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Applying Chadha: The Fate of the War Powers Resolution

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APPLYING *CHADHA*: THE FATE OF THE WAR POWERS RESOLUTION

I. INTRODUCTION

Few concepts of constitutional law evoke a greater sense of importance, and perhaps even wonder, than the separation of powers doctrine. As a general matter, the doctrine may be viewed as a means for partitioning the governmental structure. In fact, it is not difficult to imagine a caricature of the three branches of government, personified, and in the process of erecting boundaries to prevent potential infringements of their spheres of power. However, while appearing simple in theory, the separation of powers doctrine can be difficult to apply, and even more difficult to enforce.

In its most recent comprehensive statement on the separation of powers doctrine,[1] the United States Supreme Court reaffirmed the doctrine's significance, finding it to be an integral part of our Constitution.[2] While recognizing the Framer's intent to separate the three branches of government, the Court nevertheless concluded that total separation was not contemplated.[3] Rather, an effective governmental structure requires cooperation. Yet, in practice, this cooperation often leads to a "blurring" of the hypothetical lines denoting the limits of each branch. To this extent, the separation of powers doctrine must be employed to determine just how blurred the lines should be allowed to become.

A congressional device that has considerably obscured the lines between legislative and executive branch power is the legislative veto. The legislative veto is a statutory provision designed to permit one or both Houses of Congress, or even committees, to annul by resolution an action or rule of the executive branch or an administrative agency under authority delegated in the statute.[4] The device has been frequently placed in statutes since the 1930's and presently exists in

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1. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).
2. *Id.* at 119.
3. *Id.* at 121.
4. Fisher, *Introduction* to CONG. RES. SERV., 96th Cong., 2d Sess., STUDIES ON THE LEGISLATIVE VETO 1 (1980).

over two hundred federal laws.[5] Although the legislative veto is commonplace in a number of various statutory settings, it has been regarded as constitutionally suspect by the executive branch.[6] This suspicion was no more clearly evidenced than when the War Powers Resolution of 1973[7] was presented to President Nixon for his signature. The President vetoed the bill,[8] and Congress was forced to override his veto.[9]

Like the legislative veto, the War Powers Resolution essentially represents a congressional effort to blur the hypothetical lines separating the branches of government. Enacted in the aftermath of the Vietnam War, the War Powers Resolution seeks to regulate and restrict the President's ability to commit United States forces in hostile or potentially hostile situations.[10] In effect, Congress wanted a mechanism that would provide the legislature significant participation[11] in what had traditionally been regarded as an inherently executive realm.[12] While the separation of power lines have become increasingly blurred, as is apparent from the above discussion, the United States Supreme Court has recently refocused them. In *Immigration and Naturalization Service v. Chadha*,[13] the Court struck down the

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5. *See, e.g.*, Immigration and Naturalization Serv. v. Chadha, 462 U.S. ____, 103 S. Ct. 2764, 2811-16 (1983) (White, J., dissenting) (appendix listing statutes with legislative vetoes).

6. *See, e.g.*, Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. ON LEGIS. 735, 737 n.7 (1979) ("Every President since Woodrow Wilson has questioned the constitutionality of the legislative veto."). *See also* Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1357-58 (1953) (confidential opinion of President Roosevelt regarding unconstitutionality of the legislative veto).

7. 50 U.S.C. § 1541 (1976 & Supp. V 1981).

8. President's Veto Message to the House of Representatives Returning H.J. Res. 542 Without His Approval, 9 WEEKLY COMP. PRES. DOC. 1285, 1286 (Oct. 24, 1973).

9. Pub. L. No. 93-148 (Nov. 7, 1973) (codified at 50 U.S.C. § 1544 (1976 & Supp. V 1981)) [hereinafter referred to as War Powers Resolution or Resolution]

10. *See, e.g.*, Cruden, *The War-Making Process*, 69 MIL. L. REV. 35 (1975).

11. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (Court recognizes inherently broad presidential power in foreign affairs). *See also* NATIONAL COMMITMENTS, S. REP. NO. 797, 90th Cong., 1st Sess. 12, 750-55 (1967) (Fulbright Committee's review of historical developments in the expanding role of the executive in committing armed forces overseas).

12. Whether or not Congress gained the voice that it sought in armed forces deployment is largely a matter of opinion. Since the War Powers Resolution has never been formally invoked, it is difficult to measure its effectiveness other than through the opinions and analysis of scholars and congressmen who have had occasion to study it. *Compare* King and Leavens, *Curbing the Dog of War: The War Powers Resolution*, 18 HARVARD INT'L L.J. 55, 96 (1977) ("[President Ford's compliance with the Resolution] begins to establish a pattern of executive cooperation with the legislature concerning U.S. military ventures.") *with* R. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE (1983) ("the [War Powers Resolution's] failure has been demonstrated").

13. 462 U.S. ____, 103 S. Ct. 2764 (1983).

legislative veto provision of the Immigration and Nationality Act of 1952,[14] using strict separation-of-powers language that seems to invalidate all forms of the legislative veto.[15] However, because the Court refused to elaborate on the breadth of its holding, it remains to be seen whether statutes containing veto provisions will pass constitutional muster under *Chadha*. This comment attempts to resolve that question as it applies to the War Powers Resolution. First, the comment examines the history and current status of the Resolution with special regard to the legislative veto provisions; then the Resolution is tested under the *Chadha* holding. The conclusion reached by this analysis is that the statute is unconstitutional.

II. THE WAR POWERS RESOLUTION OF 1973[16]

A. *A Prolonged Birth*

As noted earlier, the War Powers Resolution of 1973 has generally been regarded as a congressional effort to prevent "future Vietnams."[17] This sentiment necessarily implies that had the Resolution been in effect during the early 1960's, the war might never have occurred. While it is, of course, impossible to prove the validity of such speculation, it is important to note that any merit due the above suggestion rests on the assumption that the War Powers Resolution is a highly effective and operative piece of legislation.[18] This assumption, too, is speculative.[19]

Although Congress was sincerely interested in preventing war when it passed the War Powers Resolution, its main concern was in

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14. 8 U.S.C. § 1251 (1982).

15. For a general discussion of the case and its implications, see Note, *Constitutional Law—Legislative Veto Held Unconstitutional—Immigration and Naturalization Service v. Chadha*, 462 U.S. ____, 103 S. Ct. 2764 (1983), 24 SANTA CLARA L. REV. 243 (1984); Smith & Struve, *Aftershocks of the Fall of the Legislative Veto*, 69 A.B.A.J. 1258 (Sept. 1983); *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 185-91 (1983).

16. *See infra* Appendix for the complete text of the War Powers Resolution of 1973.

17. Cruden, *supra* note 10, at 35.

18. As one might imagine, there is no shortage of scholarly material addressing both the pros and cons of the War Powers Resolution. While this comment does not attempt to address the effectiveness of the Resolution in foreign policy *per se*, the following articles should be helpful in acquiring a general understanding of the divergent views. *See, e.g.*, Eagleton, *Congress and the War Powers*, 37 MO. L. REV. 157 (1972); Rostow, *Great Cases Make Bad Laws: The War Powers Act*, 50 TEX. L. REV. 833 (1972); R. TURNER, *supra* note 12; Cruden, *supra* note 10; Comment, *The War Powers Resolution: Statutory Limitation on the Commander-In-Chief*, 11 HARV. J. ON LEGIS. 181 (1974).

19. *See supra* note 12.

protecting[20] its war-making power under the Constitution.[21] In effect, Congress regarded the escalation of war in Vietnam as a presidential usurpation of the legislative power to declare war as granted by article I of the Constitution.[22] In what can only be described as congressional hindsight, conventional wisdom at the time was said to have been that the President had "laid claim to power to launch the nation into war without Congressional sanction."[23] Clearly, it was this sentiment that led to the adoption of the War Powers Resolution.

To be sure, at the conclusion of the Vietnam War Congress felt betrayed by the Executive Branch, especially in light of the fact that no declaration of war was ever made by the United States.[24] However, Congress also realized that in such a delicate situation a reclamation of power would have to be subtle and diplomatic.[25] That this reasoning prevailed is evidenced by the length of time taken to draft the Resolution.[26] The end product was essentially House Joint Resolution 542, which was passed, over Nixon's veto,[27] on November 7,

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20. Actually, Congress felt that it was only *reclaiming* its power to declare war. *See War Powers Debates*, 119 CONG. REC. 21, 202 (1973) [hereinafter cited as *House Debates*].

21. U.S. CONST. art. I, § 8 provides several provisions relating to Congress' role in military affairs: "To declare War . . .; To raise and support armies . . .; to provide and maintain a Navy."

22. *See supra* note 20; *see infra* note 25.

Ironically, the war effort never would have succeeded had it not been for congressional appropriation authorizations. R. TURNER, *supra* note 12, at 5-10.

23. Berger, *The Tug-of-War Between Congress and the Presidency—Foreign Policy and the Power to Make War*, WASHBURN L.J. 1, 2 (1976). *But cf.* R. TURNER, *supra* note 12, at 5-7 (Senators concede that they were aware of their actions in regard to the Vietnam War.).

24. *See* R. TURNER, *supra* note 12, at 2-3 (distinction between declaring war and "mobilizing the national will").

25. In effect, "proponents of the Resolution were looking for a way out of the dilemma posed by a desire to reclaim the specified authority to declare war on the one hand, and the recognition that legislative action in an emergency is not always possible." Nanes, *Legislative Vetoes: The War Powers Resolution*, CONG. RES. SERV., 96th Cong., 2d Sess., STUDIES ON THE LEGISLATIVE VETO 580 (1980).

26. As John Cruden notes, "Three years of debate in Congress elicited widely divergent views concerning the wisdom of limiting the President's military prerogatives, and a score of conflicting proposals were introduced in the House and Senate." Cruden, *supra* note 10, at 35-36.

27. The need to override President Nixon's veto undercut some of the Resolution's objectives even before they became operative. Pat Holt writes,

> The fact that the resolution became law only over the President's veto destroyed one of the objectives of its principal sponsor in the Senate, Jacob Javits (R-N.Y.). It had been Javits' hope that Congress would work out a "methodology", as he called it, for joint presidential-congressional action in sending American troops into combat that the President would sign it, and that the resulting law would then represent a compact between Congress and the President for making

1973.[28]

B. *The Resolution in General*

The stated purpose of the War Powers Resolution, contained in the second of its ten sections,[29] is to "fulfill the intent of the framers of the Constitution . . . and to insure that the collective judgment of both 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."[30] The Resolution also recognizes the plenary power granted Congress under the Necessary and Proper Clause of the Constitution,[31] emphasizing Congress' 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."[32] Although it acknowledges the President's independent powers as commander-in-chief of the armed forces under article II of the Constitution,[33] and while it even goes so far as to give assurances that "nothing in [the Resolution] is intended to alter the constitutional authority of the . . . President,"[34] the War Powers Resolution nevertheless restricts the exercise of the President's article II powers when he acts to introduce forces into hostile or potentially hostile situations.[35]

Sections 3 and 4 are the consultation and reporting provisions of the Resolution. The President is required to both consult with Congress before introducing military forces into actual or potential conflict,[36] and to report the justification given for such action within forty-eight hours of deployment.[37] Section 4 becomes operative when,

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the Constitution work in what is generally admitted as a gray area.

P. HOLT, THE WAR POWERS RESOLUTION: THE ROLE OF CONGRESS IN U.S. ARMED INTERVENTION 1-2 (1978).

28. *See supra* note 7.

29. 50 U.S.C. § 1541 (1976 & Supp. V 1981).

30. *Id.*

31. U.S. CONST. art. I, § 8, cl. 18.

32. U.S.C. § 1541(b) (1976 & Supp. V 1981).

33. U.S. CONST. art. II, § 2.

34. 50 U.S.C. § 1547(d)(1) (1976 & Supp. V 1981).

35. *Id.* § 1541(c).

36. *Id.* § 1542. It should be noted that pursuant to this section, the President is required to consult with Congress as a whole, not just congressional leaders or members. The same applies to the reporting requirement. *See infra* note 37 and accompanying text. *See also* R. TURNER, *supra* note 12, at 12.

37. 50 U.S.C. § 1543 (1976 & Supp. V 1981). *See supra* note 36.

in the absence of a declaration of war, United States armed forces are introduced into either (1) hostile or imminently hostile situations; "(2) the territory, airspace or waters of a foreign nation, while equipped for combat . . . ; or (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation."[38] If troops are introduced into one of the above situations the President is required, as noted earlier, to submit a report within forty-eight hours of that introduction. He is also required, so long as troops are deployed, to keep Congress informed of the status of the deployment at least once every six months.[39]

Section 5 outlines the procedures for congressional action under the Resolution. However, this action, with the exception of subsection (c), may only be taken if the report required by section 4 is issued under section 4(a)(1), the introduction-into-hostilities subsection. A report submitted under either the foreign nation or troop enlargement subsections will not activate the time provisions set forth under sections 5(a) or 5(b).[40] In substance, to enable the President to respond quickly to emergency situations, he can commit troops into hostilities without congressional authorization, but the conflict must end within sixty days.[41] A single thirty-day extension may be granted if the President certifies in writing that the extension is necessary for the safety of American forces during withdrawal.[42] However, even during this ninety-day period, section 5(c) of the Resolution allows Congress, by concurrent resolution, to recall all of the committed troops.[43]

To avoid bureaucratic delays, congressional legislation initiated pursuant to the sixty-day period or concurrent resolution provisions is given expedited consideration by Congress under sections 6 and 7

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38. *Id.* § 1543(a).

39. *Id.* § 1543(c).

40. *Id.* § 1544.

41. *Id.* §§ 1543, 1544(b). Section 5(b) is especially unclear. For instance, the sixty-day period should begin "after a report is submitted *or is required to be submitted.*" 50 U.S.C. § 1544(b) (1976 & Supp. V 1981) (emphasis added). But if a report is not submitted, the statute fails to state *who* determines if a report is required, or by *what* procedure the determination is made. Moreover, there is no provision for how the requirement is to be enforced. At least one court has been troubled by this lack of foresight. *See* Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983).

42. 50 U.S.C. § 1544(b) (1976 & Supp. V 1981).

43. *Id.* § 1544(c). Section 5(c) represents a two-House legislative veto. The "concurrent resolution" referred to by the Resolution merely requires passage by a simple majority of each House of Congress, and does not require presentment to the President for his endorsement or veto. *See infra* notes 148-49 and accompanying text.

of the Resolution.[44] In addition, section 8 restricts any authority to introduce U.S. forces into hostile situations that may be inferred from treaties, appropriations, or other legislation unless expressly authorized with reference to the War Powers Resolution.[45] Finally, section 9, a severability clause, provides that if any provision of the Resolution is held invalid, that section will be severed, keeping the rest of the statute valid and intact.[46]

C. *The Veto Provisions*

Legislative veto action may take the form of a one-House veto (by simple resolution), a modified one-House veto (so-called one and a half-House veto), a two-House veto (by concurrent resolution), a committee veto, or a committee chairman's veto.[47] The War Powers Resolution contains essentially two different veto provisions. Section 5(c) of the Resolution exemplifies the two-House veto, while section 5(b), fitting none of the typical categories, is best defined as a "silent veto."[48]

Taken as a whole, the veto provisions are clearly the backbone of the Resolution. This point is easily confirmed by the fact that an elimination of the vetoes embodied in section 5 leaves merely reporting and consultation requirements. Thus, without veto powers it would be considerably more difficult, as evidenced to some extent by the Vietnam experience, for Congress to possess any authority over the deployment of U.S. forces.[49]

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44. 50 U.S.C. §§ 1545-1546 (1976 & Supp. V 1981).

45. *Id.* § 1547. The use of treaties creates a possible inconsistency between this provision and § 8(d), which provides that "nothing in this joint resolution . . . is intended to alter . . . the provisions of existing treaties." *Id.* § 1547(d). *See* R. TURNER, *supra* note 12, at 15. *See also infra* note 164 and accompanying text.

46. 50 U.S.C. § 1548 (1976 & Supp. V 1981).

Although incorporated into many statutes, these severability provisions have taken on an even greater role as a result of the *Chadha* case (*see supra* note 13). As Nanes observes in regard to § 9, "[t]his provision seems to indicate that the sponsors of the Resolution may have had some doubts about the constitutionality of their handiwork." Nanes, *supra* note 25, at 585.

47. Fisher, *supra* note 4, at 1.

48. *See infra* text accompanying note 177.

49. Of course, Congress still has its constitutionally-prescribed powers to indirectly control the deployment of troops. These powers include legislating and appropriation. Such powers are, as the development of the legislative veto would suggest, often time consuming and uncertain. See Henry, *supra* note 6, at 737, where the author asserts that: "[t]he legislative veto represents an attempt by Congress to effect legal change without having to go through the cumbersome process of passing new legislation." *Id.*

1. *A "Silent Veto"*

Besides being the most crucial, and possibly as a result of that fact, section 5's veto provisions are also the most controversial and constitutionally suspect of the Resolution's terms. Section 5(b), as described earlier, requires the President to terminate the deployment of U.S. troops within sixty days of the date his initial war powers report is due,[50] unless Congress has either declared war, enacted specific authorization for the use of U.S. armed forces, extended by law the sixty-day period, or is unable to meet as a result of armed attack upon the United States.[51] But it is section 5(c)[52] which represents the "ultimate" sanction.[53] It provides Congress with the power, through concurrent resolution,[54] to direct the President to remove U.S. forces engaged in hostilities on foreign soil, irrespective of presidential goals or commitments, and subject only to the prerequisite that no declaration of war or specific statutory authorization was issued at the time of the initial deployment.[55]

Needless to say, President Nixon took particular exception to the section 5 veto provisions when presented with the bill.[56] The Nixon administration was most concerned with the fact that section 5(b) allowed "congressional *inaction* . . . to strip the President of his constitutional authority."[57] In debating the Resolution, even some

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50. 50 U.S.C. § 1543(a) (1976 & Supp. V 1981).

51. *Id.* § 1544(b). This period may be extended an additional thirty days if "the President determines and certifies to the Congress that unavoidable military necessity respecting the safety of U.S. Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces." *Id.*

52. Set forth in full, § 5(c) reads:

> 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 authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

50 U.S.C. § 1544(c) (1976 & Supp. V 1981). *See supra* note 43 and accompanying text.

53. Nanes, *supra* note 25, at 580.

54. *See supra* note 43.

55. *See supra* note 52 and accompanying text.

56. *See supra* note 8 and accompanying text.

57. R. TURNER, *supra* note 12, at 13 (emphasis in the original).

In the text of his veto message, President Nixon argued that § 5(b),

> could work to prolong or intensify a crisis. Until the Congress suspended the deadline, there would be at least a chance of U.S. withdrawal. An adversary would be tempted therefore to postpone serious negotiations until the 60 days were up. Only after the Congress acted would there be a strong incentive for an adversary to negotiate. In addition, the very existence of a deadline could lead to an escalation of hostilities in order to achieve certain objectives before the 60 days expired.

congressional leaders were concerned about the silent veto device. Congressman Frelinghuysen asserted:

> There has been some discussion of the inadvisability of inaction by the Congress triggering a major change in policy undertaken by the President. I think this provision is a fatal flaw. On the face of it we are trying to arouse ourselves to a sense of responsibility to do something, to participate, to reassert our congressional role. Then we say if we cannot make up our minds within sixty days about whether we should engage in hostilities or not, that we are going to assume that the President is wrong.[58]

Some commentators have expressed a similar sentiment regarding the "inaction" provision. For example, one critique has been that the "silent" veto will not accomplish Congress' goal of reasserting itself in the war decision-making process.[59] As this criticism suggests, the provision actually serves to "cover" Congress in the event that they cannot reach a decision or agree on the wisdom of the President's action, or if they, for any number or reasons, fail to act within the ninety-day period.[60] To this extent, section 5(b) does nothing to promote a strong, positive congressional influence in the war-making process; rather, it encourages indecisiveness and prolonged congressional debate. Given this state of affairs, "it is difficult to imagine that a President, amidst a war he found [to be] in the interest of national security, would be dissuaded to act by congressional silence, inaction, or disagreement."[61] On the contrary, he would most likely disregard an irresolute legislature.

Proponents of the provision contend that the War Powers Resolution will insure prompt consideration of any hostile situation and that the sixty-day limitation will encourage Congress and the President to act jointly in an effort to resolve the deployment conflict in a timely manner. Yet, this argument overlooks the fact that the proce-

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H.R. DOC. NO. 93-171, 93d Cong., 1st Sess. (1973).

58. 119 CONG. REC. H33, 869 (1973) (statement of Rep. Frelinghuysen).

Rep. Frelinghuysen was by no means the only congressman opposed to § 5(b). Of the thirty-five members of the House Foreign Affairs Committee, eleven dissented to this provision, declaring it to be illegal or ill-advised. H.R. REP. NO. 93-287, 93d Cong., 1st Sess. (1973) (to accompany H.R.J. Res. 542).

59. Cruden, *supra* note 10, at 107. *But cf.* Rep. Findley's statement made during the House of Representatives debate on the War Powers Resolution: "[I]naction by the Congress is a reasonable and traditional way to thwart a Presidential effort to establish public policy as in the other fields." 119 CONG. REC. H9851 (daily ed. Oct. 12, 1973).

60. Cruden, *supra* note 10, at 108-09. *See supra* note 57 and accompanying text.

61. Cruden, *supra* note 10, at 108.

dures in sections 6 and 7 for establishing priority procedures regarding any joint resolution or bills drafted under the Resolution can be modified or deleted at any stage of consideration by a simple yea or nay vote.[62] Thus, with this option available to Congress, the legislature can essentially determine its policy regarding whether or not to remove troops through a motion to postpone, a motion to lay on the table, and a number of other procedural devices.[63]

2. *The Concurrent Resolution*

The significance of a concurrent resolution is that it only requires the majority vote of both Houses of Congress to become law,[64] thus circumventing the President's veto power.[65] As might have been expected, President Nixon raised several constitutional objections in his veto message, emphasizing that the legislative veto provision would result in an "impermissible legislative infringement upon valid presidential power under the Constitution."[66] Indeed, the House Committee on Foreign Affairs, in its report on the War Powers Resolution, acknowledged that "some question has been raised about the constitutionality of the use of the concurrent resolution for this purpose."[67]

The Vietnam War experience was undoubtedly the impetus behind the inclusion of the legislative veto in section 5(c). One observer confirms this fact by describing what can only be characterized as

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62. *Id.*

63. *See* 119 CONG. REC. H9851 (daily ed. Oct. 12, 1973) (testimony of Rep. Dennis).

64. There has been considerable disagreement as to whether a concurrent resolution has the same legal and binding effect as properly passed legislation, that is, legislation passed by both Houses of Congress and then presented to the President. Criticism has been particularly strong regarding the War Powers Resolution's concurrent resolution provision, since that section would allow Congress to overrule action the president has taken pursuant to his commander-in-chief power granted by the Constitution. *See generally Hearings Before Senate Comm. on Foreign Relations*, 95th Cong., 2d Sess. 74-83 (1977).

65. U.S. CONST. art. I, § 7, cl. 2-3.

66. R. TURNER, *supra* note 12, at 14. The basis for this constitutional objection is discussed later in the text.

67. HOUSE COMMITTEE ON FOREIGN AFFAIRS, WAR POWERS RESOLUTION OF 1973, H. R. REP. NO. 287, 93d Cong., 1st Sess. 13 (1973), *quoted in* R. TURNER, *supra* note 12, at 14.

The criticism is even more persuasive in light of the fact that a congressional declaration of war requires properly enacted full legislation in the form of a joint resolution. R. TURNER, *supra* note 12, at 3. Given this fact, it would seem rather anomalous for Congress to be able to direct the President to withdraw already-committed troops by using a lesser device. *See infra* note 197. *See also* 116 CONG. REC. S7117-23 (daily ed. May 13, 1970); Note, *Congress, The President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1774-75 (1968).

congressional paranoia: "The drafters of the War Powers Resolution, fearing a veto of any legislative action recalling a presidential commitment of U.S. forces abroad, attempted to provide a procedure by which the President could not act on such legislation."[68] In addition, the provision itself provides that section 5(c) only becomes operative when forces are engaged in hostilities "without a declaration of war or specific statutory authorization."[69] That the Vietnam War evolved from neither[70] is not mere coincidence.[71]

If the sense of paranoia and anger that existed in Congress following the Vietnam War did not justify the imposition of section 5(c), additional support was available in the extensive historical use of the legislative veto. Thus, the same House Committee on Foreign Affairs report which had expressed doubt as to the constitutionality of the concurrent resolution[72] evidently dismissed that doubt on the basis of "ample precedent for the use of the concurrent resolution to 'veto' or disapprove a future action of the President, which action was previously authorized by a joint resolution or bill."[73] However, as one commentator observes, that rationale assumes "that [the] exercise of the President's constitutional war powers [requires] prior affirmative congressional approval;"[74] in short, that the President's power as commander-in-chief is limited to wars Congress authorizes. Not surprisingly, the report confirms that this interpretation was expected.[75]

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68. Cruden, *supra* note 10, at 103.

69. 50 U.S.C. § 1544(c) (1976 & Supp. V 1981).

70. While the United States never officially declared war, some credit the steps that preceded the Vietnam confrontation to the Gulf of Tonkin Resolution. H.R.J. Res. 1145, 73 Stat. 384 (1964) (*repealed by* Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (1971)). In its strictest sense, this resolution *did* amount to statutory authorization for the President to commit U.S. Armed Forces in Southeast Asia. However, the resolution would probably not have met the "*specific* statutory authorization" contemplated by § 5(c) of the War Powers Resolution. 50 U.S.C. § 1544(c) (1976 & Supp. V 1981) (emphasis added).

71. *See generally* R. TURNER, *supra* note 12, at 2-10 (analysis of Gulf of Tonkin Resolution).

72. *See supra* note 60 and accompanying text.

73. HOUSE COMMITTEE ON FOREIGN AFFAIRS, WAR POWERS RESOLUTION OF 1973, H.R. REP. No. 287, 93d Cong., 1st Sess. 13 (1973) [hereinafter cited as HOUSE COMMITTEE].

74. R. TURNER, *supra* note 12, at 15.

The president's "constitutional war powers" are as follows: "The executive power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1. "The President shall be Commander in Chief of the Army and Navy of the United States. . . ." U.S. CONST. art. II, § 2, cl. 1. *See also* R. TURNER, *supra* note 12, at 16 ("the executive power clause can be read to authorize the president to act for the national good restrained only by specific grants of power to Congress.") (quoting W.T. REVELEY, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? 36 (1981)).

75. HOUSE COMMITTEE, *supra* note 73, at 14.

But, the weight to be given this interpretation ultimately depends, of course, on the validity of the veto provisions. As the analysis of the debates surrounding section 5(b) proved, not all congressmen and scholars were convinced that the veto provision was valid. In fact, nine members of the House Committee on Foreign Affairs vehemently dissented to the approval of the Resolution.[76] Nevertheless, the majority view prevailed, and the War Powers Resolution, veto provisions intact, was adopted, albeit over Nixon's veto, by a huge margin in both Houses.[77]

D. *The Resolution in Practice*

Although the veto provisions of the War Powers Resolution have never been invoked, there is general agreement that in those cases where other provisions of the Resolution have been complied with, they have not produced the results Congress had hoped for.[78]

In determining whether this criticism is well-founded, it is important to recognize some of the inherent difficulties posed by the Resolution. To begin with, in a given situation, the President must make an analytical determination as to whether the War Powers Resolution even applies. This determination requires an application of the criteria set forth in section 4(a) of the Resolution, which is anything but clear.[79] Additionally, the deployment of armed forces is a delicate undertaking that, more often than not, demands confidentiality. Indeed, the success of a military operation often turns on whether or not an element of surprise is maintained. Given this degree of sensitivity, strict adherence to the War Powers Resolution may force the President to compromise matters of national security.[80] Forcing a president into such a situation promotes conflict, not cooperation.

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76. Cruden, *supra* note 10, at 103 n.276.

77. In the House of Representatives the vote was 284-135, and in the Senate it was 75-18. R. TURNER, *supra* note 12, at 10.

78. *See generally* Nanes, *supra* note 25; R. TURNER, *supra* note 12.

79. For instance, what do the phrases "imminent . . . hostilities," "where imminent involvement in hostilities is *clearly indicated by the circumstances*," "equipped for combat," or "substantially enlarge" mean? 50 U.S.C. § 1543(a)(1)-1543(a)(3) (1976 & Supp. V 1981) (emphasis added). Clearly these terms are difficult to discern, which makes the chance of different interpretations by the President and Congress almost a certainty.

80. A good example of a delicate situation is where there is a need for an emergency rescue of U.S. citizens stationed or living abroad.

Of course, the President is more likely to forsake his responsibilities under the Resolution than to risk American lives or endanger U.S. foreign policy, but the fact that a presidential decision may have to be made in such a situation suggests that the Resolution may really be counterproductive.

The truth behind this conclusion is even more apparent when viewed in relation to the Resolution itself. The War Powers Resolution, by its very nature, mixes foreign policy with procedure; yet, the emphasis is clearly on procedure. This leads to an awkward result if Congress is in agreement with the President's policies, but in disagreement with the procedural aspects of their implementation. The irony is that the War Powers Resolution may prevent either branch from fully cooperating with the other. While Congress may want to prevent deviation from "the spirit" of the Resolution, the President may not want to appear to be acquiescing in a document his office regards as constitutionally suspect.[81] Evidence of this conflict is readily ascertainable upon an examination of those situations in which the War Powers Resolution has been said to apply.[82] While an examination of those situations is beyond the scope of this comment, suffice it to say that both procedurally and substantively, the Resolution has proved ineffective.[83]

III. IMMIGRATION AND NATURALIZATION SERVICE v. *Chadha*

A. *A Case In Point*

As evidenced by the mixed congressional reaction surrounding the adoption of the War Powers Resolution, legislative vetoes have

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81. R. TURNER, *supra* note 12, at xv. As Turner astutely observes, "[the Resolution] pits two branches against each other on essentially procedural grounds at the precise time that national unity is needed to deal with a potential crisis." *Id.* at xiv.

82. *See generally* R. TURNER, *supra* note 12, at 47; Cruden, *supra* note 10, at 111; Nanes, *supra* note 25, at 599.

Turner has done an excellent job compiling and analyzing those situations where the Executive Branch has complied with some provisions of the War Powers Resolution. These historical instances consist of the following: the evacuation of U.S. citizens from Cypress; the evacuations of U.S. citizens, foreign nationals, and U.S. forces from Indochina; the *Mayaguez* incident; a tree-trimming altercation in Korea; the Iran rescue attempt; the sending of military advisers to El Salvador; the multinational force in the Sinai; and the multinational peacekeeping force in Lebanon. R. TURNER, *supra* note 12, at 47-91.

83. Indeed, after a careful analysis of those occasions in which the applicability of the War Powers Resolution has been asserted (*see supra* note 82), Turner concludes that the success or failure of deployment has a tremendous impact on the extent to which the Resolution is enforced. *See* R. TURNER, *supra* note 12, at xiv, 59-64, 69-73 (comparison of successful 1975 *Mayaguez* rescue with unsuccessful 1980 hostage rescue attempt in Iran).

If deployment is successful, criticism, if any, is weak and short-lived. Failure, on the other hand, brings with it harsh words and threats of War Powers Resolution invocation. For example, because of the increased violence in Beirut, Lebanon, Congress sought to enforce the Resolution's provisions against the Reagan Administration in 1983. However, the two bodies reached a compromise and thus avoided a War Powers Resolution showdown. *See* Jost, *Important Compromise Between the Powers*, L.A. Daily J., Sept. 26, 1983, § 1, at 2, col 6.

been the subject of considerable constitutional controversy since their inception in the early 1930's.[84] The veto originated in a broad grant of authority from Congress that allowed President Hoover to reorganize the executive branch.[85] Despite doubts as to the constitutionality of the veto provision, President Roosevelt also assented to its use during his administration.[86] Since then, and increasingly since the 1960's, Congress has become more dependent on the legislative veto, finding it an effective means of retaining control over previously delegated authority. As a result, the provision has been used in a wide range of statutory settings including nuclear energy, environmental protection, and international trade.[87] The War Powers Resolution, as noted earlier, is evidence of the veto's ability to act as a limiting device on presidential power to commit troops overseas. Overall, the permeation of the legislative veto has been great, as reflected by its incorporation in approximately two hundred and ten laws containing roughly three hundred and twenty separate legislative veto provisions.[88]

Over the course of its more than fifty-year existence, the veto has received the greatest attention in the immigration field.[89] *Immigration and Naturalization Service v. Chadha* typifies the context in which the veto is utilized in this area. In that case, Congress used the legislative veto power contained in the Immigration and Nationality Act of 1952,[90] and, through a one-House resolution, ordered

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84. For commentary generally favorable to the legislative veto, see Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455 (1977); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977); Rodino, *Congressional Review of Executive Actions*, 5 SETON HALL L. REV. 489 (1974); Stewart, *Constitutionality of the Legislative Veto*, 13 HARV. J. ON LEGIS. 593 (1976).

For commentary generally unfavorable to the legislative veto, see J. BOLTON, THE LEGISLATIVE VETO: UNSEPARATING THE POWERS (1977); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Henry, *supra* note 6; Comment, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

85. Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogative*, 52 IND. L.J. 323, 324 n.5 (1977).

86. *See supra* note 6.

87. *See, e.g.*, 103 S. Ct. at 2811-16 (White, J., dissenting) (appendix listing statutes with legislative veto provisions).

88. Smith & Struve, *supra* note 15, at 1258.

89. As Smith and Struve note, "through Summer 1982, of 230 exercises [of the legislative veto] in almost 50 years, 111 were immigration cases, 65 pertained to the Congressional Budget and Impoundment Act, 24 concerned government reorganization plans and the remainder of only 30 covered all other subject matters." Smith & Struve, *supra* note 15, at 1258.

90. 8 U.S.C. §§ 1101-1205 (1983) [hereinafter referred to as the Act].

the deportation of an alien whose deportation had previously been suspended by the Attorney General. The Attorney General exerted his suspension power through legislation previously delegated to him by Congress.[91] Upon exercising that power, however, he was required to report information regarding suspensions to Congress.[92] Under the provisions of the Act, Congress could review that information, and either House could, by simple resolution, overrule the Attorney General's decision.[93] Pursuant to this authorization, the House of Representatives passed a resolution seeking Chadha's deportation.[94]

After statutorily authorized review of the House's action,[95] the Ninth Circuit Court of Appeals found this form of legislative veto included in the Immigration and Nationality Act unconstitutional under the separation of powers doctrine.[96] The United States Supreme Court affirmed.[97]

B. *Refocusing Separation of Power Lines*

1. *Judicial*

Although it affirmed the Ninth Circuit's separation of powers holding, the Supreme Court's majority opinion[98] reflected a broader

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91. *Id.* § 1254(a)(1).

92. *Id.* § 1254(c)(1).

93. The legislative veto, § 244(c)(2) of the Act, provides as follows:

> In the case of an alien specified in paragraph (1) of subsection (a) of this section [a deportable alien]—if either the Senate or House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at is own expense under the order of deportation in the manner provided by law.

8 U.S.C. § 1254(c)(2) (1983).

94. 103 S. Ct. at 2771.

95. Pursuant to § 106(a) of the Act, 8 U.S.C. § 1105a(a) (1970), Chadha sought review of the House of Representatives' unilateral action in the United States Court of Appeals for the Ninth Circuit, arguing that the legislative veto provision, § 244(c)(2) of the Act, was unconstitutional. 103 S. Ct. at 2772. The Immigration and Naturalization Service agreed with Chadha, and thus the Senate and House of Representatives were forced to file briefs in support of the veto provision, and eventually intervened formally as parties to the litigation. *Id.* at 2773.

96. Chadha v. Immigration and Naturalization Serv., 634 F.2d 408, 411 (9th Cir. 1980), *aff'd*, 462 U.S. ____, 103 S. Ct. 2764 (1983).

97. 103 S. Ct. at 2772.

98. Chief Justice Burger wrote the majority opinion, joined by Justices Brennan, Marshall, Blackmun, Stevens, and O'Connor. Justice Powell concurred in the result, but he filed a separate opinion. Justice White dissented and also joined in the dissent of Justice Rehnquist.

application of that doctrine. The Ninth Circuit, and Justice Powell, who authored a concurring opinion in *Chadha*,[99] found the House of Representatives' use of the legislative veto to be tantamount to the usurpation of a judicial function.[100] Thus, the focus of the Ninth Circuit holding was essentially narrow, with the analysis directed primarily at the particular legislative veto provision contained in the Immigration and Nationality Act of 1952, which essentially allowed the House of Representatives to act as an appellate court in overruling the Attorney General's decision regarding Chadha.[101] Indeed, the court of appeals found that section 244(c)(2) of the Act,[102] the legislative veto provision, allowed Congress, through a review and application of statutory criteria, to definitively rule on Chadha's immigration status. The import of the Ninth Circuit's narrow holding was that not all legislative vetoes would be invalidated under *Chadha*; only those found to usurp judicial functions would be subject to revocation.

However, the majority dismissed the above analogy between judicial action and the one-House veto espoused by the Ninth Circuit and Justice Powell, finding the comparison "less than perfect."[103] Instead, the Court found the House of Representatives' section 244(c)(2) resolution to be legislative for all intents and purposes.[104] The Court's analysis was broad, and, as a result, *all* forms of the legislative veto became constitutionally suspect.[105]

2. *Legislative*

The crux of the majority's holding in *Chadha* was that action

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99. 103 S. Ct. at 2788 (Powell, J., concurring).

100. 634 F.2d at 430-31.

101. *Id.*; 103 S. Ct. at 2791-92 (Powell, J., concurring).

102. *See supra* note 93.

103. 103 S. Ct. at 2787 n.21.

104. *Id.* at 2786-87.

105. The concerns of Justice Powell and the Ninth Circuit coupled with the majority's conclusion that congressional action taken pursuant to § 244(c)(2) of the Act was an encroachment on the executive branch, make it clear that § 244(c)(2) was unusually vulnerable to constitutional attack. Thus, the Court could have held the provision invalid on other more limited grounds. *See* 103 S. Ct. at 2788 n.1 (Powell, J., concurring); Schwartz, *Court Should Have Limited Its Legislative Veto Ruling*, L.A. Daily J., Nov. 10, 1983, § 1, at 4, col. 3 ("The Court should not have chosen this atypical case to invalidate a 50-year old balancing device used more than 200 times.") The Court, however, chose to make a definitive ruling on the fate of the legislative veto, striking it down with broad language.

See also Strauss, *Was There a Baby in the Bathwater?: A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789 (drawing a distinction between use of the veto in a political context and use of the veto in a regulatory context).

taken pursuant to section 244(c)(2) amounted to legislation and thus must adhere to the usual legislative process: passage by both Houses of Congress and then presentment to the President. Because section 244(c)(2) required only a one-House simple resolution, it effectively avoided both of these requirements. The Court's holding, though, demanded an examination of both the separation of powers doctrine and the express requirements of the Constitution.

Although acknowledging the popularity of the legislative veto and its reputation for being an "indispensable political invention,"[106] the Court refused to accept convenience over the express restraints of the Constitution.[107] Specifically, the Court was referring to the bicameral and presentment clauses of article I of the Constitution.[108] The importance of adhering to these provisions was, the Court reasoned, evidenced by the history of their enactment.[109] From this history, the *Chadha* Court found that presentment to the President and bicameral approval of a bill/law were essential elements of legislative action. Presidential participation, the Court concluded, was designed to "protect the Executive Branch from Congress and to protect the people from improvident laws," while bicameralism "assures that the legislative power [will] be exercised only after opportunity for full study and debate in separate settings."[110] Moreover, the Court found these considerations to be "integral parts of the constitutional design for the separation of powers."[111]

Viewing article I of the Constitution as an exemplification of the separation of powers doctrine, the Court evaluated the action taken under section 244(c)(2). This analysis began with the recogni-

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106. 103 S. Ct. at 2795 (White, J., dissenting).

107. As the Court noted, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." 103 S. Ct. at 2780-81.

108. These clauses provide in part:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States.

U.S. CONST. art. I, § 7, cl. 2.

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President . . .; and before the Same shall take Effect, shall be approved by him, shall be repassed by two thirds of the Senate and House of Representatives . . . .

U.S. CONST. art. I, § 7, cl. 3.

109. Indeed, it was clear to the Court that the Framers of the Constitution "were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions." 103 S. Ct. at 2784.

110. *Id.*

111. *Id.* at 2781.

tion that through the separate articles of the Constitution, "the powers delegated to the three Branches are functionally identifiable."[112] This being the case, when a branch acts, it is presumptively acting through power delegated to it by the Constitution. Thus, in *Chadha*, when the House of Representatives exercised its veto under section 244(c)(2), it was presumptively acting through article I. The result of this presumption is that if legislative branch action is taken pursuant to article I grants of power, the applicable article I standards must be observed. The Court determined that before applying the presumption to the *Chadha* case, it must first find "that the challenged action under section 244(c)(2) [was] of the kind to which the procedural requirements of article I, section 7 apply."[113]

C. *Establishing a Test Under* Chadha

1. *Is It Legislation?*

Generally, the use of a legislative veto permits Congress to monitor the implementation of its policies by the Executive, without the enactment of additional legislation. However, when the veto provision requires congressional action, it has been described as a device "designed to reserve future authority to repeal or modify the delegation of power other than by traditional legislative action under the Constitution."[114] When used in this capacity, the veto attempts to alter the legal status quo, but it does so by circumventing the constitutionally-prescribed legislative process. Although this result may appear straightforward, the *Chadha* Court noted that, "[n]ot every action taken by either House is subject to the bicameralism and presentment requirements."[115] The first problem then is determining whether action taken pursuant to a legislative veto is amenable to these legislative procedures; in short, whether the action amounts to legislation of the type contemplated by article I.

In making this determination, the *Chadha* Court begins by stating that when deciding whether veto actions are exercises of legislative power, form is not determinative. Rather, the question is

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112. *Id.* at 2784.

113. *Id.* This question is posed because, as the Court notes, "[n]ot every action taken by either House is subject to" the legislative process. *Id.* For example, the impeachment power can be initiated only in the House of Representatives. U.S. CONST. art. I, § 2, cl. 5. *See infra* note 124.

114. Henry, *supra* note 6, at 735.

115. 103 S. Ct. at 2784. *See supra* note 113.

whether such action contains "matter which is properly to be regarded as legislative in its character and effect."[116] This question is answered through the additional query of whether the action taken has "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch."[117]

Clearly this is a broad test, for almost any congressional action taken pursuant to a legislative veto could be found to have altered the legal status of *someone*. Nevertheless, the Court provides no guidelines for determining a permissible range of alteration.[118] The only requirement is that the affected person be outside the legislative branch. For instance, in the *Chadha* case, the Court found the test satisfied by the fact that Chadha's status was altered by the congressional veto action that sought his deportation.[119]

In addition to this "alteration analysis," the Court found further justification for its decision that the Act's veto provision was legislative in character. First, the Court looked at the nature of the congressional action supplanted by the veto,[120] and concluded that, absent the legislative veto, Congress could have overruled the Attorney General and mandated Chadha's deportation only through the enactment of legislation requiring deportation.[121] This legislation, of course, would have to be passed by both Houses of Congress and be presented to the President. Secondly, the Court focused on the "nature of the decision" implemented by the veto,[122] and stated that, to the extent Congress had originally delegated, through the proper legislative process, power allowing the Attorney General to suspend deportations, Congress *must* abide by that delegation until it is "legislatively altered or revoked."[123] Finally, in a point directed primarily to the one-House veto provision in *Chadha*, the Court noted that the

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116. *Id.* (citing S. REP. No. 1335, 54th Cong., 2d Sess. 8 (1897)).

117. 103 S. Ct. at 2784.

118. In the *Chadha* case, the Court merely noted that in exercising its naturalization power, U.S. CONST. art. I, § 8, cl. 4, the House of Representatives' action had altered the "legal rights, duties and relations of persons, *including* the Attorney General, Executive Branch officials and Chadha." 103 S. Ct. at 2784 (emphasis added).

119. In particular, the Court was referring to the fact that the legislative veto had the effect of forcing Chadha's deportation. Interestingly, this reasoning is similar to Justice Powell's judicial function analysis, which was grounded on the fact that through § 244(c)(2) Congress was able to determine that Chadha had not satisfied the "statutory criteria for permanent residence in this country." 103 S. Ct. at 2789 (Powell, J., concurring). *See also supra* notes 98-101 and accompanying text.

120. 103 S. Ct. at 2785.

121. *Id.*

122. *Id.* at 2786.

123. *Id.*

Constitution provided for only four situations in which one House of Congress may act alone "with the unreviewable force of law [and] not subject to the President's veto."[124] Because the one-House legislative veto was not among the four, and because these four exceptions were "narrow, explicit, and separately justified," the Court concluded that the section 244(c)(2) veto was "not authorized by the constitutional design of the powers of the Legislative Branch."[125]

2. *Is It Severable?*

Although the Supreme Court determined that section 244(c)(2) of the Act was an unconstitutional abuse of the legislative process, the real impact of the holding turned on whether or not the veto provision could be severed from the Act without rendering the entire statute unconstitutional. The import of this determination was emphasized in Justice Rehnquist's dissenting opinion.[126] Because he found section 244(c)(2) inseverable from the rest of the Act, he concluded that if the veto was found to be unconstitutional, all of section 244 would be invalid and thus the Attorney General would have no power to suspend deportations. Consequently, Chadha would gain no relief from deportation even if his constitutional challenge was sustained.[127] This finding, of course, precluded a determination on the merits.

The majority, however, dismissed the severability argument as an unsuccessful procedural challenge.[128] In the Court's opinion, the legislative veto provision was clearly severable. To support this finding, the Court relied both on the language of the Immigration and Nationality Act and on its own severability analysis first promulgated in *Champlin Refining Company v. Corporation Commission of Oklahoma*.[129]

As employed by the *Chadha* Court, the *Champlin* test is essentially two-pronged with an emphasis on the legislative intent and history underlying the affected statute. The first prong establishes a presumption of severability by requiring that the invalid portions of

124. *Id.* These four situations are the House of Representatives' power to impeach, U.S. CONST. art. I, § 2, cl. 5, and the Senate's powers to conduct trials following impeachment, U.S. CONST. art. I, § 3, cl. 6 to disapprove or to approve presidential appointments, U.S. CONST. art. II, § 2, cl. 2, and to ratify treaties negotiated by the President, U.S. CONST. art. II, § 2, cl. 2.

125. *Id.* at 2787.

126. *Id.* at 2816-17 (Rehnquist, J., dissenting).

127. *Id.* at 2817 (Rehnquist, J., dissenting).

128. *Id.* at 2774-76.

129. 286 U.S. 210 (1932).

a statute be severed unless it is clear that the legislature would not have enacted the valid provisions independently of the invalid ones.[130] The second prong also presumes severability, but only if "what remains 'is fully operative as a law.' "[131] Both prongs require careful statutory analysis: first a reconstruction of the statute's legislative history, and then a determination of the legislative intent as it pertains to the veto provisions.[132]

Legislative history notwithstanding, the Court found the severability clause[133] in section 244 to be an extremely persuasive indication of legislative intent. Simply, the clause provided that if any provisions of the Act were found to be invalid, that finding was to have no effect on the validity of the remainder of the Act. Noting that the language of the clause was unambiguous, the Court concluded that severance was the rule, not the exception, with regard to section 244(c)(2). In other words, in relation to the *Champlin* test, the legislative intent, expressed through the inclusion of the severability clause, supported the presumption raised under the first prong of the test. This conclusion was confirmed under the *Champlin* analysis which established that the presence of a severability clause creates a presumption that the legislature would have enacted the remaining provisions of a statute without regard to the invalid section.[134]

While the *Chadha* Court was undoubtedly influenced by the applicability of the *Champlin* analysis, it sought further support for its position that section 244(c)(2) was severable by analyzing the legislative history of the Act. After a thorough examination of this history, the Court found that Congress would have enacted section 244 without the legislative veto rather than refusing to delegate the numerous deportation decisions to the Attorney General.[135] After this review, the Court was also able to conclude, in accordance with the presumption raised by prong two, that section 244 was "fully operative" without the veto provision.[136]

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130. 103 S. Ct. at 2774 (quoting Champlin Refining Co. v. Corporation Comm'n., 286 U.S. 210, 234 (1932)). This point was reaffirmed in Buckley v. Valeo, 424 U.S. 1, 108 (1976) (per curiam).

131. 103 S. Ct. at 2775 (quoting *Champlin*, 286 U.S. at 234).

132. *Champlin*, 286 U.S. at 234-35.

133. 8 U.S.C. § 1101 (1983). This section states: If any particular 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 other persons shall not be affected thereby.

134. 286 U.S. at 235. *See also* Electric Bond & Share Co. v. SEC, 303 U.S. 419, 434 (1938).

135. 103 S. Ct. at 2775-76.

136. *Id.*

D. *After* Chadha: *What Are The Consequences?*

Given the enormous number of legislative vetoes currently in existence,[137] the *Chadha* opinion will undoubtedly maintain a prominent position in a number of legal fields.[138] Indeed, the bulk of the commentaries written since *Chadha* have centered on the fate of the legislative veto. From these observers, the pervasive question has not been whether the large number of veto provisions are now unconstitutional, but rather, *when* the vetoes *are* found to be unconstitutional, will the provisions be severable?[139] This pessimistic attitude towards the validity of the veto was precipitated by the Court's affirmance, several weeks after *Chadha*, of two circuit court of appeal decisions holding other legislative veto provisions unconstitutional.[140]

While the effects of the *Chadha* decision are just starting to be felt throughout the federal court system, the outlook for the veto itself is not promising. Given this fact, the future of *statutes* containing veto provisions is extremely uncertain. Each statute will have to be analyzed on a case-by-case basis to determine its validity. The remainder of this comment conducts such an analysis on the War Powers Resolution of 1973.

IV. Applying *Chadha*: Disarming The War Powers Resolution

Of those statutes containing legislative veto provisions, the War Powers Resolution of 1973 is arguably the most significant. Not only does the Resolution have far-reaching military implications, but procedurally it embodies two different veto provisions, neither of which were addressed by the *Chadha* Court. Thus, the statute presents a unique opportunity to evaluate the *Chadha* criteria.

Court review of a statute's constitutionality depends on a plaintiff's ability to bring a proper action under the affected statute.

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137. *See supra* note 88 and accompanying text. It appears that *Chadha* has not been a deterrent to the use of the legislative veto. In fact, since the case was decided in June 1983, at least two veto provisions have been incorporated into enacted bills. *See* San Jose Mercury News, Dec. 25, 1983, at A22, col. 1.

138. *Chadha* addresses issues with implications in at least three fields: constitutional law, administrative law, and immigration law.

139. *See generally* Smith & Struve, *supra* note 15; Schwartz, *Congress Should Have Limited Its Legislative Veto Ruling*, L.A. Daily J., Nov. 10, 1983, § 1, at 4, col. 3.

140. Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983), *aff'g* Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982) (National Gas Policy Act's one-house veto); U.S. Senate v. FTC, 103 S. Ct. 3556 (1983), *aff'g* Consumer's Union v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (en banc) (Federal Trade Commission Improvement Act of 1980's two-house veto).

While such a procedural analysis is beyond the scope of this comment, suffice it to say that previous litigation brought under the War Powers Resolution has met with seemingly insurmountable justiciability arguments.[141] This is because the issues presented by the Resolution represent inherent separation-of-power concerns, and to this extent are highly susceptible to procedural challenges, i.e., standing, and allegations that the controversy is a nonjusticiable political question. Commentators have suggested other ways in which legal resolution of the war powers controversy may be averted.[142] Yet, this speculation fails to recognize the opportunities presented by the *Chadha* decision. *Chadha* actually increases the chance that the Resolution may be invalidated by legal action.

Traditional attacks on the War Powers Resolution have been directed at the substantive aspects of the statute and assert that the Resolution *itself* represents an unconstitutional infringement on the President's war powers. Under *this* approach it may well be that courts will decline to hear challenges to the statute. For instance, it would be difficult for a court to find that the President erred in failing to determine that hostilities were "imminent" in a given situation. However, *Chadha* avoids these controversial determinations by focusing on the *procedural* aspects of the statute. In effect, the unconstitutionality of the legislative veto has made sections 5(b) and 5(c) of the War Powers Resolution procedurally vulnerable. Under the sweeping language of *Chadha*, all legislative vetoes are invalid; thus, if the severability requirements are not satisfied, an entire statute may be invalidated. This analysis, of course, assumes that a proper action can be initiated under the Resolution.[143] Putting aside

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141. *See, e.g.*, Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (action by congressmen under War Powers Resolution dismissed as nonjusticiable political question); Effron, *Legal Resolution on War Powers Seen as Unlikely*, L.A. Daily J., Sept. 20, 1983, § 1, at 1, col. 6.

In the past, actions of this nature have usually been dismissed on the basis of political question or standing concerns. *See* Goldwater v. Carter, 617 F.2d 697, 702 (D.C. Cir.) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979). While the author realizes the hurdles presented by these issues, the possibility of bringing a successful action is not foreclosed. In fact, the standing barrier under separation of powers litigation appears to have been lowered. In *Riegle v. Federal Open Market Comm.*, the District of Columbia Circuit Court of Appeals held that separation of powers concerns can be addressed by the federal courts under the "equitable discretion" doctrine. 656 F.2d 873, 879-81 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981). While strong political question arguments remain for purposes of analyzing the War Powers Resolution under *Chadha*, this comment will assume that political question challenges have been met.

142. *See* Effron, *supra* note 141, at col. 6.

143. *See supra* note 141. *See also* Crockett v. Reagan, 558 F. Supp. at 901 ("[This] Court does not decide all disputes under the War Powers Resolution would be inappropriate

the possibility of successful procedural challenges, the effect of such an action would undoubtedly result in a disagreement between the executive and legislative branches as to the application of, and consequently the constitutionality of, the War Powers Resolution.[144]

Although the Resolution has, because of its restrictive nature in regard to presidential war-making power, been of doubtful validity since its inception, the *Chadha* decision, in striking down the legislative veto, provides the mechanism for replacing that doubt with certainty.

A. *Constitutionality of Section 5(c): The Two-House Veto*

A concurrent resolution, like that embodied in section 5(c) of the War Powers Resolution, is generally known as a "two-house legislative veto."[145] In the Resolution's context the veto provides that Congress may order the President, by simple majority vote in each House, to withdraw troops committed abroad under neither a declaration of war nor specific authorization. By design, the concurrent resolution precludes presentment to the President. While the veto has been generally used to give Congress "an active part in the execution of policy," section 5(c) represents an effort to "terminate authority which arose independently of congressional delegation."[146] In short, the President's war power originates in the Constitution,[147] not from a previous delegation of Congress. Nevertheless, the effect is the same—overruling decisions of the Executive Branch which are inconsistent with the views of Congress.

Although *Chadha* involved a one-house veto, the Court's analysis will apply to *any* legislative veto.[148] This conclusion is confirmed

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for judicial resolution.").

For instance, possible plaintiffs in an action brought under the War Powers Resolution might be a representative group of soldiers deployed on foreign soil who maintain that their service constitutes a presidential violation of the Resolution. This option is raised by King and Leavens in their discussion of the ways in which congressional action under the Resolution's termination provisions (§§ 5(b) and 5(c)) actually increases the possibility of judicial resolution of disputes over military activity. Suggesting potential lawsuits in regard to these disputes, they note, "[f]or example, a soldier might petition for habeas corpus to prevent his deployment to an unauthorized war [or] a congressman might seek an injunction to enforce congressional opposition to a war or at least a declaratory judgment to ratify the binding nature of Congress' opposition . . . ." King & Leavens, *supra* note 12, at 89. *See also* L.A. Daily J., Sept. 20, 1983, § 1, col. 6.

144. *See* King & Leavens, *supra* note 12, at 88-90.

145. *See supra* note 47 and accompanying text.

146. Henry, *supra* note 6, at 736.

147. *See supra* note 74.

148. Justice Powell conceded this result in his *Chadha* concurrence, "[t]he Court's deci-

not only by the summary affirmance given to the legislative veto cases[149] pending on the Court's docket, but also by a recent lower court interpretation of the *Chadha* decision. In that case, the United States District Court for the Southern District of Mississippi,[150] in

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sion based on the Presentment Clauses . . . apparently will invalidate *every* use of the legislative veto." 103 S. Ct. at 2788 (Powell, J., concurring) (emphasis added).

149. *See supra* text accompanying note 140.

150. EEOC v. Allstate Ins. Co. 570 F. Supp. 1224 (S.D. Miss. 1983), *appeal dismissed*, 104 S. Ct. 3499 (1984). *Allstate* is just the first in a series of cases that have been decided since *Chadha*. A number of these cases address the one-house legislative veto provision in the Reorganization Act of 1977, 5 U.S.C. § 901-912 (West 1977). Although the federal courts generally agree that the *Chadha* decision *has* invalidated the veto provision, the courts are divided on whether the provision is severable from the Act. *Compare* EEOC v. CBS, Inc., 743 F.2d 969, 971 (2d Cir. 1984) (provision inseverable) *with* EEOC v. Hernando Bank, Inc., 724 F.2d 1188, 1190 (5th Cir. 1984) (provision severable). The district courts have been lining up on both sides. Those cases falling under the *Allstate—CBS* view include: EEOC v. Westinghouse Elec. Corp., 33 Fair Empl. Prac. Cas. (BNA) 1232 (W.D. Pa. 1984), *appeal docketed*, No. 84-3073 (3d Cir. Feb. 9, 1984); EEOC v. Martin Industries, Inc., 581 F. Supp. 1029 (N.D. Ala. 1984); EEOC v.. Chrysler Corp., 33 Fair Empl. Prac. Cas. (BNA) 1838 (E.D. Mich, 1984) (provision inseverable but court refuses to give *Chadha* retroactive effect). Those cases consistent with *Hernando* include: Muller Optical Co. v. EEOC, 574 F. Supp. 946 (W.D. Tenn. 1983),*appeal docketed*, No. 83-5889 (6th Cir. Nov. 29, 1983); EEOC v. Ingersoll Johnson Steel Co., 583 F. Supp. 983 (S.D. Ind. 1984); EEOC v. Dayton Power & Light Co., 35 Fair Empl. Prac. Cas. (BNA) 401 (S.D. Ohio 1984). Similarly, the courts have also been divided on the issue of whether *Chadha* should apply retroactively to invalidate legislation which was enacted prior to that decision. In this regard, compare *Allstate*, 570 F. Supp. at 1232, with *Chrysler*, 33 Fair Empl. Prac. Cas. at 1843.

These controversies have arisen in essentially two contexts involving the Reorganization Act's legislative veto provision. That Act conferred on the President authority to reorganize executive departments and agencies subject to certain specified congressional limitations, including a "veto" by either house of Congress. Procedurally, the Act required the President to transmit any proposed reorganization plan to *both* houses, and such a plan was to become effective if neither house passed a resolution of disapproval within sixty days. 5 U.S.C. §§ 903, 906(a) (West 1977). Pursuant to the Act, President Carter prepared and submitted to Congress Reorganization Plan No.. 1 of 1978, 43 Fed. Reg. 19, 807, 92 Stat. 3871, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 9795-9800, which was designed to reorganize and expand the functions of the EEOC. Among the functions and responsibilities transferred to the EEOC were enforcement and administrative authority for the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 (West 1977), and the Equal Pay Act (EPA), 29 U.S.C. § 206(d) (West 1977), both of which had previously been enforced by the Secretary of Labor. Since neither house passed a resolution of disapproval, the entire plan, including its transfer of enforcement authority over the ADEA and the EPA, became effective.

The cases cited above are representative of the following scenario: The EEOC brings an action charging a violation of either the ADEA (*see, e.g., CBS*) or the EPA (*see, e.g., Hernando*). The defendant will seek dismissal of the suit on the basis that the transfer of enforcement authority to the EEOC under Reorganization Plan No. 1 was invalid because the legislative veto provision in the Reorganization Act is unconstitutional. In addition, the defendant will maintain that the veto provision is inseverable from the balance of the Act and, thus, that the entire Act is invalid; that the transfer of enforcement authority to the EEOC pursuant to the Act is therefore invalid; and that, as a result, the EEOC was without authority to enforce either the ADEA or the EPA. As mentioned above, the questions raised by these actions involve primarily the issue of severability, and also whether *Chadha* should be applied retroac-

Equal Employment Opportunity Commission v. Allstate Insurance Co., invalidated the Reorganization Act of 1977[151] because of the legislative veto in that statute. In *Allstate*, the Equal Employment Opportunity Commission (EEOC) sought to enforce the Equal Pay Act[152] against Allstate Insurance Company pursuant to legislation enacted under the Reorganization Act. Allstate motioned for summary judgment arguing that the unconstitutional legislative veto provision invalidated the entire act and thus the EEOC had no authority to enforce the Equal Pay Act.[153] The court granted the motion and found the one-House veto provision unconstitutional under *Chadha*, stating that "*[a]ny* use of a legislative veto scheme which has the effect of enacting laws without complying with the Constitutional prescription for legislation is unconstitutional."[154] Because all veto provisions, by design, avoid presentment, the district court's

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tively to invalidate the transfer of authority. To date, the United States Supreme Court has not decided either of these issues. *See infra* note 154.

151. 5 U.S.C. §§ 901-912 (West 1977).

152. 29 U.S.C.A. § 206 (West 1978). The Equal Pay Act legislates certain labor standards, such as minimum wages.

153. *Allstate*, 570 F. Supp. at 1226-27.

154. *Id.* at 1228 (emphasis added). *See infra* notes 184-88 and accompanying text.

The EEOC's direct appeal to the United States Supreme Court was dismissed for lack of appellate jurisdiction under 28 U.S.C. § 1252 (1983). However, Chief Justice Burger, the author of the *Chadha* opinion, dissented to the dismissal in an opinion joined by Justice O'Connor. In that dissent, the Chief Justice took issue with the dismissal in light of the substantive issues he felt existed in this controversy. After a rather lengthy review of the case's procedural history, the Chief Justice disclosed the reason for his disagreement with the Court. Essentially, the issue concerned whether the EEOC was challenging just the relief ordered by the district court, the district court's holding that the legislative veto provision is unconstitutional, or the district court's holding that the *entire* Act is unconstitutional. The Court concluded that the EEOC was only appealing the relief ordered by the district court, and thus under the authority of Heckler v. Edwards, 104 S. Ct. 1532 (1984), refused to exercise appellate jurisdiction. On the other hand, the Chief Justice felt that the EEOC was "necessarily challenging the constitutional holding", and to that extent the Court was obliged to hear the appeal pursuant to § 1252. 104 S. Ct. at 3501 (Burger, C.J., dissenting). As noted above, the Court's result was particularly distressing to the Chief Justice because of the substantive issues presented by the case:

> There is the question whether the District Court was correct in its finding that the legislative veto provision is [in]severable. There apparently are also lingering questions after *Chadha* on what a court is to do once it finds a legislative veto provision unconstitutional and [in]severable. Finally, there are the substantial questions whether *Chadha* should be applied retroactively . . . .

104 S. Ct. at 3502 (Burger, C.J., dissenting).

This dismissal and Burger's dissent are interesting for two reasons. First, there are several indications in the dissenting opinion that the Chief Justice was disturbed by the district court's application of *Chadha*. Secondly, though, there appears to be a general unwillingness on the part of a majority of the Court to elaborate on what it regards as a proper application of *Chadha*.

holding suggests that all veto provisions, including section 5(c) of the War Powers Resolution, are *per se* invalid.

The constitutionality of section 5(c) is further threatened by the Supreme Court's affirmance of *Consumers Union v. Federal Trade Commission*.[155] Based on an analysis similar to that used by the *Chadha* Court, the District of Columbia Circuit Court of Appeals invalidated the *two-House* legislative veto provision of the Federal Trade Commission Improvements Act of 1980.[156] Again, the basis for the court's holding was that although the two-House veto meets bicameralism requirements, it clearly does not meet the Presentment Clause mandates of the Constitution.[157] This is the crux of the *Chadha* decision: by their very nature, legislative vetoes will fail to satisfy the Constitution's requirement that all legislation be presented to the President in observance of his veto power. Any possibility that the Court may deviate from adherence to the requirements of the Presentment Clause is precluded by the strict language set forth in *Chadha*. As the Court asserts, "[t]o preserve those checks [on each branch], and maintain the separation of powers, the carefully defined limits on the power of each Branch *must not be eroded*."[158] Exceptions to the Presentment Clause requirements would certainly lead to an "erosion" of the limits Congress must observe when legislating.

Concluding that *Chadha* makes presentment an absolute requirement of the legislative process, it must now be shown that Congress, through its section 5(c) action, is bound by these legislative requirements.[159] This analysis begins with the presumption that when Congress purports to act under section 5(c) it is "acting within its assigned sphere."[160] The application of this presumption depends on whether action taken pursuant to section 5(c) " 'contain[s] matter which is properly to be regarded as legislative in its character and

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155. 691 F.2d 575 (D.C. Cir. 1982) (en banc), *aff'd mem. sub nom.* United States Senate v. FTC, 103 S. Ct. 3556 (1983).

156. 15 U.S.C. § 57a-1(a) (Supp. IV 1980).

157. *See* 103 S. Ct. at 2808 n.23 (White, J., dissenting) (discussion of two-House veto).

158. *Id.* at 2787 (emphasis added).

159. In an action involving the presence of a legislative veto, an issue might arise as to whether the veto actually has to be exercised, or whether it is unconstitutional in its dormant state. That issue did arise in *EEOC v. Allstate Ins. Co. See supra* note 150 and accompanying text. There the court concluded "that a retained one-house veto is unconstitutional even when not exercised." 570 F. Supp. at 1229. *See also* Dorchester Gas Producing Co. v. U.S. Dep't of Energy, 582 F. Supp. 927, 936 (N.D. Tex. 1983). The issue in *Dorchester* has been certified to the Temporary Emergency Court of Appeals.

160. 103 S. Ct. at 2784.

effect' ".[161] If the action does not contain such matter it is not an exercise of legislative power, and thus *Chadha* would be inapplicable, and the veto provisions would be valid. To determine the contents of a particular legislative veto action, and examination of the effects of the action must be made to ascertain whether the alleged action results in an altering of "the legal rights, duties and relations of persons" outside the legislative branch.[162]

Arguably, sufficient alteration can be found in several forms as a result of section 5(c) action. First, action taken pursuant to section 5(c) would alter the President's legal rights, duties and relations as they bear on his constitutionally-prescribed power as commander-in-chief of the armed forces, by compelling him to withdraw already-committed troops.[163] In addition, because section 5(c) action requires a recall of forces already engaged in hostilities the legal status of the United States may be affected, for example, by the forced violation of a treaty with a foreign country.[164] Lastly, compulsory withdrawal may alter the legal status of soldiers or other military personnel involved in the conflict. Hence, because action taken pursuant to section 5(c) would result in the alteration—outside the legislative branch—of someone's legal status, such action is essentially legislative in its purpose and effect.

A finding that veto action is legislative would be enough under *Chadha* to invalidate the veto. Because the concurrent resolution directing withdrawal is legislative in effect, the mechanism that allows for this action, the veto itself, should be regarded as an effort to pass legislation without going through the legislative process. Additional support is available confirming the legislative character of section 5(c). For example, absent the veto provision, in order for Congress to direct the President to withdraw engaged troops it would require properly enacted legislation, that is, legislation passed by both Houses of Congress and presented to the President. Moreover, to the extent that such action is viewed as an alteration of the President's constitutional powers, it would require nothing short of a constitu-

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161. *Id.* (quoting S. REP. No. 1335, 54th Cong., 2d Sess. 8 (1897)).

162. *Id.*

163. Indeed, Turner suggests that § 5(c), by providing for the alteration of the President's constitutional powers, attempts to achieve by concurrent resolution what cannot even be achieved by statute. R. TURNER, *supra* note 12, at 108.

164. *See* 50 U.S.C. § 1547(a)(2) (1976 & Supp. V 1981). The War Powers Resolution provides that treaties shall not be interpreted as authorizing the introduction of armed forces into hostilities unless the treaty has been implemented by legislation specifically authorizing such introduction. This provision, in itself, would seem to have the effect of altering existing treaties.

tional amendment.[165] Clearly the legislative character of the two-house veto presented here is substantiated "by the character of the Congressional action it supplants."[166]

Similarly, to verify its finding of legislation under section 244 (c)(2) of the Immigration and Nationality Act, the *Chadha* Court analyzed the nature of the decision implemented through the veto. In particular, the Court found it significant that the congressional policy determinations resulting in the original delegation of power to the Attorney General were not so different from those arrived at to effect Chadha's deportation. The Court concluded that since the former required proper legislative enactment, so should the latter.[167] Section 5(c) of the War Powers Resolution differs from the Immigration and Nationality Act in that its veto provision is not a device for reviewing *previously delegated* power. Rather, the presidential powers affected by section 5(c) arise from the Constitution.[168] Again, the inescapable result is that action under section 5(c) requires *at least* properly enacted legislation. To the extent that the War Powers Resolution was enacted through the constitutionally-prescribed legislative process, determinations made under the Resolution, such as those provided for by section 5(c), require nothing less. Consequently, section 5(c) is unconstitutional under *Chadha*. The effect this finding will have on the War Powers Resolution itself depends on whether or not the section is severable, an issue to be discussed later.

B. *Constitutionality of Section 5(b): The Silent Veto*

Section 5(b) has been the subject of perhaps even more debate and criticism than the concurrent resolution provision.[169] The silent veto provision is often viewed as a device that "would deprive the president of his constitutional authority as commander-in-chief during a period of hostilities after a period of sixty days if the Congress remained silent on the matter."[170] What opponents of the provision find particularly objectionable is that Congress is able to effect major

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165. *See supra* note 163 and accompanying text. *See also* Moore, *Rethinking the "War Powers" Gambit*, Wall St. J., Oct. 27, 1983, § 1, at 30, col. 3.

166. 103 S. Ct. at 2785.

167. *Id.* at 2785-86.

168. *See supra* notes 74 & 163.

169. *See, e.g., House Debates, supra* note 20, at 21,202. *See also* R. TURNER, *supra* note 12, at 13 and 107.

170. R. TURNER, *supra* note 12, at 107. The President does have an additional thirty days to exercise his commander-in-chief powers if he is protecting the U.S. troops in the process of withdrawal from hostilities. 50 U.S.C. § 1544(b) (1976 & Supp. V 1981).

policy determinations without exercising its powers in any affirmative way.[171] However, proponents of the provision argue that by imposing the sixty-day limitation on U. S. military involvement, section 5(b) serves to encourage Congress and the President to act together in a timely manner.[172] Although the provision certainly forces some action within a timely manner,[173] it is not at all clear that such action will be the result of cooperation. What is clear, though, is that Congress "profits" by indecision. If at the end of sixty days no agreement has been reached or Congress has simply failed to act, the presidentially-introduced troops are subject to recall.

In addition to the controversy surrounding the *content* of section 5(b). *Chadha* raises issues regarding the provision's *form*. As noted earlier, *Chadha* has been perceived to hold as *per se* unconstitutional all forms of the legislative veto.[174] To this extent, depending on the outcome of the severability analysis, the validity of statutes may turn on how a particular provision is characterized.[175] Section 5(b) is clearly not, on its face, typical of a legislative veto provision.[176] However, it has been characterized as a "silent veto."[177] This label, accurate or not, denotes the fact that section 5(b) has attributes similar to those found in standard legislative veto provisions. Indeed, a directive requiring the President to withdraw troops is authorized under section 5(b) by congressional silence; without that section this directive would require properly enacted legislation. If this inaction is tantamount to legislation, the same *Chadha* test and analysis used to invalidate section 5(c) would also apply to section 5(b). Hence, section 5(b) is also unconstitutional. The result is the same because the veto in each section allows Congress to direct Executive action. Section 5(c) permits an order of withdrawal through affirmative action, while section 5(b) can force a recall through silence.

Despite the difficulties in characterizing section 5(b), the provision's invalidity can still be established by looking to the results of action taken under that section, and comparing them with the results contemplated by section 5(c). As one commentator observes, "[i]f the

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171. *See* Cruden, *supra* note 10, at 108.

172. *Id.*

173. *See* R. TURNER, *supra* note 12, at 110. *See also supra* note 57.

174. *See supra* note 148 and accompanying text.

175. Assuming that § 5(c) is unconstitutional, characterizing § 5(b) as a legislative veto is not crucial to an invalidation of the War Powers Resolution. *See infra* text accompanying note 180.

176. *See supra* note 4 and accompanying text.

177. *See supra* note 59 and accompanying text. *See also* R. TURNER, *supra* note 12, at 108.

concurrent resolution, an affirmative action by Congress, is an unconstitutional circumvention of the President's legislative authority, this 'silent' veto is *a fortiori* illegal . . . Congress cannot accomplish by inaction more than can be achieved by the constitutionally established legislative process of affirmative action."[178] The Supreme Court expressed similar sentiment in the *Chadha* decision. Although not referring specifically to section 5(b)'s silent veto provision, the essence of the Court's conclusion applies squarely to that section: "[t]o allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with article I."[179] In short, the congressional action prescribed by section 5(b) is inconsistent with the strict mandates of the Constitution as recently revived and laid down in the *Chadha* opinion.

Because section 5(b) would appear to be invalid under both a legislative veto and non-legislative veto characterization, the inability to conclusively classify it as a legislative veto does not hinder a severability analysis. The severability criteria utilized by the *Chadha* Court apply to unconstitutional provisions in general, not just legislative veto provisions.[180] In addition, since section 5(c) is clearly an unconstitutional legislative veto, finding that section inseverable would invalidate the entire act.[181]

C. *Severability: The Final Test*

1. *First Prong of* Champlin

The important issue left open by *Chadha* with respect to existing statutes containing legislative veto provisions is severability. If veto provisions are found to be inseverable, the entire act in which

178. Cruden, *supra* note 10, at 108. *See also* Moore, *supra* note 165, at col. 4 ("If it is unconstitutional for Congress to seek to act by simple majority vote of both Houses, does this not raise, at least, serious questions about a procedure that purports to terminate the commitment of forces abroad by congressional silence?").

179. 103 S. Ct. at 2788 n.22. In context, the Court was pointing out the fallacy in Justice White's argument that when the Attorney General reached his decision to suspend Chadha's deportation, the decision was merely a proposal for legislation and that through a failure to veto, Congress would be satisfying the requirements of bicameral approval. The error in this reasoning, as the Court asserts, is that if Justice White's argument is true, then through silence Congress is essentially enacting (by approval) these Executive proposals into law. *Id.* In short, silence would amount to an enactment of legislation, which is exactly what § 5(b) of the War Powers Resolution purports to do.

180. 103 S. Ct. at 2774.

181. *See supra* note 175.

they are included will be held invalid. The severability analysis employed by the *Chadha* Court is essentially the same one the Court has been applying since the late 1800's;[182] but, with a multitude of statutes now hanging in the balance it has taken on a renewed significance.

Determining whether or not an unconstitutional provision is severable from its parent-statute entails a reconstruction of the statute's legislative history. This reconstruction, while inherently ambiguous, is nevertheless essential in ascertaining whether Congress would have made a particular delegation of authority without retaining the power to veto. In addition to finding clear congressional intent expressed in the form of a severability clause, the *Chadha* Court noted that Congress was so tired of dealing with the tremendous number of deportation cases on a bill-by-bill basis that it would have delegated power to the Attorney General irrespective of its ability to retain veto power.[183] Similar reconstruction under other statutes promises to be more difficult as illustrated by the *Equal Employment Opportunity Commission v. Allstate Insurance Company* decision and subsequent cases.[184]

In *Allstate*,[185] the district court found that the legislative veto provision in the Reorganization Act of 1977 was inseverable, and struck down the entire act.[186] Following the *Chadha* criteria closely, the court was persuaded by both the lack of a severability clause, and the "unequivocal" intent of the Act's sponsors to retain legislative veto control over the delegation of power to the President.[187] These factors evidenced that the veto provision was an "integral and insep-

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182. Field v. Clark, 143 U.S. 649, 695-96 (1891).

183. 103 S. Ct. at 2775.

184. *See supra* note 150. As some observers noted in the aftermath of *Chadha*, "future severability litigation is virtually certain given the discrete nature of the issues and the flexibility inherent in reconstructing the legislative intent of a past Congress." Rein & Stone, *Legislative Veto: Can Congress Go Back to Basics?*, LEGAL TIMES, July 25, 1983, at 40, col. 2.

The prediction by Rein & Stone has to this point been fairly well borne out in the federal courts. Besides those cases cited in note 150, *supra*, see the following: Exxon Corp. v. United States Dep't. of Energy, 744 F.2d 98 (Temp. Emer. Ct. App. 1984) (one-house veto provision in both the Emergency Petroleum Allocation Act and the Energy Policy and Conservation Act held severable); Alaska Airlines, Inc. v. Donovan, No. 84-0485, slip op. (D.D.C. May 18, 1984) (veto provision in the Airline Deregulation Act held inseverable); Allen v. Carmen, 578 F. Supp. 951 (D.D.C. 1983) (one-house veto provision in the Presidential Recordings and Materials Preservation Act held severable).

185. 570 F. Supp. 1224 (S.D. Miss. 1983), *appeal dismissed*, 104 S. Ct. 3499 (1984). *See supra* notes 151-54 and accompanying text.

186. 570 F. Supp. at 1232.

187. *Id.*

arable part" of the Reorganization Act of 1977.[188]

The fact that section 5(c) does not represent congressional veto power over delegated authority sharpens rather than dulls the severability inquiry. It is clearly more onerous for Congress to attempt to restrict presidential war powers than it is for them to retain veto power over previously delegated authority. Thus, because Congress does not endeavor to limit delegated powers through section 5(c) by no means precludes the application of severability analysis. Section 5(c) is unconstitutional, and to that extent the validity of the War Powers Resolution rests on whether or not this section is severable.

The severability analysis enunciated by the Supreme Court in *Champlin* begins with a presumption that the affected provision is severable "unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not."[189] As applied to the War Powers Resolution, the question is whether Congress would have enacted the balance of the Resolution absent the legislative veto provision signified by section 5(c). Although the *Chadha* Court found the inclusion of a severability clause indicative of congressional intent to sever invalid provisions, such a clause does not conclusively resolve the issue. Rather, the final determination is reached by "ascertaining the intent of the lawmakers,"[190] and will "rarely turn on the presence or absence of a [severability] clause."[191] Indeed, in *Consumer Energy Council v. Federal Energy Regulatory Commission*,[192] the District of Columbia Circuit Court of Appeals, after invalidating a legislative veto, rejected inseverability arguments despite the *absence* of a severability clause.[193] At best, then, a severability clause only creates a rebuttable presumption that Congress intended the severance of invalid provisions.

The presumption of severability created by section 9[194] of the

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188. *Id.*

189. Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932).

190. Carter v. Carter Coal Co., 298 U.S. 238, 312 (1936).

191. United States v. Jackson, 390 U.S. 570, 585 n.27 (1968).

192. 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem. sub nom.*, Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983).

193. 673 F.2d at 444-45. Compare also the following two cases in which the circuit courts of appeal are divided over whether the legislative veto provision in the Reorganization Act of 1977, 5 U.S.C. § 901 (West 1977), is severable despite the absence of a severability clause. EEOC v. CBS, Inc., 743 F.2d 969, 971 (2d Cir. 1984) (provision inseverable); EEOC v. Hernando Bank, Inc., 724 F.2d 1188, 1190 (5th Cir. 1984) (provision severable). *See supra* notes 150-54.

194. 103 S. Ct. at 2794.

Section 9, a severability clause, provides in pertinent part: If any provision of this joint

War Powers Resolution is rebutted by the legislative history surrounding the enactment of the Resolution. Prior to its adoption, the Resolution[195] went through a number of versions in both Houses. The final Senate bill[196] provided for congressional action by way of a joint resolution, while the House version sought to give Congress concurrent resolution power.[197] That the House bill was the version eventually adopted is not mere coincidence. The concurrent resolution was considered a crucial element of the Resolution, and together with section 5(b), was considered the "meat of the legislation."[198]

This view is supported by an examination of the reasons given for adopting House Joint Resolution 542 and its concurrent resolution provision. As Representative Frelinghuysen observed, "the reason for the concurrent resolution was an awareness on the part of the proponents that if a joint resolution were the mechanism with which to express disapproval, the President would have to participate."[199] Thus, section 5(c) was viewed as essential to effective congressional action under the War Powers Resolution. Any other mechanism would require presidential participation, a process Congress undoubtedly recognized as incompatible with legislation that seeks to restrict presidential war powers. Interestingly, in its original form, House Joint Resolution 542, though including both sections 5(b) and 5(c), did not contain a severability clause.[200] This omission suggests either that the House of Representatives was confident in the validity of its provisions, or more likely, it felt severance of any sections would render the act ineffective. While the eventual inclusion of a severability clause tends to negate this conclusion, as noted earlier, the presence of such a clause is not dispositive of the severability issue.

There was, however, considerable debate over the constitution-

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resolution . . . is held invalid, the remainder of the . . . resolution . . . shall not be affected thereby. 50 U.S.C. § 1548 (1976 & Supp. V 1981).

195. H.R.J. Res. 542, 93d Cong., 2d Sess. (1973).

196. S. 440, 93d Cong., 2d Sess. (1973).

197. This difference between the two bills is important. As Holt notes, "the technical distinction between a bill and resolution, on the one hand, and a concurrent resolution on the other, is crucial. For practical purposes, there is no difference between a bill and a joint resolution . . . [both, as opposed to a concurrent resolution], must go through the proper legislative process." P. HOLT, *supra* note 27, at 5-6.

198. *House Debates*, *supra* note 20, at 21,208 (statement of Rep. Mitchell).

199. *Id.* at 21,206 (statement of Rep. Frelinghuysen).

200. *War Powers: Hearings Before the Subcomm. on National Security Policy and Scientific Developments of the Comm. on Foreign Affairs House of Representatives*, 93d Cong., 1st Sess. 531-32 (1973).

ality of section 5—the "Congressional Action" section.[201] Yet, the fact that the War Powers Resolution was passed with that section intact evidences the importance of the provisions embodied in that section. By passing the Resolution in this form Congress stated that the Resolution's provisions were so important to the effectiveness of the statute that it was willing to take the chance that the provisions might be found invalid. As one observer asserts, "despite fluctuations in the total number of members voting, there was a steady accretion of support for the Resolution."[202] This support was no more evident than in the House of Representatives' debates regarding House Joint Resolution 542.[203] These debates are particularly illustrative of the weight placed on sections 5(b) and 5(c) in relation to the rest of the War Powers Resolution.[204]

The prevailing sentiment during the House of Representatives' debates regarding HJR 542 is clearly expressed by Representative Mitchell, who proclaimed that: "We are here to discuss a war powers resolution, not a war courtesy resolution. The power in this resolution lies in the congressional action section. If we refuse to accept that section, we are just wasting our time."[205] In particular, Representative Findley, one of the sponsors of the bill,[206] referred to section 5(c) as the "safety valve"[207] of the Resolution. Coupled with section 5(b), the two provisions were termed the "heart"[208] of the bill. The import of these statements is clear: the provisions in section 5 were considered crucial to the War Powers Resolution, provisions which if absent, would render the Resolution ineffective. Congress recognized the need for substance in the Resolution, and thus sought to pass a bill that would "provide a means of preserving congressional authority and *augmenting congressional control* in an area that presently is not subject to effective control through Congress'

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201. *See, e.g., House Debates, supra* notes 20, at 21, 205-236.

202. P. HOLT, *supra* note 27, at 8.

203. *See supra* note 201 and accompanying text.

204. Although the statements in support of these sections are, of course, made by proponents of the Resolution, they tend to illustrate the type of arguments made in an effort to persuade opponents. In light of the fact that the Resolution passed by large margins in each House, these arguments were evidently persuasive. *See supra* note 77.

205. *House Debates, supra* note 20, at 21,209 (statement of Rep. Mitchell).

206. The court in *Allstate* noted that "although not dispositive of the intent of Congress, the statements of one of the legislation's sponsors 'deserves to be accorded substantial weight in interpreting the statute.' " 570 F. Supp. at 1231 (quoting Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976)).

207. *House Debates, supra* note 20, at 21,219 (statement of Rep. Findley).

208. *Id.* at 21,224 (statement of Rep. DuPont).

traditional oversight powers."[209]

Based on such legislative history, the conclusion is inescapable: Congress would never have enacted the War Powers Resolution absent sections 5(b) and 5(c). These provisions represent the very gist of the statute. Without them, the Resolution requires nothing more than reporting and consultation. Certainly a Congress bent on reclaiming "lost" war-making power would not have settled for such passive action. The legislative history thus rebuts the presumption of severability raised by the presence of the severability clause.

2. *Second Prong of* Champlin

The effect that removal of the invalid provisions will have on the remaining sections of the War Powers Resolution is essentially the basis for part two of the severability analysis. In the second prong, an invalid provision is also presumed severable, but only if what remains is "fully operative as a law."[210] In applying this measure to the facts of its case, the *Champlin* Court was able to elaborate on the mechanics of the test. The court suggested that the proper inquiry was whether after severance there was a "complete scheme" remaining for carrying into effect the "general rules" laid down in the affected statute.[211] The expectation is that the remaining provisions of a statute will only be considered fully operative if the statute will continue to operate as a whole, interrelated act and not just as a series of semi-operative, isolated provisions.

The express purpose of the War Powers Resolution, according to its drafters, was to "reaffirm the constitutionally given authority of Congress to declare war."[212] The Resolution itself states that its purpose is to insure that the collective judgment of both Congress and the President will apply to the introduction of U.S. forces. These objectives could only be accomplished through a carefully integrated document, including sections 5(b) and 5(c).

In the more than three years of debate preceding this document, each provision was subjected to intense scrutiny, and when each section was incorporated into the Resolution it was done with great precision. The result was a highly complex, interrelated piece of legislation. Specifically regarding sections 5(b) and 5(c), Representative

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209. *Id.* at 21,221 (statement of Rep. Findley) (emphasis added). *See supra* note 206.

210. *Champlin*, 286 U.S. at 234.

211. *Id.* at 235.

212. H.R. REP. NO. 547, 93d Cong., 1st Sess. 21 (1973) (House of Representatives conference report to accompany H.R.J. Res. 542).

DuPont stated: "[these sections are] the fulcrum which will give Congress the legislative leverage to assert its warmaking authority."[213] The obvious implication of this statement is that without these provisions, the War Powers Resolution has no "fulcrum" and thus Congress has no "leverage" with which to reaffirm its warmaking authority or even to insure that collective judgment is undertaken. Given that these two ideals are representative of the desired effect of the War Powers Resolution, without sections 5(b) and 5(c) the scheme remaining to implement this effect is far from complete.[214] Clearly, without these provisions the Resolution is merely a statutory frame, devoid of substance, and comprised of partially operative and wholly inoperative sections which, when severed from section 5, are deprived of their unity and effect. For these reasons, again the presumption of severability must fall.

V. CONCLUSION

The War Powers Resolution of 1973 is unconstitutional under the United States Supreme Court's analysis in *Immigration and Naturalization Service v. Chadha*. Section 5(c) of the Resolution, a two-House legislative veto, is unconstitutional because it essentially enacts legislation that alters the legal status of a number of individuals outside of the legislative branch, without such legislation ever being presented to the President as required by the Constitution. Section 5(b), though not a typical legislative veto provision, nonetheless has the same effect as section 5(c) and to this extent is also invalid.

Moreover, from an analysis of legislative intent, it is clear that the War Powers Resolution would not have been enacted in the absence of these two provisions. To be sure, Congress recognized that without sections 5(b) and 5(c) the Resolution would be ineffective for its intended purposes. Despite the presence of the severability clause, the legislative history of the Resolution clearly illustrates that Congress considered these sections to be an integral part of the statute

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213. *House Debates*, *supra* note 20, at 21,224 (statement of Rep. DuPont).

214. In addition, a number of the other provisions of the Resolution are cross-referenced to §§ 5(b) and 5(c), and those sections are in turn cross-referenced to other sections. *See* 50 U.S.C. §§ 1544-1546 (1976 & Supp. V 1981). Clearly, severance of §§ 5(b) and 5(c) would have a tremendous impact on these referenced sections, rendering some of them nugatory.

In Note, *Severability of Legislative Veto Provisions: A Policy Analysis*, 97 HARV. L. REV. 1182, 1188-89 (1984), the author argues that removal of the veto provision in the War Powers Resolution (§ 5(c)) "would leave intact a system of limitations on presidential power." As a primary example of such limitations, the author cites § 5(b). However, as this comment points out, § 5(b) is as much a legislative veto provision as § 5(c), and clearly cannot withstand the *Chadha* analysis.

and intended them to be inseverable. Pursuant to these findings, the entire War Powers Resolution must be held unconstitutional.

Robert A. Weikert

APPENDIX

Public Law 93-148

93rd Congress, H. J. Res. 542

November 7, 1973

JOINT RESOLUTION

Concerning the war powers of Congress and the President

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

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 Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

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

CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTION OR BILL

SEC. 6. (a) Any joint resolution or bill introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 5(b). The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar 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 provi-

sion 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.

CARL ALBERT

Speaker of the House of Representatives.

JAMES O. EASTLAND

President of the Senate pro tempore.

IN THE HOUSE OF REPRESENTATIVES, U.S.,

November 7, 1973.

The House of Representatives having proceeded to reconsider the resolution (H.J. Res. 542) entitled "Joint resolution concerning the war powers of Congress and the President", returned by the President of the United States with his objections, to the House of Representatives, in which it originated, it was

Resolved, That the said resolution pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

W. PAT JENNINGS

Clerk.

I certify that this Joint Resolution originated in the House of Representatives.

W. PAT JENNINGS

Clerk.

IN THE SENATE OF THE UNITED STATES

November 7, 1973.

The Senate having proceeded to reconsider the joint resolution (H.J. Res. 542) entitled "Joint resolution concerning the war powers of Congress and the President", returned by the President of the United States with his objections to the House of Representatives, in which it originated, it was

Resolved, That the said joint resolution pass, two-thirds of the Senators present having voted in the affirmative.

Attest:

FRANCIS R. VALEO

Secretary

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 93-287 (Comm. on Foreign Affairs) and No. 93-547 (Comm. of Conference).
SENATE REPORT No. 93-220 accompanying S. 440 (Comm. on Foreign Relations).
CONGRESSIONAL RECORD, Vol. 119 (1973):
June 25, July 18, considered and passed House.
July 18 - 20, considered and passed Senate, amended, in lieu of S. 440.
Oct. 10, Senate agreed to conference report.
Oct. 12, House agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 9, No. 43:
Oct. 24, vetoed; Presidential message.
CONGRESSIONAL RECORD, Vol. 119 (1973):
Nov. 7, House and Senate overrode veto.