apr. 12, 1975, § A, at 1, col. 1. Radio broadcasts reported that one Cambodian was killed and an American marine was wounded.

163. Pub. L. No. 93-52, § 108 (July 1, 1973).

164. Dep't of Defense Appropriations Act, Pub. L. No. 93-437, § 839 (1974); Dep't of Defense Appropriations Act, Pub. L. No. 93-238, § 741 (1974); Foreign Assistance Act of 1973, Pub. L. No. 93-189, § 30; Dep't of Defense Appropriation Authorization Act, Pub. L. No. 93-155, § 806 (1973); Dep't of State Appropriations Authorization Act of 1973, Pub. L. No. 93-126, § 13; Second Supplemental Appropriations Act, Pub. L. No. 93-50, § 307 (1973).

165. President Ford stated:

> I ask the Congress to clarify immediately its restrictions on the use of U.S.

latter request raises a question concerning the necessity of making the request: if the evacuations of foreign nationals from Da Nang and Phnom Phen were legal, then why was there a need for Congress to permit specifically the projected evacuation of South Vietnamese from Saigon? The President's request may have been due to the probability of hostilities requiring a report under section 4(a)(1) of the War Powers Resolution, as well as to an awareness that any prolonged use of the military for such an evacuation without prior congressional authorization would be a violation of the Church-Case amendment. At the time of President Ford's foreign policy address, no statute specifically authorized the introduction of armed forces into South Vietnam within the meaning of section 8(a)(1) of the War Powers Resolution; seven statutes, however, specifically prohibited the use of funds for military purposes in South Vietnam.[166] Thus it was necessary, as well as prudent, for the President to consult with the Congress immediately.

Swift action resulted from the President's request. Both the Senate and the House passed legislation regarding humanitarian assistance and evacuation, each house making reference to the War Powers Resolution.[167] On April 25, a conference committee report reconciling the two bills as the Vietnam Humanitarian Assistance and Evacuation Act of 1975 was presented to Congress along with a statement by the conference chairman, Senator John Sparkman, also the new Chairman of the Senate Foreign Relations Committee, that the legislation provided an important precedent: it was the first specific congressional authorization under the War Powers Resolution for the use of armed forces in hostilities.[168] The Senate agreed

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military forces in Southeast Asia for the limited purposes of protecting American lives by ensuring their evacuation if this should be necessary, and I also ask prompt revision of the law to cover those Vietnamese to whom we have a very special obligation, and whose lives may be in danger, should the worst come to pass.

121 CONG. REC. H2684 (daily ed. Apr. 10, 1973).

166. *See* notes 163, 164 *supra*.

167. 121 CONG. REC. S6852 (daily ed. Apr. 25, 1975).

168. *Id.* at S6872. The conference report accompanied the Vietnam Humanitarian Assistance and Evacuation Act of 1975, H.R. 6096, 94th Cong., 1st Sess. (1975). Included in the Act were the following provisions: (1) an authorization of $327 million for humanitarian assistance and evacuation with the requirement that within 90 days and every 90 days thereafter, a report on humanitarian assistance under the Act be filed with the Speaker and Senate Foreign Relations Committee; (2) an authorization for the President to use armed forces to assist in withdrawing Americans, their dependents and endangered foreign nationals in a single operation, if feasible; (3) that, if armed forces are employed, a report would be filed

to the conference report[169] and transmitted it to the House where the Rules Committee, on April 28, cleared the conference bill for action on the floor of the House on the following day.

On April 29, however, news began arriving of the final evacuation from Saigon by helicopter of all remaining Americans and some South Vietnamese, the entire operation being almost completed by the time the House convened. Shortly after the conference report was called up for consideration, Speaker Carl Albert called from the White House to ask that the resolution for the bill be withdrawn. Later that day, after the resolution had been withdrawn pursuant to his message,[170] Speaker Albert reported an agreement with the President that consideration would be deferred because disagreement concerning the bill's authorization for the President to use troops in Vietnam might be moot before the day was over.[171] Representative Bella Abzug agreed that the authorization was moot and any enactment of it at that time might authorize reintroduction of troops into Vietnam.[172] Representative Zablocki, however, urged consideration of the bill because its adoption would require detailed reports of the evacuation by the President and the force-authorization portions of the bill could provide a precedent for congressional action under the War Powers Resolution.[173] Representative Thomas Morgan, Chairman of the House Committee on International Relations, later issued a statement supporting consideration of the conference report.[174] Meanwhile, on April 30, President Ford submitted a report to Congress about the evacuation of Saigon, acknowledging that the report was submitted pursuant to section 4

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under section 4 of the War Powers Resolution; (4) that, if the armed forces are used to bring out endangered foreign nationals, a report would be filed under section 4(b) of the War Powers Resolution; (5) that the Act is stated to be specific statutory authority under section 8(a) of the War Powers Resolution, but not for the purposes of sections 5(b) and (c) of the War Powers Resolution; (6) that statutory prohibitions against use of funds for combat activities in Vietnam are waived; (7) that daily reports on the withdrawal be filed with Congress; (8) that the President use diplomatic means to obtain an accounting of Americans missing in action and the remains of known American dead, and report on the actions being taken within 30 days after aid is made available; (9) that no funds under the Act be used, directly or indirectly, by the Democratic Republic of Vietnam or the Provisional Revolutionary Government. *See* S. Rep. No. 94-97, 94th Cong., 1st Sess. (1975).

169. 121 Cong. Rec. S6878 (daily ed. Apr. 25, 1975).

170. 121 Cong. Rec. H3401 (daily ed. Apr. 29, 1975).

171. *Id.* at H3406.

172. *Id.*

173. *Id.*

174. Statement of Representative Morgan, Apr. 29, 1975.

of the War Powers Resolution, but not specifying which subsection of section 4 required the report.[175]

Following the unconditional surrender of the South Vietnamese government, assorted opponents of the conference committee's bill combined on May 1 to reject the committee's report and bill.[176] Liberals opposed the conference report because they feared it would authorize reintervention in Vietnam;[177] conservatives opposed it because they feared a large influx of refugees into the United States and the possibility that humanitarian aid funds authorized by the bill would end up in the hands of the Provisional Revolutionary Government.[178] A variety of Congressmen could have voted against the report on the basis that much of the controversy over its provisions was moot.

According to testimony given before the House Committee on International Relations on May 7 after the various Vietnam operations, the present view of the Department of State is that the requirement for prior consultation contained in section 3 of the War Powers Resolution does not apply to all of the situations in which an after-the-fact report is required by section 4(a), with the result that the President is not required to enter into prior consultations with Congress except when armed forces are to be introduced into present or clearly imminent hostilities.[179] The Department's witness

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175. *See* Appendix 4.

176. 121 CONG. REC. H3540-51 (daily ed. May 1, 1975).

In a later commentary on the House decision, Senator Eagleton wrote the following:

> But Congress fumbled the ball. When the President was forced by events to order the evacuation from South Vietnam on April 20, the House of Representatives had not yet completed the final stage in enacting the necessary legislation. Two days later, when the House finally had the opportunity to express Congressional will and intent, the House voted overwhelmingly not to act.
>
> This unfortunate decision raises grave questions about the willingness of Congress to fulfill its constitutional responsibilities. The President obviously had no authority to use the United States forces to rescue foreign nationals in Vietnam. Yet our forces evacuated thousands of Vietnamese. Asked to explain, President Ford tried to justify his action on 'moral' rather than legal grounds. Yet Congress let the precedent stand. Future Presidents might now conclude that the Commander in Chief had an inherent right to do what Mr. Ford did.

Eagleton, *Congress's "Inaction" On War*, N.Y. Times, May 6, 1975, at 39, col 2.

177. For example, Majority Leader Thomas O'Neill stated that the provision authorizing use of troops in South Vietnam had become moot and that to pass the bill would set "a bad precedent for the future." 33 CONG. Q. WEEKLY 907 (May 3, 1975).

178. For example, Congressman Bauman stated that he would oppose sending any money into Communist-controlled areas. *Id.*

179. *See* Statement of Monroe Leigh, Legal Adviser of the Department of State, to the

stated that although the President in fact directed some prior consultation for each of the three emergencies about which he subsequently reported to Congress, prior consultations technically were not required by the Resolution.[180] Acceptance of this construction, which is supportable by a reading of the Resolution, would thwart one of the Resolution's principal purposes, prior consultation with Congress on use-of-force decisions generally.

Prior to the series of reports filed by the Ford Administration beginning in April 1975, the most serious threat to the War Powers Resolution was that it would be ignored. This disregard, exemplified by the Cyprus operations, appeared to be a greater challenge to the Resolution than the various constitutional objections. The latter might be debated periodically in the classroom and Congress, but they seemed unlikely to be resolved by judicial opinion. Realists would agree with Senator Javits' observation in his final argument after the override of President Nixon's veto:

> I doubt very much that any court would have decided [the constitutionality of the Resolution] before or would decide it now. It is almost a classic example of what the courts have considered a "political question." That was the reason we had to settle it through legislation, including a veto override. No one is being arrogant about this. We are talking about war. This involves human lives in the millions.[181]

Because the viability of the Resolution will continue to depend upon the response of the President to future circumstances and events, a promising sign for the Resolution was the handling of the seizure on May 12, 1975, of an American ship, the *Mayaguez*, off the coast of Cambodia by forces of that nation's new regime. President Ford promptly consulted[182] with Congress, and on May 14 the Senate Foreign Relations Committee issued the following statement: "We support the President in the exercise of his Constitutional powers within the framework of the War Powers Resolution to secure the

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Subcommittee on International Security and Scientific Affairs, House Committee on International Relations, May 7, 1975.

180. Congressman Zablocki does not share this view, believing that prior consultation had not taken place before either the Da Nang or Phnom Phen evacuations. Private communication to author.

181. 119 CONG. REC. S20,116 (daily ed. Nov. 7, 1973).

182. All did not agree that consultation took place. Senator Henry Jackson stated that President Ford had not consulted with Congress, but had advised them. Virginian Pilot, May 19, 1975, § A, at 2.

release of the ship and its men."[183] On the next day President Ford reported to Congress[184] "[i]n accordance with my desire that the Congress be informed on this matter and taking note of Section 4(a)(1) of the War Powers Resolution . . . ."[185]

These actions concerning the rescue of the *Mayaguez* do not establish conclusively the efficacy of the Resolution. Along with the reports filed after the evacuations in Southeast Asia and the provisions of the unenacted Vietnam Humanitarian Assistance and Evacuation Act of 1975,[186] they evidence the Resolution's utility, inducing consultation about and shared responsibility for commitment of the armed forces.[187] Nevertheless, Presidents thus far have given only restrained compliance, and experience during 1975 has confirmed that emergency situations may require swift action by the President when war powers considerations are overtaken and rendered moot by the press of events. It now would be appropriate for Congress to review the Resolution, particularly the consultation and reporting sections, with a view toward the recent history of the four reports submitted concerning the evacuations at Da Nang, Phnom Phen, and Saigon, and the *Mayaguez* incident. Improved procedures both within Congress and the executive branch for implementation of the Resolution are needed.[188]

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183. N.Y. Times, May 15, 1975, at 18, col. 7.

184. *See* Appendix 5.

185. *Id.* This language probably satisfied those in Congress, particularly the Members of the House Committee on International Relations who had questioned Monroe Leigh, Legal Adviser, Department of State, asking why the report on the Saigon evacuation had not specifically been made under section 4(a)(1). Hearings before the House Comm. on International Relations, May 7, 1975.

186. *See* note 168 *supra* & accompanying text.

187. However, Senator John Sparkman, Chairman of the Senate Foreign Relations Committee, stated that some Members of his committee felt the consultation was not adequate. Majority Leader Mike Mansfield voiced concern that Congressional leaders were merely notified of decisions already reached by President Ford rather than consulted while options were still open. Washington Star, May 16, 1975, § A, at 5.

188. The initial comments of some of the principals in the history of war powers legislation show that familiar problems and themes remain. Two of the orginal architects, Senators Javits and Eagleton, advocate changes in section 2(c) and in the consultation and reporting process to empower the President to evacuate and rescue American nationals in emergency situations prior to congressional concurrence. Within days after the *Mayaguez* incident, Senator Eagleton addressed the Senate:

> [The reason Congress did not clarify the assignment of war powers], according to a brief prepared by House conferees considering war powers legislation was that the "necessary and proper" clause did not give "Congress the right to define the powers of the President." I believe that the acceptance of such a statement is equivalent to a declaration of congressional impotence.

> Nonetheless, my concern over the war powers resolution was grounded on practical as well as constitutional considerations. The procedure established by the resolution did not involve Congress in the decisionmaking process until after forces were committed to battle. I was concerned that such a procedure would tie Congress hands and contribute to rather than inhibit the derogation of war-making responsibilities that had characterized the congressional performance in recent years.
>
> It is not my purpose today to rehash the debate on this issue or to assert that recent experience has proven my case. I am here because I sense a very positive desire on the part of those who supported the war powers resolution to involve Congress in the decisionmaking process at the outset, even before the provisions of the statute come into play. I am encouraged, for example, that such leading advocates of the war powers resolution as Senator Javits, and Representatives Zablocki, Morgan, and Fraser, fought to inject the concept of congressional authorization into the Vietnam evacuation. Congress eventual failure to act on this matter cannot, therefore, be ascribed to any of those who worked so long and hard on the war powers resolution.
>
> The amendments I offer today do not go to my central criticism of that resolution. I recognize that reversing the House on such a fundamental matter as the issue of prior authority would be next to impossible. And I will add, on the positive side, that as long as there is a growing awareness of Congress constitutional responsibility to initiate war and a growing resolve to invoke that power, there is, concomitantly, a diminishing requirement for a statutory approach to the problem.

121 CONG. REC. S8825 (daily ed. May 21, 1975). The amendments referred to would accomplish the following: recognize in section 2(c) the "traditionally exercised" right of the President to rescue American nationals under certain prescribed circumstances, substitute "seek the advice and counsel of Congress" for "consult with Congress" in section 3 (*cf.* note 41 *supra*); and circumscribe the President's use of civilian combatants in the same manner as the use of uniformed armed forces. *Id.* at S8825-26. The last of these provisions is a revival of Senator Eagleton's "CIA amendment." *See* notes 56-58 *supra* & accompanying text.

Senator Javits also has seen a need for review of procedures under the Resolution, stating in early June 1975:

> Within the past eight weeks, the War Powers Resolution . . . has been tested under fire three times in rapid succession. I believe that this unique legislation has stood-up well in its initial tests; and that this is an opportune time to examine with some care just what the initial tests reveal about the War Powers Resolution.
>
> First, I think it is important to note that [the War Powers Resolution] has been accepted by the Executive Branch as the central legislation defining the legal parameters of Presidential initiative in the introduction of the Armed Forces into hostilities, as well as the correlation of such actions with the powers and responsibilities of the Congress. President Ford's compliance with the law is in welcome contrast to his predecessor's unsuccessful effort to veto it.
>
> Second, our initial experiences show that improved procedures are required, both within the Executive Branch and the Congress, to assure smooth and effective implementation of this legislation.
>
> Third, it seems clear that while the Executive Branch has accepted the requirement of compliance with the War Powers Resolution, the Congress must be vigilant, alert and active to assure that the spirit as well as the letter of the law is observed. If Congress sits back passively and merely awaits Executive fulfillment of the reporting requirements of the law, the key policy decisions will continue to be monopolized by the Executive Branch, as they were in the

Assessment of the early tests of the Resolution is complicated by the presence of several other factors. It may be impossible to determine with certainty whether President Ford would have turned to Congress for the evacuation operations if other legislation had not

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decades leading up to enactment of the War Powers Resolution.

Fourth, the initial test runs have shown that the consultation provisions of the law is the pressure point most vulnerable to circumvention and manipulation.

Testimony of Senator Javits Before the International Security and Scientific Affairs Subcomm. of the House International Relations Comm., June 4, 1975.

Senator Goldwater has remained firm in his opposition to the Resolution, stating to the Senate:

> There is another question raised by these laws that did not occur during the evacuations, but very well could have. The answer to this question may be crucial to the safety of the United States and its citizens at some time in the future. This question is raised by the belief of the sponsors of the war powers resolution that Congress can put a halt to an emergency rescue operation at any time even though it involves the protection of U.S. Citizens.
>
> For example, on April 23, I engaged in a colloquy over the pending evacuation authority with the senior Senator from New York (Mr. Javits). While admitting that the President "has an unchallenged right, under the Constitution, to use the Armed Forces of the United States to rescue Americans from a war zone," the Senator from New York declared that—
>
> Those forces, when so used, remain accountable to the Country through both he and the Congress, so that we may have some control over what happens with respect to their use, and so that *the whole thing may be called off* if it goes beyond what we think is a fair measure of use for their purpose. (Emphasis added.)
>
> If what my friend from New York says is true, then it means that Congress can tell the President 1 day, or 1 hour, after he initiates a humanitarian rescue mission to protect American citizens that he must call the whole thing off. If Congress fears the operation could involve some risk which outweighs the safety of the number of Americans immediately involved, it can direct the President to abandon those Americans.
>
> This contingency, which I truly hope will never happen, could occur under section 5(c) of the war powers resolution which provides that American forces engaged in hostilities outside the United States without a declaration of war or specific statutory authorization "shall be removed by the President if the Congress so directs by concurrent resolution."
>
> Mr. President, congressional measures of this type could cripple not only the President, but through him, the United States at some time of great need for immediate and decisive action. The very fact that one might argue that the President now stands in violation of the law points up the dangerous position in which we have placed our country, our citizens, and our President.
>
> . . . .
>
> Mr. President, I intend to continue discussing the war powers resolution and similar laws from time to time in the continuing hope that we might get it before the American people for consideration of a proper solution through a constitutional amendment.

121 CONG. REC. S7717 (daily ed. May 8, 1975).

prohibited specifically the use of funds for combat activities by United States forces in South Vietnam. Likewise, it is difficult to gauge the effect of the fear of an influx of refugees upon the defeat of Congress' first attempt to authorize action by the President under the War Powers Resolution; the inclusion of humanitarian-aid provisions in that legislation also complicates assessment.

It is clear that the hoped-for balancing of legislative and executive war powers will depend upon prompt consultation and full reporting by the President and upon the efforts made by Congress to obtain compliance. These conditions will be met if Presidents and the Congress remember the overriding message of the war powers proposals that the constitutional powers of war and peace are shared powers and that the responsibility to the people for war or peace is a shared responsibility. If these postulates of the War Powers Resolution are observed, then the provisions of the Resolution for prior consultation and timely reports are adequate to allow and encourage Congress to adopt an early, considered policy position concerning the wisdom and necessity of troop commitments initiated by the President.

Conclusion

As an attempt to bring about shared responsibility for decisions of war and peace and to enable the President and Congress each to fulfill their constitutional responsibilities, the War Powers Resolution contains much language that can be interpreted as not mandatory. A product of compromise, reflecting in part the debris of a legislative battlefield, it depends for its efficacy upon the good faith and judgment of Presidents and the will of Congress. The ambiguities arising from the Resolution's legislative history, wording, and constitutional premises are resolvable in the context of accommodation, particularly where the public debate over issues as crucial as war powers encourages accommodation. Whether the reliance upon such accommodation will destroy the efficacy of the War Powers Resolution cannot yet be determined. The limited use of its procedures thus far, and the results of that use, must be characterized as inconclusive. The test of experience ultimately will determine whether the enactment of the Resolution constituted congressional surrender or an historic accomplishment.

[Excerpt from International Law and Politics (Vol. 8:457, 1976) War Powers Resolution]

THE RECAPTURE OF THE S.S. MAYAGUEZ: FAILURE OF THE CONSULTATION CLAUSE OF THE WAR POWERS RESOLUTION

While traversing a trade route on the morning of May 12, 1975,[1] the *S.S. Mayaguez*, a merchant vessel of United States registry manned by 39 United States citizens, was forcibly seized by a Cambodian gunboat at a location six and one half miles southeast of the Cambodian island of Poulo Wai and 60 miles from the Cambodian mainland.[2] When informed of these events about six hours later, President Ford called the seizure an act of piracy.[3] Secretary of State Kissinger subsequently initiated diplomatic efforts to secure freedom for the ship and crew.[4] As a precaution against the transfer of the *Mayaguez* or its crew to a Cambodian port, at 10:30 A.M. on May 13 the President commanded United States forces to interdict any foreign vessel approaching or leaving the Cambodian island of Koh Teng near which the *Mayaguez* was then anchored.[5] Shortly thereafter, seven Cambodian patrol boats were destroyed or immobilized by U.S. war planes striking pursuant to the President's order.[6]

Continuing diplomatic efforts failed to resolve the crisis, and at 4:45 P.M. on May 14 President Ford ordered assaults against Cambodian targets by United States air, land and naval forces in order to secure the release of the *Mayaguez* and its crew.[7] At 7:00 P.M. that same day, radio broadcasts emanating

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1. Unless otherwise specified, all times and dates mentioned in this Note are based on Eastern Standard Time as provided by a chronology of events in the *Mayaguez* affair compiled by the Congressional Research Service and reprinted in War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the *Mayaguez* Incident, Hearing Before the Subcomm. on International Security and Scientific Affairs of the Comm. on International Relations, 94th Cong., 1st Sess., at 105 (1975) [hereinafter "House Hearings"].

2. House Hearings, supra note 1, at 105.

3. Briefing on the *Mayaguez* Seizure, Hearings Before a Subcomm. of the Comm. on Appropriations, 94th Cong., 1st Sess., at 605 (1975) [hereinafter "*Mayaguez* Briefing"].

4. House Hearings, supra note 1, at 106.

5. Id. at 106.

6. Id.

7. Id. at 107.

from Phnom Penh, Cambodia and monitored in Bangkok, Thailand announced that the *Mayaguez* would shortly be set free.[8] The relay of this message to the White House took over one hour, by which time the attacks ordered by the President had already commenced.[9] At 7:20 P.M. about 135 Marines launched a helicopter assault against heavily defended Koh Teng Island in hope of rescuing members of the *Mayaguez* crew, who were believed to be held captive there.[10] At 9:00 P.M. another contingent of Marines boarded and recaptured the *Mayaguez* without opposition,[11] and two hours later carrier-based aircraft attacked military targets on the Cambodian mainland.[12] Meanwhile, the entire *Mayaguez* crew had been released unharmed by their captors at 9:20 P.M. and by 11:20 P.M. was safely aboard a U.S. warship.[13] Losses to American forces involved in the rescue mission numbered 15 dead, 50 wounded and three missing in action;[14] the Cambodians are estimated to have suffered at least 20 to 30 casualties.[15]

When President Ford first considered using military force during the *Mayaguez* crisis the War Powers Resolution[16] became applicable. In essence, the Resolution defines procedures by which the President and Congress are to exercise their overlapping authority to commit United States forces to combat.[17] Be-

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8. Id.
9. Id.
10. Id. Officials are unclear as to the exact size of the Marine strike force.
11. Id.
12. Id.
13. Id. at 106-07.
14. *Mayaguez* Briefing, supra note 3, at 611. Another 23 American troops died in a helicopter crash while being ferried into position for possible use during the *Mayaguez* rescue mission. N.Y. Times, May 22, 1975, at 1, cols. 2-3.
15. *Mayaguez* Briefing, supra note 3, at 617.
16. 50 U.S.C. §§ 1541-48 (1976).
17. The war powers which are specifically reserved to Congress are found at U.S. CONST. art. I, § 8:

> 1. The Congress shall have power . . .
>
> . . .
>
> 11. To declare war, grant letters of marque and reprisal, and make rules concerning captives on land and water;
>
> 12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than 2 years;
>
> 13. To provide and maintain a Navy;
>
> 14. To make rules for the government and regulation of land and naval forces;

tween the time of its enactment in 1973 and the *Mayaguez* episode, the Resolution had been invoked only three times.[18] On each of those occasions, in compliance with Section 4[19] of the Resolution, the President submitted written reports to Congress concerning evacuation missions conducted by U.S. military forces.[20] The

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15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

16. To provide for organizing, arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States;

. . .

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

The war powers that are expressly reserved to the President are found at U.S. CONST. art. II, § 2:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States . . . .

18. See note 20 infra.

19. The pertinent part of § 4 reads as follows:

Sec. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) 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; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(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.

20. President Ford sent reports to Congress on April 4, April 12 and April 30, 1975, concerning the evacuations of Danang, South Vietnam; Phnom Penh, Cambodia; and Saigon, South Vietnam respectively. A fourth report was submitted on May 15 concerning the *Mayaguez* incident. Although little public attention was focused on these reports, Section 4 serves two important functions. Its obvious goal is to provide Congress with all the information it needs to make informed decisions regarding the use of its war powers. 119 Cong. Rec. 33037

Mayaguez affair, however, provided the first test of the Resolution's now controversial consultation clause, Section 3,[21] which requires the President to consult with Congress before ordering United States forces into hostilities or into situations where hostilities are likely.[22] This initial application of Section 3 raised many doubts concerning when consultation must occur, who must be involved, what type of exchange suffices as a "consultation" and, not least, the likelihood that this clause can be enforced.[23]

This Note will analyze Section 3 of the War Powers Resolution and its application to the *Mayaguez* affair. Part One explores the considerations which compelled Congress to enact the Resolution. Part Two examines the procedural guidelines of the consultation clause, the extent of presidential compliance with them during the *Mayaguez* incident, and modifications which are needed to clarify vague statutory language. Part Three suggests means of ensuring that future Presidents comply with Section 3 of the Resolution.

(1973). However, Section 4 is also a valuable means of requiring the executive branch to delineate carefully before the fact the legal basis for its actions. See Ehrlich, The Legal Process in Foreign Affairs: Military Intervention—A Testing Case, 27 Stan. L. Rev. 637, 648 (1975). For instance, had Section 4 been in existence in 1962, President Kennedy would have been hard pressed to justify legally sending 18,000 combat ready troops to South Vietnam, and perhaps the tragic U.S. involvement there would have been avoided. House Hearings, supra note 1, at 15.

Senator Javits has argued that the four reports submitted by President Ford to Congress pursuant to Section 4 have been improperly labelled, incorrectly delivered, and almost worthless from an information point of view. Id. at 69. All four reports can be found in The War Powers Resolution: Relevant Documents, Correspondence, Reports, Subcomm. on International Security and Scientific Affairs of the Comm. on International Relations, 94th Cong., 2d Sess. (1976) at 40-46.

21. Section 3 reads as follows:

> 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.

22. Id.

23. See text accompanying notes 39-119, infra.

I. The Historical Background of the War Powers Resolution

An appreciation of the purpose of the War Powers Resolution as a whole is vital to an understanding of the consultation clause. The immediate stimulus for legislation to delimit presidential war powers was the widespread dissatisfaction with President Nixon's failure to consult with Congress before ordering U.S. forces to invade Cambodia in May of 1970.[24] However, the Cambodian incursion was not the only impetus to congressional action. Throughout U.S. history, Presidents have on approximately 200 occasions used force or the threat of force in the conduct of foreign affairs without any specific congressional authorization.[25] Major examples in recent years have included America's three year participation in the Korean conflict beginning in 1950, the quarantine of Cuba during the missile crisis of October, 1962 and the sending of 21,500 troops to the Dominican Republic following the outbreak of revolt in 1965. The source of presidential authority to take such actions is questionable, however, because although the President is commander in chief of the armed forces,[26] the power to declare war is specifically given to Congress.[27]

During their constitutional debates the Founding Fathers expressed the intent that the President could independently authorize combat only when necessary "to repel sudden attacks" against U.S. territory.[28] This power has been recognized by the Supreme Court;[29] the President's authority to act unilaterally with force to protect American lives and property abroad from direct attack has also been upheld.[30] Nowhere in the Constitution

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24. H.R. Rep. No. 287, reprinted in 2 U.S. Cong. and Admin. News 2346, 2348, 93d Cong., 1st Sess. (1973) [hereinafter "House Report"].

25. Emerson, The War Powers Resolution Tested: The President's Independent Defense Power, 51 Notre Dame Law. 187, 198 (1975). See the chronological list in Emerson, War Powers Legislation, 74 W. Va. L. Rev. 53, 88-110, 367-68 (1972). But see Schlesinger, Jr., The Imperial Presidency 61-62 (1973), wherein a substantial number of the incidents noted by Emerson are characterized as too trivial for congressional concern.

26. See note 17 supra.

27. Id.

28. See 2 Farrands, Records of the Federal Convention of 1787, at 317-18 (rev. ed. 1937) and Berger, War-Making and the President, 121 U. Pa. L. Rev. 29, 36-54 (1972).

29. See The Prize Cases, 67 U.S. 635 (1863).

30. Durand v. Hollins, 8 F. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860) upheld

or in case law is the President granted authority to employ armed force whenever he alone deems such action to be essential to the national security.

Nonetheless, President Johnson claimed just such a right,[31] and the State Department issued a memorandum in 1966 explaining this view.[32] It reads in part:

> In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States. In the 20th century the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation's security. . . .
>
> The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed conflict are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress.[33]

The 1966 State Department interpretation of the President's independent war making authority is without any constitutional

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the right of the President to independently authorize the use of U.S. naval forces to protect American lives and property abroad. Id. at 112.

Professor Raoul Berger notes that there is a dearth of subsequent case law to supplement the commonly cited decision in Durand v. Hollins, and he argues that the Founding Fathers intended to limit independent presidential war making powers to repelling sudden attacks against the United States. Although Congress may delegate to the President authority to repel imminent threats or to protect citizens and property abroad, he says, the Constitution does not directly grant this power to the President. Berger, supra note 28, at 36-54.

Other commentators, such as J. Terry Emerson, counsel to United States Senator Barry M. Goldwater, have espoused a very broad interpretation of independent presidential war making powers. Emerson points to history and argues that repeated past usage of broad presidential authority without objection from Congress gives constitutional validity to continued similar usage. Emerson, supra note 25, at 195-201. But see Powell v. McCormack, 395 U.S. 486 (1969), wherein Chief Justice Warren states, "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date." Id. at 546-47.

31. President Johnson believed he had the right to intervene militarily in Vietnam without congressional authorization, and that the Gulf of Tonkin Resolution, H.R.J. Res. 1145, 88th Cong., 2d Sess., 78 Stat. 384 (1964), which many people regarded as the legal basis for Johnson's actions, was not a constitutional prerequisite. Berger, supra note 28, at 67.

32. Office of the Legal Advisor, U.S. Dept. of State, The Legality of United States Participation in the Defense of Vietnam, reprinted in 75 Yale L.J. 1085, 1101 (1966).

33. Id.

basis. The text of the Constitution makes no reference to such broad presidential powers. In contrast, the Founding Fathers expressed the intent that the President was never to commence war independently except to repel a sudden attack.[34] The relative shrinking of the world is no justification for a corresponding expansion of the President's constitutional powers. One can only conclude that recent attempts at such an expansion are warranted neither in the constitutional text nor in the understanding of the Framers.[35] Accordingly, when President Nixon initiated U.S. armed aggression against Cambodia in 1970 without seeking congressional authorization or input into the decision making process, the Congress was finally spurred to consider legislation "to fulfill the intent of the framers of the Constitution of the United States."[36] Following three years of often bitter debate and strong presidential opposition, including a veto,[37] the War Powers Resolution was enacted into law on November 7, 1973.[38]

II. The Consultation Clause and its Application to the Mayaguez Incident

The consultation clause, Section 3 of the War Powers Resolution, provides that

> 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.[39]

This seemingly simple command is the source of much controversy. Senator Jacob Javits, author and Senate sponsor of the

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34. See Farrands, supra note 28, at 318.

35. See Berger, supra note 28, at 54.

36. War Powers Resolution, 50 U.S.C. 1541(a) (1976).

37. H.R. Doc. No. 171, 93d Cong., 1st Sess. (1973).

38. For an excellent account of the three year legislative process traversed by proponents of the Resolution, see Spong, The War Powers Resolution Revisited: Historical Accomplishment or Surrender? 16 Wm. & Mary L. Rev. 823, 841 (1975).

39. 50 U.S.C. 1542 (1976).

Resolution, characterized this provision of the law as "the pressure point most vulnerable to circumvention and manipulation,"[40] while Congressman Paul Findley of the House International Relations Committee portrayed it as "the least precise and therefore least effective" section of the Resolution.[41]

At the root of these criticisms is Congress's failure to devote sufficient attention to the language of Section 3 when it was originally drafted.[42] In fact, the consultation clause was never the subject of debate on the floor of either chamber of Congress.[43] Because the consultation clause met no challenge in Congress,[44] the vagueness of its language was not brought to light prior to its passage. Accordingly, it should come as no surprise that parts of Section 3 are currently subject to a variety of interpretations.

A. *When Prior Consultation is Required*

The clause initially states that "The President in every possible instance shall consult with Congress. . . ." The House Foreign Affairs Committee (now called the House International Relations Committee), emphasizing that the word "every" applies even to dire emergencies, acknowledged that when confronted with situations which require immediate military action—such as an already launched missile attack or invasion of U.S. territory —the President must act at once and prior consultation with Congress is not possible.[45] Most controversies concerning the requirement of prior consultation, however, will arise not in such unambiguous situations, but when the country faces an emergency

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40. House Hearings, supra note 1, at 44.

41. Id. at 57.

42. The bulk of congressional debate centered on the constitutionality of Section 5, which details the means by which Congress may terminate any United States involvement in hostilities. See, e.g., 119 Cong. Rec. 33858-74 (1973). Controversy still surrounds the constitutionality of Section 5. See, e.g., House Hearings, supra note 1, at 91; Emerson, supra note 25, at 215-16; Rostow, Great Cases Make Bad Law: The War Powers Act, 50 Tex. L. Rev. 833 (1972).

43. House Hearings, supra note 1, at 44. Moreover, when submitted to the Conference Committee, the Senate version of the War Powers Bill did not even contain a consultation clause. See S. 440, 93d Cong., 1st Sess. (1973).

44. Even President Nixon, who emphatically opposed passage of the Resolution as a whole, embraced the consultation clause as valuable legislation. H.R. Doc. No. 171, 93d Cong., 1st Sess. (1973).

45. House Report, supra note 24, at 2350-51.

to which an immediate response can be reasonably justified but is not essential. Such would have been the case had President Ford, upon learning of the *Mayaguez* seizure, desired to launch an immediate rescue mission without consulting Congress based on his belief that every minute of delay would increase the danger faced by the rescue party and decrease the likelihood of their success.

One method of resolving such a problem of interpretation would be to establish precise guidelines defining the phrase "in every possible instance." The drawback of such an approach is that such guidelines would likely prove both impractical and too inflexible to deal with the wide range of situations in which the President might be required to act. In the words of Alexander Hamilton, "The circumstances that endanger the safety of nations are infinite."[46] Thus, to avoid undue restrictions, the President must exercise a certain amount of discretion in determining which dangers require such a rapid response that prior consultation is not possible. The President, however, should respect Congress' mandate that it be consulted if at all possible. The present language of Section 3 suffices to convey this meaning.

Accordingly, President Ford would have been justified in ordering the use of armed force as soon as he learned of the seizure of the *Mayaguez* if he had believed that such action was necessary to protect U.S. interests. In fact, though, the President responded not immediately, but in a very deliberate fashion. Nearly 27 hours had passed from the time that he first learned of the seizure when President Ford placed United States forces into potentially hostile circumstances by ordering them to prevent the movement of foreign vessels located in the vicinity of the *Mayaguez*.[47] The President waited an additional 30 hours before commanding the actual rescue operations to commence.[48] Such time spans are hardly indicative of the type of emergency which requires immediate reaction and renders prior consultation impossible. Rather, such periods provide ample opportunity for the President to consult with Congress before acting. It seems clear, therefore, that President Ford's failure to consult with Congress before issuance of both of the above orders violated Section 3 of the War Powers Resolution.

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46. The Federalist Papers, No. 23.
47. House Hearings, supra note 1, at 106.
48. Id. at 107.

B. *The Parties to Be Involved in Consultation*

A major shortcoming of Section 3 is its failure to specify which members of Congress the President is required to consult. The phrase "consult with Congress" surely does not mandate a joint address to Congress, if for no other reason than that a speech does not qualify as a consultation.[49] Neither, for obvious reasons of practicality, must the President individually confer with each of the 535 members of Congress. The question of what level of discourse suffices to constitute "consultation" thus goes to the heart of the section's effectiveness.

The House version of the War Powers Bill provided that consultation should involve "the leadership and appropriate committees of the Congress."[50] Without stating why, the Conference Committee rejected this attempt at specificity in favor of the vague language which ultimately became law.[51] Perhaps the Conference Committee intended to grant the President great flexibility in determining who in Congress should be consulted. Perhaps the Committee members could not agree upon specific members of Congress who should be designated for consultation, and simply ignored the issue for the sake of compromise. Nevertheless, President Ford clearly relied upon the original House language in choosing those legislators who were to be consulted regarding the *Mayaguez* crisis.[52] In the absence of more precise guidelines, no fault can be found with these selections.

However, Congress could best promote meaningful consultation by revising Section 3 to identify clearly those members of Congress who must be consulted, lest some future President confer only with partisans or, worse, completely dispense with consultation due to the vagueness of the current law. One acceptable approach to revising the statute would be to designate

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49. See text accompanying notes 60-89, infra.

50. See H.J. Res. 542, 93d Cong., 1st Sess., at § 3 (1973).

51. Conference Report 93-547, reprinted in 2 U.S. Cong. & Admin. News 2363, 2364, 93d Cong., 1st Sess. (1973).

52. During the *Mayaguez* incident the following members of Congress were contacted by the White House: the Speaker of the House and the President pro tempore of the Senate; the bi-partisan leaders of the House and Senate; the Chairman and ranking Republican members of the House and Senate Armed Services Committees; the Chairman and ranking Republicans of the House and Senate Appropriations Committees; and the Chairman and ranking Republican members of the Senate Foreign Relations Committee and House International Relations Committee. 11 Weekly Compilation of Presidential Documents 511 (1975).

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specific congressional leaders from each political party who would represent Congress in consultations with the President.[53] Alternatively, Senator Javits, believing that Congress can play a meaningful role in the decision making process only if its foreign affairs experts are involved, has suggested that consultation should include the Senate Foreign Relations Committee and the House Foreign Affairs Committee.[54] He has argued that the input generated by the committee staffs will enable Congress, independent of the executive bureaucracy, to obtain a professional analysis of the situation under discussion.[55] The Javits proposal, however, is most appropriate in non-emergency or potentially long-term uses of U.S. forces. Congressional committee deliberations would generally prove too time consuming to meet the exigencies of *Mayaguez*-type incidents. In cases of ongoing hostilities, however, such as the United States engagement in Indochina, active Congressional staff involvement would not only be feasible, it would clearly comport with Section 3's mandate of consultation. A sensible compromise would have Congress amend the Resolution to give the President the option of choosing whichever of the approaches discussed above he believes to be more appropriate in the existing circumstances.

The issue of the proper parties to the consultation is not limited to the Congressional participants. The House Foreign Affairs Committee reported that "for consultation to be meaningful, the President himself must participate."[56] This statement clearly establishes that the drafters of the Resolution believed that whenever possible the President himself must be directly involved in all required consultations. This intention was disregarded throughout the period of the *Mayaguez* emergency. There is no record of President Ford having personally consulted with any member of Congress prior to a White House meeting

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53. A bill to effect just such an amendment upon the Resolution was submitted to Congress by Rep. Seiberling in 1975 following the *Mayaguez* incident. See H.R. 7594, 94th Cong., 1st Sess. (1975). No action was taken on this proposed legislation.

54. House Hearings, supra note 1, at 68.

55. Id.

56. House Report, supra note 24, at 2351. Senator Javits has indicated that, under his proposal, consultation would involve those committees of Congress with original jurisdiction of war powers legislation, but would not require the President himself to testify before formal meetings of the committees. House Hearings, supra note 1, at 62.

which was held two hours after he had already ordered the final attacks to begin.[57]

Time was not a factor in the President's failure to meet with members of Congress.[58] During the course of the *Mayaguez* incident President Ford conferred with the National Security Council on four separate occasions.[59] A similar face to face meeting with a congressional delegation should have been arranged. To ensure that future congressional consultations are meaningful, Section 3 should be amended to require direct presidential involvement whenever time permits.

C. *What Constitutes Proper Consultation*

Once it has been determined when the President must consult with Congress and which parties are to be involved, the ultimate question to be answered is what constitutes proper consultation. The House Foreign Affairs Committee devoted considerable attention to the definition of "consultation" as used in Section 3 and explicitly rejected the notion that to consult means merely to inform.[60] The Committee reported that

> 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 . . . .[61]

If consultation means more than to inform, however, there appears to have been no prior consultation throughout the *Mayaguez* affair. The White House reported that President Ford had consulted congressional leaders before ordering the sinking of Cambodian patrol boats on May 13 and the *Mayaguez* rescue

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57. This meeting, with 17 congressmen, did not begin until 6:40 P.M. on May 14, 1975. The orders for military operations to commence had already been issued at 4:45 P.M. of that day. The attack actually began at 7:20 P.M. House Hearings, supra note 1, at 107. Section 3 requires that, if possible, there must be consultation "before introducing United States Armed Forces into hostilities." The House Foreign Affairs Committee determined that, for the purposes of this section, the introduction of forces "convenes when the President makes the final decision to act and issues orders putting that decision into effect." House Report, supra note 24, at 2351. Hence, it is not possible to consider the 6:40 P.M. meeting with congressional leaders as a prior consultation.

58. See text accompanying notes 45-48, supra.

59. House Hearings, supra note 1, at 105-07.

60. House Report, supra note 24, at 2351.

61. Id.

mission on May 14.[62] Such consultation, however, consisted of White House aides merely notifying leaders of Congress of the May 13 decision seven hours after orders to implement that decision had already been issued.[63] The inadequacy of the May 14 "consultation" is equally apparent. The 17 members of Congress who ostensibly had been consulted were merely telephoned by three members of the President's congressional liaison staff.[64] The last of these telephone calls was not placed until 8:20 P.M. on May 14,[65] more than three hours after the issuance of the order to attack, and one hour after the attack had actually begun. Moreover, the trio of presidential substitutes simply read to the legislators a formal statement announcing the President's decision.[66] Five of the allegedly consulted lawmakers[67] explicitly objected to this process. Typical of their statements was that of Senate Majority leader Mike Mansfield, the first member of Congress to be telephoned by the White House, who said, "I was not consulted. I was notified after the facts about what the administration had already decided to do."[68] There is no reason to believe that any of the other "consulted" congressmen was treated in a different fashion.[69]

Nevertheless, many people were satisfied that the President had complied with the mandate of the consultation clause. Roderick Hills, a legal counsel to the President during the *Mayaguez* incident, explained to reporters that President Ford was correct in believing that he could satisfy the Resolution's consultation requirement simply by informing Congress of his intentions prior to the actual commencement of hostile actions.[70] His conclusion ignores the definition assigned to "consultation" by the House Foreign Affairs Committee[71] which is substantially identical to the interpretation commonly accepted by the Ameri-

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62. N.Y. Times, May 15, 1975, at 1, col. 7.

63. House Hearings, supra note 1, at 106.

64. N.Y. Review, May 21, 1975, reprinted in House Hearings, supra note 1, at 126. The three staff members involved have been identified as Max Friedersdorf, Bill Kendall and Pat O'Donnell. Id.

65. N.Y. Times, May 15, 1975, at 18, col. 6.

66. N.Y. Review, supra note 64, at 126.

67. Those five were Senators Mansfield, Eastland and Case and Representatives Albert and O'Neil. House Hearings, supra note 1, at 45.

68. N.Y. Times, May 16, 1975, at 15, col. 2.

69. See House Hearings, supra note 1, at 61.

70. N.Y. Times, May 15, 1975, at 18, col. 3.

71. See text accompanying notes 60-61 supra.

can legal community.[72] Moreover, the Resolution states that one of its purposes is "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."[73] Merely informing Congress of action that is to be taken on the basis of decisions which have already been made hardly qualifies as applying the judgment of Congress.

Concurring with Hills was Monroe Leigh, Legal Advisor to the State Department. Weeks after the resolution of the *Mayaguez* crisis, he asserted that in his opinion President Ford had satisfied the consultation requirements.[74] He recounted that congressional leaders had been informed of the President's intentions prior to the commencement of hostilities,[75] they had been given an opportunity to express their views, and all of their comments had been relayed to the President.[76]

Other observers are also convinced that President Ford complied with Section 3 during the *Mayaguez* incident.[77] Notable among laymen is journalist David Broder, who insisted that distinguishing between "informing" and "consulting" is "more of a semantic argument than one of substance."[78] Such a view might be attributable to the fact that the President is not legally bound to act upon suggestions which he receives during consultations with Congress, but is free to disregard any and all advice.[79] In other words, because President Ford's constitutional emergency powers legitimized his independent efforts to free the *Mayaguez*,[80] he was not required to seek congressional approval before

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72. See 9 Words & Phrases, "Consult; Consulting" (1960).

73. 50 U.S.C. 1541(a) (1976).

74. House Hearings, supra note 1, at 77-79.

75. In fact, none of the members of Congress selected for "consultation" were informed prior to the commencement of hostilities. See text accompanying notes 63-65 supra.

76. House Hearings, supra note 1, at 77-78.

77. For instance, one commentator concluded,

> How the President could have cooperated more fully with Congress than he did in the circumstances of rapidly changing and developing events, each of which could be seen as a new reason for consulting with Congress, is unexplained by his critics. The answer to this practical problem surely lies in a common sense approach based on Congress' own phrase, "in every possible instance" . . . .

Emerson, supra note 25, at 194.

78. Washington Post, May 25, 1975, at C6, col. 5.

79. House Hearings, supra note 1, at 54, 68.

80. See text accompanying notes 28-30 supra.

ordering military action. However, if this was the basis of Broder's view, the journalist sorely misunderstood the major goal of the War Powers Resolution—the restoration of Congress to the position of partner with the executive branch in the war making decision process.[81] If Congress provides no input until after U.S. forces have already intervened, congressional impact will be significantly diminished. Once the President has already committed American prestige to battle, experience indicates that public support lines up firmly behind him, and congressional debates of the merits of U.S. involvement fall upon deaf ears.[82]

A compelling argument in favor of adequate congressional involvement is offered by Professor Raoul Berger of the Harvard Law School. He elucidates the significance of prior congressional consultation by asking whether President Ford could have justified his failure to consult Congress had the *Mayaguez* incident involved an attack upon Soviet forces rather than those of "pygmy" Cambodia.[83] In other words, is it for the President alone to make the fatal decision that might plunge the United States into total war even though time allows for consultation with Congress? To the contrary, he asserts, the Founding Fathers condoned the commission to battle of U.S. troops only upon the closest possible collaboration between the President and Congress.[84] The consultation clause of the War Powers Resolution merely codifies the Framers' intent. Unfortunately, the executive branch has not so construed Section 3.

Past events have proven the value of congressional input to the formulation of American war making decisions. In early 1954 the French Chief of Staff sought U.S. military participation in Indochina in order to prevent the collapse of French forces fighting there. On April 4, 1954, Admiral Radford, the Chairman of the Joint Chiefs of Staff, Secretary of State Dulles and eight congressional leaders met with President Eisenhower to consider this request. The eight legislators opposed intervention, while Radford and Dulles endorsed it. Despite the pressure applied by these and other key administrative officials who favored the use of U.S. forces in Southeast Asia, President Eisenhower found compelling the counterarguments of a small con-

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81. See text accompanying notes 24-38 supra.

82. Eagleton, The August 15 Compromise and the War Powers of Congress, 18 St. Louis L. J. 1, 9 (1973).

83. N.Y. Times, May 23, 1975, at 37, col. 2.

84. Berger, supra note 28, at 82.

gressional delegation and opted against taking military action.[85] As one commentator concluded, it is "hard to dissent from the proposition that congressional judgment brought a valuable dimension to the decision making process."[86]

Senator Thomas Eagleton[87] is correct when he argues that congressional *involvement* in the decision making process before the executive branch has rendered its decision rather than afterwards makes "all the difference in the world."[88] Congress can best end the confusion concerning the meaning of "consultation" within the context of the Resolution by amending Section 3 to require the President directly to "seek the advice and counsel" of certain members of Congress, thereby making clear the inadequacy of merely informing the legislators of decisions which have already been made.[89]

III. Enforcing the Consultation Clause

One commentator has suggested that in truth the President is free to ignore the War Powers Resolution because Congress is unable to enforce it and "impeachment would be ludicrous in a time of real emergency."[90] This assertion of congressional impotence is too cynical. Successful implementation of the Resolution need not and should not depend solely upon the good faith of the President.

A. *Judicial Action*

One means to enforce the consultation clause would be for Congress to seek an injunction to prevent the President from acting until proper consultation had taken place. There are two

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85. Ehrlich, supra note 20, at 650-51.

86. Id. at 651.

87. Senator Eagleton was originally a strong supporter of the War Powers Bill in the Senate, but he opposed passage of the legislation that ultimately became the Resolution because he feared that changes made by the Conference Committee would grant the President too much authority. See, e.g., 119 Cong. Rec. 33555 et seq. (1973).

88. 119 Cong. Rec. 33557 (1973).

89. A bill to enact such an amendment to the Resolution was introduced in Congress by Rep. Seiberling in 1975 following the *Mayaguez* incident. See H.R. 7594, 94th Cong., 1st Sess. (1975). No action was taken on this bill.

90. Angst, 1973 War Powers Legislation: Congress Re-Asserts Its War-making Powers, 5 Loyola U.L.J. (Chicago) 83, 105 (1974).

basic reasons why such an approach would be an ineffective means of ensuring presidential compliance with the consultation clause. The first limitation is the short duration of many of the emergencies to which the War Powers Resolution is applicable. For instance, during the *Mayaguez* affair, Congress was not aware that there had been inadequate compliance with Section 3 until after troops had already been ordered into battle.[91] Moreover, the hostilities lasted only a few hours.[92] During such sudden and short-lived crises there is little if any opportunity for the courts to deliberate and rule on the adequacy of executive compliance with the War Powers Resolution.

Even if time limitations did not preclude judicial intervention, the political question doctrine, which prohibits courts from deciding controversies of a political nature,[93] would probably lead to the same result. To the extent that the issue joined concerned the wisdom of presidential action, a court would likely refuse the case for lack of justiciability. However, a long and complicated line of recent cases, most of which questioned the legality of the Indochina War, has left the present breadth of the doctrine unclear.[94] Whereas most courts found there to be a political question and refused to rule on the merits of the war's legality,[95] some courts decided, the doctrine of political questions notwithstanding, that the deployment of U.S. military forces into foreign hostilities was a justiciable issue.[96] In the absence of a definitive ruling by the Supreme Court, the doctrine constitutes a serious obstacle to the enforcement of the War Powers Resolution

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91. See text accompanying notes 63-69 supra.

92. See text accompanying notes 10-13 supra.

93. For excellent judicial reviews of the development and meaning of the political question doctrine, see Baker v. Carr, 369 U.S. 186 (1962) and Atlee v. Laird, 347 F. Supp. 689 (1972), aff'd mem., 411 U.S. 911 (1973).

94. For a discussion and comparison of these cases, see, e.g., Alstyne, Congress, the President, and the Power to Declare War: A Requiem for Vietnam, 121 U. Pa. L. Rev. 1, 2-5 (1973); Henkin, "A More Effective System" For Foreign Relations: The Constitutional Framework, 61 Va. L. Rev. 751, n. 44 (1975); Shattuck, The "Political Question" Quagmire: War and Peace in the Second Circuit, 40 Brooklyn L. Rev. 1031 (1974); and Wenner, The Indochina War Cases in the United States Court of Appeals for the Second Circuit: The Constitutional Allocation of War Powers, 7 N.Y.U.J. Int'l L. & Pol. 137 (1974).

95. See, e.g., Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973); Atlee v. Laird, 347 F. Supp. 689 (1972), aff'd mem., 411 U.S. 911 (1973).

96. See, e.g., Berk v. Laird, 429 F.2d 302 (2d Cir. 1971), cert. denied, 404 U.S. 869 (1971); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971).

through judicial action.[97] Accordingly, litigation offers at best a tenuous means of enforcing the consultation clause.

B. *Congressional Control of Appropriations*

Congress has in the past frequently attempted to use its control of the military purse[98] to prevent what it believed to be improper exercises of war making authority by the executive branch. Typically, Congress has voted to bar the further expenditure of already appropriated funds to finance a particular ongoing conflict.[99] This process, in which Congress seeks to extricate forces from combat in which they are already involved, is best characterized as a means of "subsequent restraint."[100] Such an exercise of congressional will is fraught with drawbacks. Even those members of Congress who originally opposed American intervention may hesitate to withdraw the funds which support U.S. troops once American prestige has been committed to the battlefield. Additionally, the President would probably veto any bill that eliminated funding for military actions which he initiated. To render a veto less likely, Congress might consider attaching a rider that restricted the use of military funds to otherwise unrelated legislation which is so important that to veto it would create a crisis in itself. However, those who have had occasion to employ such a procedure[101] have found it to be an inadequate means of asserting Congress' will. Senator Javits characterized it as a "clumsy, blunt and obsolescent tool."[102] In fact, the War Powers Resolution was intended to obviate the need to resort to this approach.

Michael Glennon, Assistant Legislative Counsel to the United States Senate, has suggested that Congress' control of the appropriations process can be used to force presidential compliance with the War Powers Resolution. He urges that the Resolution

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97. Indeed, Senator Javits, author of the Resolution in the Senate, fears that litigation seeking enforcement of the War Powers Resolution would be an almost "classic example of what the courts have considered a 'political question.'" 119 Cong. Rec. 36198 (1973).

98. See note 17 supra.

99. Such an approach was used, for instance, to end the bombing of Cambodia by the United States in 1973. See 31 U.S.C. 665 (1976).

100. Glennon, Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions, 60 Minn. L. Rev. 1, 3 (1975).

101. Eagleton, supra note 82, at 10.

102. 119 Cong. Rec. 1395 (1973).

be amended to prohibit absolutely the use of military funds except in compliance with the operative sections of the Resolution.[103] Glennon maintains that by establishing prior restraints upon the usage of all military funding, Congress can avoid the inherent pitfalls of subsequent spending restraints.[104] Moreover, because Congress possesses an absolute right to specify how all appropriations funds shall or shall not be spent,[105] there would be no doubt as to the Resolution's constitutionality and the President's corresponding duty to comply with this law. The efficacy of this approach, however, is belied by the fact that, during the course of the *Mayaguez* affair, President Ford never challenged the constitutional validity of the Resolution. Indeed, the White House explicitly announced that the President intended to comply fully with the requirements of Section 3.[106] Nevertheless, throughout the *Mayaguez* incident, the President consistently failed to consult with Congress before acting.[107] There is no reason to believe that any future President would demonstrate greater respect for the consultation clause than did President Ford simply because the Resolution was based upon advance congressional control of the military budget. Stronger measures need to be taken.

C. *Statutory Clarity and Vigilant Oversight*

The most effective means of ensuring future compliance with the consultation clause is to clarify it today. Most impor-

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103. Glennon, supra note 100, at 23-38.

104. Id. The Founding Fathers did not envision that a standing army or navy would be necessary. (In fact, during Washington's eight years as President, there existed no navy and the regular army never exceeded 4,100 men. Emerson, supra note 25, at 195.) Accordingly, they intended that all military expeditions would require the direct approval of Congress in the form of appropriating the needed funds. 119 Cong. Rec. 21223 (1973). Clearly, then, the Framers anticipated that the power of the purse would automatically provide Congress with a prior restraint. However, with today's standing forces numbering in the millions and annual defense appropriations in excess of $100 billion, no specific funding is required to meet brief emergencies such as the *Mayaguez* incident. See, e.g., Spong, supra note 38, at n. 164; and Angst, supra note 90, at 85-87. Therefore, implementation of a proposal such as Glennon's is needed to reestablish effective congressional control by means of the purse strings.

105. Berger, supra note 28, at 78-79. But see House Hearings, supra note 1, at 103.

106. N.Y. Times, May 15, at 1, col. 7.

107. See text accompanying notes 60-89 supra.

tantly, Congress should eliminate the vagueness of Section 3 by elaborating on the meaning of "consult."[108] The major sponsors of the original resolution, however, Senator Javits and Representative Zablocki, have opposed taking such action at present, given the rarity of the Resolution's exercise to date.[109] Such a view imperils the future effectiveness of the Resolution.

The simple fact that the War Powers Resolution is now the law does not guarantee direct congressional involvement in the formulation of war making decisions. For instance, Monroe Leigh recently argued that Section 3 not only allows the President to set the parameters of consultation, but also permits him to decide when to forego consultation altogether.[110] Congress clearly intended a different interpretation of Section 3.[111] Congress should act now to dispel interpretations such as Leigh's which are at variance with the goals of the Resolution. Congressman Seiberling of the House International Relations Committee correctly analyzed the issue:

> Congress must take action to see that the law works. The best way to do this is to evaluate each instance in which the resolution comes into play to determine if its provisions have been complied with and, if not, what should be done to correct the situation.[112]

Delaying this process serves only to encourage further misapplication of the Resolution.

Once Section 3 has been amended to define "consultation" and the parties thereto, Congress should maintain a vigorous watch over the President's application of the consultation clause. The provisions of the law are ineffective absent the congressional intent to enforce them. Although President Ford's actions during the *Mayaguez* affair were sufficiently contrary to both the letter and the spirit of Section 3 to have provoked strong protests from Congress,[113] only the leadership complained.[114] Upon the resolu-

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108. See text accompanying notes 49-89 supra.

109. House Hearings, supra note 1, at v, 67. Senator Javits takes this position even though he acknowledges the "initial experiences show that improved procedures are required." Id. at 67.

110. Id. at 100.

111. See text accompanying notes 39-119 supra.

112. House Hearings, supra note 1, at 43.

113. See text accompanying notes 60-89 supra.

114. Concededly, congressional reaction during the course of the *Mayaguez*

tion of the crisis, most lawmakers were concerned only with recording their praise of the President quickly enough to gain public notice.[115] The absence of negative congressional reaction can probably be attributed to the widespread popularity of the President's response to the seizure. His handling of the affair was widely regarded as a major political triumph.[116] Following by only a few weeks the total military defeat of two Southeast Asian allies who had received substantial U.S. assistance,[117] the successful application of American military force in this same theatre was widely regarded as a badly needed demonstration of U.S. willingness and ability to meet its global commitments.[118]

Congress, of course, had every right to concur with President Ford's handling of the *Mayaguez* affair. But when the President, without congressional objection, ignores the requirements of the consultation clause during its first application, there is no reason to expect compliance in future crises, when Congress's attitude may be less hospitable. If Congress truly desires to reassert its proper influence regarding the application of United States forces to combat, it must strive zealously and consistently to do so, and not merely when politically most expedient. In light

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incident itself would have been difficult because of the limitations on time and available information. However, in the immediate aftermath of the affair, when all the relevant information became available and there was ample time for reflection, nothing prevented Congress from raising its voice in outrage.

115. Washington Post, May 25, 1975, at C6, col. 5. A particularly interesting reaction is that of Senator Charles Percy, who supported the Resolution's passage in 1973:

> I think this is a very important first test of the War Powers Resolution. I would say, without any equivocation, that both the executive branch and legislative branch passed the test. There was consultation between the executive branch and the legislative branch passed the test. There was consultation between the executive branch and the legislative branch.

121 Cong. Rec. S8441 (daily ed. May 16, 1975).

116. N.Y. Times, May 16, 1975, at 1, col. 5. However, the public did not have immediate access to all pertinent information. For instance, the initial statements issued to the press characterized losses among the United States rescue forces as "light." N.Y. Times, May 15, 1975, at 1, col. 8. In fact, over 60 casualties were suffered to effectuate the release of the 39 *Mayaguez* crewmen. *Mayaguez* Briefing, supra note 4, at 611.

117. Communist troops had scored total military victories toppling United States supported governments in Cambodia and South Vietnam on April 12 and April 29, 1975, respectively. N.Y. Times, Apr. 13, 1975, § 1, at 1, col. 8; N.Y. Times, Apr. 30, 1975, at 1, col. 8.

118. N.Y. Times, May 14, 1975, at 18, col. 2.

of the United States' Indochina experience, Congress owes a duty both to itself and to the public to guard and exercise to the fullest extent possible its power to contribute to the formulation of war making decisions.

The President's awareness of congressional oversight is particularly vital to the enforcement of Section 3 during short emergencies such as the *Mayaguez* affair, when lack of both time and information are likely to prevent an outcry demanding compliance.[119] In such circumstances the President must know from prior experience that neither Congress nor the public will quietly tolerate violation of the Resolution, and that he will be called upon to account for any failure to comply with Section 3.

IV. Conclusion

The *Mayaguez* incident clearly illustrates the present deficiencies of Section 3 of the War Powers Resolution. Poor drafting has caused this clause to be subject to a variety of interpretations, many of which do not comport with the stated legislative intent. Congress should act now to clarify the duties imposed on the President by Section 3. But even after this step has been taken, Congress's work will not be done. In the long run the Resolution will be only as valuable as Congress chooses to make it. The Resolution establishes a mechanism through which Congress can ensure its involvement in the war making process; Congress's diligence is required if this mechanism is to be effective. Congress has thus far failed to act. Continued congressional apathy will greatly reduce the effectiveness of the entire Resolution and signal the unwillingness of Congress to regain and maintain its constitutionally designated role as an equal partner to the executive branch in the formulation of United States military policy.

Robert Zutz

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119. See note 115 supra.

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