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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 Javits¹

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 Eagleton²

From 1969 to 1974 Congress considered various war powers proposals, following adoption of the Senate's National Commitments Resolution³ 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 South-east Asia, this legislative activity, which culminated in the enactment of the War Powers Resolution of 1973,⁵ revealed a growing

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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-

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

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

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 language⁴¹

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 committee⁶¹ 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 days⁶³ 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-

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 House⁶⁷ 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 conferees⁷⁰ 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 essentials⁷⁵:

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 905 (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 subsections¹⁰³ 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 observation¹⁰⁵ 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)

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 forces¹¹⁹ 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.

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):

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 view¹²⁸ and the language of the Resolution itself¹²⁹ 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, although 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 1939¹³⁴ and 1949,¹³⁵ the Greek-Turkish Aid Act of 1947¹³⁶ 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 initiative 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 initiative. 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,

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 support 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

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 report¹⁶⁹ 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

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

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 consulted¹⁸² 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

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 Penh 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 Congress¹⁸⁴ "[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

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 original 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

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.

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.

APPENDIX 1

The War Powers Resolution, Enacted November 7, 1973

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 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;
- (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 Com-

mittee 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 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.

(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.

APPENDIX 2

Report Dated April 4, 1975, from President Gerald R. Ford to Hon. Carl Albert, Speaker of the House of Representatives, in Compliance with Section 4(a)(2) of the War Powers Resolution

April 4, 1975.

Hon. Carl Albert,
Speaker of the House of Representatives,
Peking, China
(C/O Ambassador Bush).

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.

APPENDIX 3

Report Dated April 12, 1975, from President Gerald R. Ford to Hon. Carl Albert, Speaker of the House of Representatives, in Compliance with Section 4(a)(2) of the War Powers Resolution

THE WHITE HOUSE

Washington, D.C., April 12, 1975.

Hon. Carl Albert,

Speaker, U.S. House of Representatives, Washington, D.C.

DEAR MR. SPEAKER: 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) defense 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 [a] 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 recoilless 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 evacuees.

Although these 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 indi-

cates that a total of 82 U.S. citizens were evacuated and that the task force was also able to accommodate 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

APPENDIX 4

**Report Dated April 30, 1975 from President Gerald R. Ford to
Hon. James O. Eastland, President Pro Tempore of the Senate**

THE WHITE HOUSE

Washington, D.C., 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.

GERALD R. FORD

APPENDIX 5

**Report Dated May 15, 1975, from President Gerald R. Ford to
Hon. Carl Albert, Speaker of the House of Representatives**

THE WHITE HOUSE
Washington, D.C., May 15, 1975

DEAR MR. SPEAKER:

On 12 May 1975, I was advised that the SS *Mayaguez*, a merchant vessel of U.S. 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. e.d.t. 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.

GERALD R. FORD

APPENDIX 6

**House Joint Resolution 542, As Passed By House, July 18, 1973,
And Referred To Senate**

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 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; and
- (D) 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 thereupon 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 the 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 intro-

duced, pursuant to such subsection (b), within three days of the convening of such next succeeding Congress.

INTERPRETATION OF ACT

SEC. 8. Nothing in this 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 of this Act.

EFFECTIVE DATE

SEC. 9. This Act shall take effect on the date of its enactment.

APPENDIX 7

Senate Bill 440, As Passed By Senate, July 20, 1973, And Referred To House

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 State 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 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 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 cosponsored 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.