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Curbing The Dog of War:The War Powers Resolution

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We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.

—Thomas Jefferson

INTRODUCTION

America's long involvement in Vietnam marked the unhappy climax of a steady growth of independent presidential power to commit American forces to combat. Neither congressional nor public opposition proved capable of forcing an end to United States involvement in that conflict. Consequently, Congress felt compelled to assert greater control over future United States military involvements. In 1973, over President Nixon's veto, the War Powers Resolution was enacted.[1]

This article will develop a theory of the constitutional allocation of the war power and apply it to the provisions of the War Powers Resolution. Examination of the constitutional text and analysis of the respective

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1. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

powers of the President and Congress will suggest the division of all United States military activity into three categories: "peacetime deployments," "war threatening actions," and "acts of war." It will be shown that military actions in the first category are controlled exclusively by the President, in the second are controlled both by the President and by Congress through political interaction, and in the third are implemented by the President but require congressional authorization to be constitutionally valid. With respect to those uses of force requiring congressional authorization, three types of authorization will be distinguished — express, implied, and presumed — each of which may in specified circumstances satisfy the constitutional requirement that Congress authorize acts of war. Finally, this constitutional theory will be applied to the provisions of the War Powers Resolution. While it will be demonstrated that the Resolution suffers from a number of constitutional infirmities, it will also be shown that certain aspects of the Resolution legitimately enhance Congress' ability to control war.

THE CONSTITUTIONAL SETTING

Despite the extensive treatment which the allocation of the war power receives in the Constitution,[2] the complete constitutional scheme for that allocation is difficult to discern. Congress is expressly entrusted with the power to declare war[3] and to establish and maintain the armed forces,[4] and courts and commentators alike have taken this to mean that war must have some form of congressional authorization to be constitutionally valid.[5] On the other hand, the President as Commander-

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2. For a compendium of the various constitutional provisions relating to the war power, see the appendix to the district court's opinion in Orlando v. Laird, 317 F. Supp. 1013, 1020–21 (E.D.N.Y. 1970).

3. U.S. CONST. art. I, § 8, cl. 11. Note that this clause of the Constitution includes within congressional control the lesser forms of combat which are authorized by means of "Letters of Marque and Reprisal."

4. U.S. CONST. art. I, § 8, cls. 1, 12, 13, 15. Note not only Congress' power to provide for an army and navy, but also its analogous power to put the states' militia at the command of the President in cases of national emergency.

5. Although many commentators during the Vietnam era disputed this assertion, *see, e.g.*, Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEXAS L. REV. 833 (1972); Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19 (Special Issue 1970), few, if any, courts have taken seriously the idea that Congress need not authorize war. *See, e.g.*, Mitchell v. Laird, 488 F.2d 611, 614 (D.C. Cir. 1973); DeCosta v. Laird, 471 F.2d 1146, 1156 (2d Cir. 1973); Orlando v. Laird, 317 F. Supp. 1013, 1018 (E.D.N.Y. 1970). This issue thus seems resolved. For an extensive analysis of it, *see* Note, *Congress, The President, and The Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968).

in-Chief has actual command of the armed forces[6] and is thereby effectively empowered to order without congressional authorization military actions which might threaten or even provoke war. In their logical extension, therefore, the powers of Congress and of the President appear to conflict. This article will demonstrate, however, that this apparent conflict results not in clashes of authority which are beyond resolution but in a mutual limitation of the respective powers of Congress and the President.

The General Scheme

Since only Congress can authorize United States participation in war, a threshold task is to ascertain the meaning of "war" as a constitutional term of art. The cases which have explored the issue have concluded that "war" means different things in different contexts.[7] Only a few early courts addressed this definitional question in the context of determining the constitutionality of a particular use of force. These courts defined war in very sweeping terms,[8] including within its ambit, for example, the limited naval skirmishes between the United States and France from 1798 to 1800.[9] This broad approach resulted from a formalistic view of warfare which recognized relatively few modes of international conflict,[10] a view inadequate to comprehend the variety of modern uses of armed force.[11]

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6. U.S. CONST. art. II, § 2. Note that the armed forces assigned to the President's tactical command include the militia of the states when they are called into the nation's service.

7. For a good summary of the various contexts in which war has been defined see Note, *supra* note 5.

8. *E.g.*, Prize Cases, 67 U.S. (2 Black) 635, 666 (1862) ("War has been well defined to be, 'that state in which a nation prosecutes its right by force.' "); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40 (1800) ("[E]very contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war.").

9. *E.g.*, Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).

10. *See* Note, *supra* note 5, at 1774. *Compare with* Johnson v. Eisentrager, 339 U.S. 763, 772 (1950).

11. As early as 1853, a significant naval force consisting of four men-of-war was used to "encourage" the Japanese to negotiate a commercial treaty with the United States. American troops were very active in China and the Philippines at the turn of the century, insuring that United States trade interests were protected. And throughout the twentieth century the Marines have played varying roles in "stabilizing" Latin America, at one point fighting Communist-backed insurgents in Nicaragua for over seven years, from 1926 through 1933.

More recently, Presidents have felt free to use shows of force to dissuade political or military actions inimical to American interests. In 1961, President Kennedy ordered the Navy to take positions just off the coast of the Dominican Republic in order to discourage

A more limited concept of "war" emerges from the extensive litigation surrounding United States involvement in Vietnam. The courts which reviewed the Vietnam conflict held that it was a "war" in the constitutional sense,[12] but they did so only because that conflict exhibited two characteristics: first, the size and duration of the United States military commitment was great,[13] and second, the United States military activity was directed against a foreign nation.[14]

These two characteristics of the Vietnam conflict provide a starting point for defining "war" generally. For convenience sake, the size and duration of a military action will be referred to as its "magnitude" and the degree to which a military action is directed against the interests of another nation will be referred to as its "political content."[15]

The first of these two characteristics — the magnitude of commitment — was the focus of extensive treatment by the courts,[16] and needs no further explanation. The second — the political content of the commitment — was not expressly referred to by most Vietnam courts, but is implicit in their decisions given the recognized nature of the military

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the brothers of the late dictator Rafael Trujillo from staging a coup. Six years later, in 1967, President Johnson stationed a large task force within fifty miles of the Syrian coast for the purpose of discouraging Soviet intervention in the Arab-Israeli War. *See War Without Declaration, A Chronological List of 199 U.S. Military Hostilities Abroad Without a Declaration of War, 1796–1972,* 119 CONG. REC. S14174, S14178–S14181 (July 20, 1973) [hereinafter *War Without Declaration*].

12. *See, e.g.,* Mitchell v. Laird, 488 F.2d 611, 614 (D.C. Cir. 1973); DeCosta v. Laird, 471 F.2d 1146, 1156 (2d Cir. 1973); Orlando v. Laird, 317 F. Supp. 1013, 1018 (E.D.N.Y. 1970). A few courts declined to determine whether war actually existed, holding that issue to be essentially a political question. *See* Massachusetts v. Laird, 451 F.2d 26, 33 (1st Cir. 1971); Velvel v. Johnson, 287 F. Supp. 846, 852 (D. Kan. 1968).

13. *See* note 16 *infra.*

14. Although United States military actions in Vietnam were characterized initially as assistance to South Vietnam, they were nevertheless directed against the Viet Cong and the North Vietnamese. *See* notes 17 and 18 *infra.* Generally, a use of force for the benefit of one government or political entity will be at the same time directed against the interests of another.

15. The word nation is used loosely here. It should be construed to include not only established governments but also insurgent groups. Thus military actions directed against revolutionary forces could have a "political content" similar to actions directed against an established government. Generally, "political content" echoes, though it does not depend for its validity upon, the distinction in international law between humanitarian and other interventions. *See* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (R. Lillich ed. 1973).

16. *E.g.,* Mitchell v. Laird, 488 F.2d 611, 614 (D.C. Cir. 1973) (magnitude and duration of hostilities); Berk v. Laird, 429 F.2d 302, 305 (2d Cir. 1970) (prolonged military activity); Orlando v. Laird, 317 F. Supp. 1013, 1018 (E.D.N.Y. 1970) (magnitude in size and duration); Berk v. Laird, 317 F. Supp. 715, 718 (E.D.N.Y. 1970) (number of men, number killed and wounded, amount of equipment and money expended).

activity there in question.[17] It is necessary to consider political content for an adequate definition of war because magnitude alone is insufficient. Large-scale military activity may be essentially peaceful while small-scale military activity may constitute war. For example, United States troop presence in Western Europe and United States naval presence throughout the world both involve large-scale prolonged commitments of men and materials but neither constitute war. Conversely, a single aircraft bombing raid on a foreign capital or a single battalion invasion of a small nation for the purpose of territorial expansion would involve a relatively small-scale use of force but would be so hostile as clearly to constitute war.

This attempt to define war in terms of magnitude and political content is supported both by the intent of the Framers of the Constitution and by the practical realities of representative government.[18] It was the intent of the Framers that massive economic and physical sacrifice by the nation in a military conflict be possible only with the approval of Congress, the branch of government most broadly representative of the will of the people,[19] and it can be inferred that it was similarly their intent that the drastic moral and legal consequences of hostile action by the United States against another nation require the broad based support of congressional approval.[20] In terms of the practical needs of representative government, a costly and bitter struggle cannot be waged

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17. *See, e.g.,* DeCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973), where the military action reviewed by the court was the mining of Haiphong harbor. In addition, American courts which have defined "war" as a contest between sovereigns or between political entities implicitly recognize the significance of "political content." Prize Cases, 67 U.S. (2 Black) 635 (1862); Lewis v. Ludwick, 46 Tenn. (6 Cold.) 368, 373 (1869); Brown v. Hiatt, 4 F. Cas. 384, 388 (1870); Taffs v. U.S., 208 F.2d 329, 331 (8th Cir. 1953); U.S. v. Bortlik, 122 F. Supp. 225, 227 (D. Pa. 1954); Commercial Cable Co. v. Burleson, 255 F. 99, 105 (S.D.N.Y. 1919); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40 (1800).

18. *See, e.g.,* Note, *supra* note 5, at 1775.

19. *See* 2 M. FARRAND, THE FRAMING OF THE CONSTITUTION 318–19 (2d ed. 1937), where the Convention debated vesting Congress with the power to declare war. Although the debate was very brief, the comments of the Framers in combination with the easy passage of the Declare Clause make it plain that the Convention wanted to keep the power to initiate wars as close to the people as possible. Indeed, Thomas Jefferson wrote to James Madison after the Convention, saying, "We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay." 15 PAPERS OF JEFFERSON 397 (J. Boyd ed. 1955). Note also the comments of Alexander Hamilton, the leading advocate of executive power, where he argued that only Congress should have the power to initiate war. VII A. HAMILTON, WORKS 745–48 (J. Hamilton ed. 1801), *quoted in* Note, *The War-Making Powers: The Intentions of the Framers in the Light of Parliamentary History,* 50 B.U.L. REV. 5, 15 (Special Issue 1970).

20. *See* note 19 *supra; see also* Justice Taney's comments on the nature of the war power in Fleming v. Page, 50 U.S. (9 How.) 603, 614–15 (1850).

successfully by the government of a free society without the support of its people.[21]

While the Vietnam cases indicate the two characteristics of military activity which are critical in the constitutional definition of war, they do not establish the precise point at which a particular use of force becomes sufficiently large-scale and sufficiently threatening to another nation to be considered war.[22] Indeed, given the variety of military action and of circumstances calling for such action, specification of such a point is not possible. Uses of force do not divide neatly into those that are war and those that are not. Instead, all uses of force demonstrate some degree of both magnitude and political content. This is true of even the most innocuous military maneuver. For example, deployment of troops within the borders of the United States would certainly have some magnitude, and it equally would convey some message to the international community concerning American military or foreign policy intentions.[23] With all uses of force reflecting both magnitude and political content, it follows that peacetime deployments shade imperceptibly into actions which threaten war, and actions which threaten war shade in turn into acts of war.

Since a precise definition of war is impossible, it becomes necessary to determine how the Constitution allocates control over those uses of force which are not so large-scale and so threatening to another nation as clearly to constitute war. A partial answer to this question is provided by delineation of those military actions so far removed from war that they are within the exclusive control of the President.

As Commander-in-Chief the President has two types of command authority. The first is the authority to direct the military in time of war and the second is the authority to deploy troops during peacetime. The President's wartime command authority is beyond question[24] and thus needs no elaboration, but his peacetime command authority raises some difficult questions and will therefore be explored in detail. Although there is virtually no case law on the subject,[25] it seems clear from the

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21. *See* Note, *supra note* 5, at 1775.

22. *See* note 12 *supra.*

23. In 1865, 50,000 troops were sent to the U.S.-Mexican border to back up the protest by Secretary of State Seward of the presence of 25,000 French troops in Mexico. In February 1866, Seward demanded that a definite date for withdrawal be set and France complied. *War Without Declaration, supra* note 11, at S25068.

24. Johnson v. Eisentrager, 339 U.S. 763, 789 (1950); DeCosta v. Laird, 471 F.2d 1146, 1154 (2d Cir. 1973).

25. The only courts which even mention the President's command authority do so

text of the Constitution that the President may deploy and maneuver troops when the nation is not engaged in war. The Commander-in-Chief Clause makes no mention of war or peace, simply giving command of the nation's armed forces to the President. If the Framers had wanted to limit the President's use of force to times of war they could have done so through an express limitation such as that imposed on the States. Under the Constitution, States may only use force during times of actual invasion or "imminent danger as will not admit of delay."[26] No such explicit limitation attaches to the President's authority. Indeed, the Framers of the Constitution realized that as long as a military force exists, in peace as well as in war, some branch of government must exercise command authority over it. It was as obvious to the Framers as it is today that the President is best suited to fill that role.[27] Peacetime command of the armed forces is therefore assigned to the President by the Constitution, both with respect to standing armed forces and with respect to militia in service of the national government.[28]

It is this peacetime command authority of the President which creates the potential for conflict with the authority of Congress to control war, since a peacetime use of force might under certain circumstances threaten or even provoke war.[29] This potential is enhanced by the practice of employing peacetime maneuvering of military forces as an integral tool of foreign policy.[30] While the power over foreign affairs is nominally divided between the President and Congress,[31] the institu-

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very perfunctorily, usually with regard to wartime tactics. Johnson v. Eisentrager, 339 U.S. 763, 789 (1950); DeCosta v. Laird, 471 F.2d 1146, 1154 (2d Cir. 1973). *Compare with* Berk v. Laird, 429 F.2d 302, 305 (2d Cir. 1970).

26. U.S. CONST. art. I, § 10, cl. 3.

27. *See* 1 M. FARRAND, *supra* note 19, at 112. *See also* Hamilton, *The Federalist No. 74*, THE FEDERALIST 379 (M. Beloff ed. 1948). For modern commentary noting the advantages of executive control of the military, *see, e.g.*, Rostow, *supra* note 5.

28. U.S. CONST. art. II, § 2. *Compare with* Johnson v. Eisentrager, 339 U.S. 763 (1950); Massachusetts v. Laird, 451 F.2d 26, 32 (1st Cir. 1971).

29. It is also possible that presidential selection of wartime "tactics" could impermissibly expand the scope of an authorized war. The court in DeCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973), indicated that a radical change in character of the Vietnam War, such as indiscriminate bombing of civilians, might require separate congressional authorization. But the court rejected the plaintiff's claim that the 1972 mining of North Vietnamese harbors was such a radical escalation that it necessitated specific approval by Congress, *id.* at 1156.

30. See examples cited *supra* note 11. Some commentators have suggested that the foreign affairs powers and the war power are so integrally related that they cannot be meaningfully distinguished. *See, e.g.*, Monaghan, *supra* note 5, at 33, where the Vietnam War is seen as "an instrument of presidential foreign policy."

31. In the conduct of foreign affairs, the President is assigned a basically active role (appointing ambassadors, receiving foreign ministers and making treaties. U.S. CONST.

tional advantages of the unitary executive over the legislature produce a recognized ascendency of the President in foreign affairs.[32] Were there an unlimited presidential power to use the military as a tool of foreign policy, congressional control over war making would be rendered nugatory.[33] Since the Framers could not have intended such a result, the scope of the President's peacetime command authority must be limited by the countervailing congressional power to control war. Thus the President has exclusive control only over those military actions which in no way threaten war, actions referred to hereafter as "peacetime deployments."

It is impossible to define peacetime deployments precisely just as it is impossible to define war precisely. However, as is the case with war, the considerations of magnitude and political content indicate those military actions which without question constitute peacetime deployments. Just as large-scale military actions which threaten another nation epitomize war, small-scale apolitical actions epitomize peacetime deployments. The latter are likely to involve very limited physical and economic sacrifice and similarly limited moral and legal consequences. The purposes which would be served by congressional approval in such cases are clearly outweighed by the value of presidential control over the tactics and strategies appropriate for achieving limited apolitical objectives.

An example of a peacetime deployment might be the dispatch of a fleet to the North Atlantic for a NATO training exercise or of a detachment of troops to protect an American Embassy in Europe from terrorists.[34] Although both of these uses of force have some potential for

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art. II, §§ 2, 3) while the Congress operates to oversee and limit the President (through appropriations. U.S. CONST. art. I, §§ 1, 7, and through the requirement that the Senate ratify treaties and approve ambassadorial appointments. U.S. CONST. art. II, § 2). Congress has an independent role, of course, in the regulation of foreign commerce. U.S. CONST. art. I, § 8.

32. From the earliest stages of American history, it has been recognized that the institutional advantages of the presidency effectively insure that the President would assume primacy over the conduct of foreign affairs. *See* Remarks of Justice Marshall delivered to the House of Representatives (1800), *quoted in* United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 319 (1936). This view of the President's power has not diminished but rather grown in the context of modern times. In 1936, the Supreme Court in *Curtiss-Wright* asserted, albeit in dictum, that "the President alone has the power to speak or listen as a representative of the nation." 299 U.S. at 319. *See also* Monaghan, *supra* note 5, at 22.

33. Berk v. Laird, 429 F.2d 302, 305 (2d Cir. 1970).

34. A distinction should be made between terrorists like the Baader-Mienhoff Gang, who demonstrate no political connections, and terrorists like those of the Palestinian Liberation Organization, who have some affiliation with a recognized or extant political

confrontation and the firing of shots, they are sufficiently small-scale and apolitical to constitute peacetime deployments under the exclusive control of the President.

But few uses of the military are so clearly limited and apolitical. Most contain the seeds of broader conflict. These uses of force are neither peacetime deployments nor acts of war but instead constitute "war threatening actions." Figure I illustrates graphically these three categories of military activity.

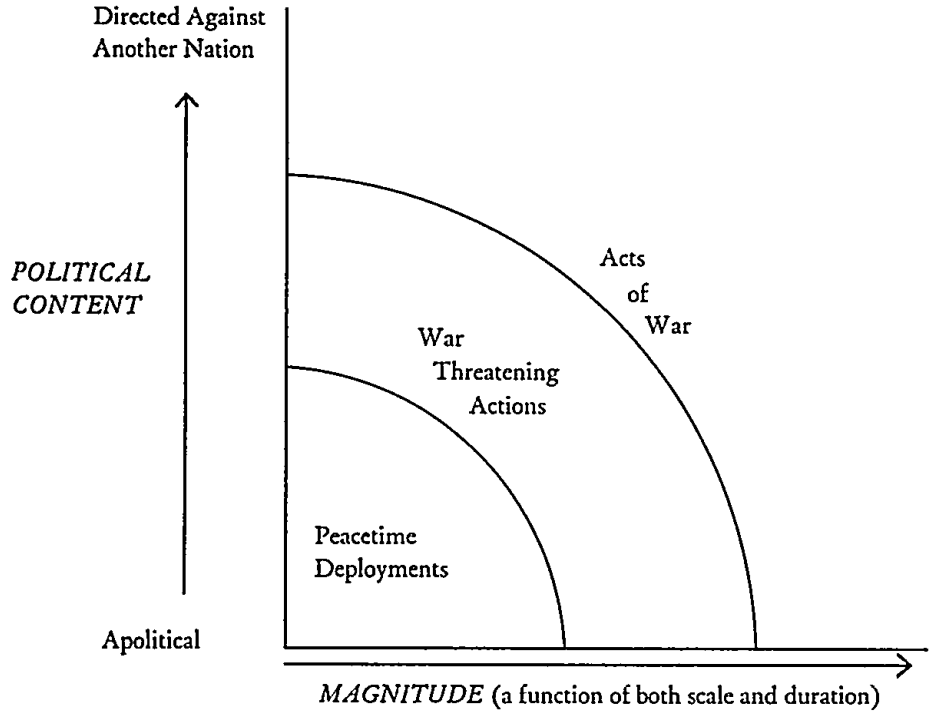

FIGURE I

The large category of military activity which constitutes "war threatening actions" includes most of the significant military activity in the past hundred years.[35] It encompasses uses of force ranging from

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group. While a military operation against the former would be virtually apolitical, a use of force against the latter could conceivably have a very high political content.

35. Of the 199 American military actions conducted without a declaration of war prior to 1973, fifty were for broad strategic aims, ranging from the protection of commerce in the Mediterranean to the forestalling of Japanese expansion into Russia after World War I. Eighty-two of these uses of force actually involved combat or ultimata, while ninety-seven lasted more than thirty days. *War Without Declaration, supra* note 11, at S14182-S14184. Most of the uses of force which were of significant dimension and thus which represented genuine threats of war occurred during the period since the

deployment of troops to a sensitive area such as the Congo in 1964,[36] through a blockade of a foreign nation like that of Cuba in 1962,[37] to situations which involve some extended hostilities as in the 1965 Dominican Republic action.[38] In short, it includes any use of force which, in today's world, has a reasonable chance of provoking war but which is not of sufficient magnitude and political content to actually be war.

Recognition of the broad category of war threatening actions necessarily poses the problem of controlling such actions. As suggested in the foregoing analysis, congressional control of war and presidential command of the armed forces are, in their logical extension, mutually incompatible.[39] Where these inconsistent aspects of the war power intersect, that is, in the control of those uses of force which are neither "acts of war" nor "peacetime deployments" the Constitution offers no principled resolution but only an invitation to political struggle.[40] As the First Circuit noted in *Massachusetts v. Laird*,[41] "the war power of the country is an amalgam of powers, some distinct and others less sharply limned."[42] Taken together these powers provide a "delicate fabric of checks and balances"[43] which serve as a framework within which the Congress and the President can test their relative political strength with regard to controlling a particular use of war threatening force.

For example, the President might justify a complete blockade of Cuba under his Commander-in-Chief, foreign affairs and general executive powers, even where there is a high probability that war will result. While the Congress cannot direct or prevent the execution of mere peacetime deployments,[44] the threat of war implicit in this blockade provides the Congress with constitutional authority to try to prevent or halt the blockade by utilizing the political means available to it, *e.g.*,

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Civil War. For example, of the fifty actions for broad strategic aims, only eleven took place before 1880. This is not surprising given the geographic extent of United States national interests in this period.

36. *Id.* at S14181.
37. *Id.*
38. *Id.*
39. *See, e.g.*, Berk v. Laird, 429 F.2d 302, 305 (2d Cir. 1970); Davi v. Laird, 318 F. Supp. 478, 483 (W.D. Va. 1970).
40. *See* Davi v. Laird, 318 F. Supp. 478, 483 (W.D. Va. 1970).
41. 451 F.2d 26 (1st Cir. 1971).
42. *Id.* at 31.
43. Davi v. Laird, 318 F. Supp. 478, 483 (W.D. Va. 1970).
44. *See* text at notes 24–34 *supra*.

selective suspension of appropriations, joint resolution or even threat of impeachment.[45] To take yet another example, if the President employed a naval show of force to deter Soviet intervention in a local conflict,[46] Congress would be well within its constitutional power to use similar means to bring to an end this show of force as long as there was a reasonable chance that the deployment would lead to war.

This concept, which leaves to political struggle the determination of the particular outcome in an area of shared power, is not a novel one. It is most forcefully articulated in Justice Jackson's classic analytic approach to executive power in *Youngstown Sheet & Tube Co. v. Sawyer*.[47] The opinion of the Court[48] is a sweeping rejection of President Truman's asserted power to nationalize the nation's steel mills during the Korean War. Justice Jackson's concurrence, however, is more sensitive to the idea that presidential power cannot be viewed from a single perspective, but rather that its exercise can only be assessed in the context of relevant congressional action or inaction.

Justice Jackson recognized that all presidential actions must logically take place in one of three circumstances. Presidential power to take such action, he reasoned, depends on which of the three circumstances obtains in the particular case. First, when a President acts with congressional approval, either explicit or implicit, presidential power is at its height, the only limitation normally being whether the federal government as a whole is constitutionally authorized so to act.[49] Second, when a President's action is in an area in which Congress has neither granted nor denied him authority, the President must rely on his independent constitutional power to validate his action.[50] Justice Jackson here recognized that there exist certain "twilight" areas where the constitutional allocation of power between the President and Congress is imprecise or concurrent, and that in these "twilight" areas congressional inaction might as a practical matter expand the permissible scope

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45. *See* Massachusetts v. Laird, 451 F.2d 26, 33–34 (1st Cir. 1971); Orlando v. Laird, 317 F. Supp. 1013, 1018–19 (E.D.N.Y. 1970); Davi v. Laird, 318 F. Supp. 478, 483–84 (W.D. Va. 1970).

46. This is, in fact, precisely the action taken by President Johnson in the 1967 Arab-Israeli War. *See War Without Declaration, supra* note 11, at S14181.

47. 343 U.S. 579, 635–37 (1951) (Jackson, J., concurring).

48. Justice Black wrote the opinion of the Court, but his opinion was accompanied by concurring opinions from each of the Justices who formed the six to three majority.

49. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1951) (Jackson, J., concurring).

50. *Id.* at 637.

of executive authority.[51] Third, where a President's act is clearly incompatible with the express will of Congress, presidential action under this circumstance is not constitutionally valid unless it is supported solely by the President's independent power minus any authority which the Constitution allocates to Congress over the matter.[52] Justice Jackson asserted that in this category, the President's power is at its "lowest ebb." [53]

Analyzing the constitutional allocation of control over war threatening actions in terms of Justice Jackson's framework, when the President acts unilaterally to utilize war threatening force, he is acting within Justice Jackson's "twilight" area of concurrent authority, and absent congressional opposition, is constitutionally entitled to take the action.[54] If Congress responds with opposition in such a situation, that opposition will not conclusively bind the President. Rather, as Justice Jackson said, "in this area [of concurrent authority], any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." [55]

During such a "test of power" the most effective weapon which Congress can employ, and therefore the most likely to be used, is the appropriations power.[56] While war threatening actions are not constitutionally invalid merely because they lack congressional authorization,[57]

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51. *Id.*

52. *Id.* at 637–38.

53. *Id.* at 637. Justice Jackson's three categories can be applied to analyze the constitutionality of any presidential action. They are not delineations of a particular substantive allocation of constitutional authority as is the tripartite analysis of the war powers presented in this article. The two should not be confused.

54. The court in Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971), specifically reserved judgement on the issue of whether the President can validly exercise a shared war power in the face of congressional silence, holding that Congress had clearly participated in the decision to fight in Vietnam. However, it seems clear from Justice Jackson's analysis in *Youngstown* and from cases which have actually dealt with presidential acts in the face of congressional silence, that such acts are valid so long as they do not impinge on an exclusive congressional power. Of course, Justice Jackson was not dealing with a case in *Youngstown* where Congress had been silent and thus his assertions are dictum. But, for example, in United States v. Midwest Oil Co., 236 U.S. 459 (1914), the Supreme Court upheld a President's unilateral act essentially on the ground that Congress had not opposed that act.

55. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637 (1951).

56. It should be noted that in dealing with appropriations for armed forces, the Constitution contains a special provision which limits those appropriations to two years, U.S. CONST. art. I, § 8, cl. 12. This special provision has been widely read as emphasizing the intent of the Framers that Congress use the appropriations power to control executive uses of force. *See* Note, *The Appropriations Power as a Tool of Congressional Foreign Policy Making*, 50 B.U.L. REV. 34, 40 (Special Issue 1970) for a good summary of that position.

57. *See* text at notes 39–46 *supra.*

Congress can make the prosecution of such actions impossible by cutting off appropriations which support them.[58] This indirect method of proscribing war threatening uses of force may appear to be inconsistent with Congress's inability directly to order their termination, but an analysis of the two powers reveals that they are very different in their exercise and in their impact.

First, an order to stop a particular military action would be easier to draft and enact than an appropriations cut-off to accomplish the same objective. An order to halt contested activities could be phrased in general terms, leaving to the President the difficulties of actually disengaging American forces. In contrast, an appropriations limitation would have to define the specific amounts which the President could spend and the particular activities on which the money could be spent if it were to have the desired effect on the President's actions. Any less specific limitation of funds such as one which simply directed the President not to spend more money in conjunction with a particular use of force would make it impossible for the President to conduct a withdrawal. Indeed, Congress demonstrated the truth of this proposition when it expressed its opposition to the Vietnam War with its repeal of the Gulf of Tonkin Resolution in 1970, but continued to fund the war until its conclusion in 1973.[59]

The second and perhaps more important difference between the two approaches to halting war threatening military activity is that appropriation limits are subject to presidential veto whereas resolutions ordering the halt of a particular use of force are not. Thus, where the President desires to continue a specific use of war threatening force, a two-thirds majority in Congress is effectively required to limit or cut off appropriations supporting that action. If such a two-thirds majority is not attainable, Congress must either accede to the President's actions or refuse to pass any appropriations at all until a suitable compromise is arranged.[60]

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58. *See* note 45 *supra.*

59. As noted, the Constitution specifically limits appropriations for the armed forces to two years. U.S. CONST. art. I, § 8, cl. 12. The idea that this was to be an operative check on the President is borne out by the Constitutional Debates. The Framers were concerned about the danger of giving the President control of a standing army and consequently a limitation on its size was proposed. This was not, however, adopted because it was ultimately decided that the best protection against executive abuse was the limiting of appropriations. 2 M. FARRAND, *supra* note 19, at 330. Drinan v. Nixon, 364 F. Supp. 854, 862 (D. Mass. 1973), indicates that a cut-off of funding for the 1973 bombing of Cambodia could well have been a valid way to stop that action.

60. *See* DeCosta v. Laird, 448 F.2d 1368, 1369 (2d Cir. 1971). As the court in Mitchell v. Laird, 488 F.2d 611, 615 (D.C. Cir. 1973) noted, congressmen opposed to

This is the epitome of political "struggle" and highlights the difference between the direct and indirect methods of restricting uses of armed force.[61]

To summarize the constitutional scheme for allocating the war power, the Constitution assigns to the President exclusive control over peacetime deployments while requiring some form of congressional authorization for war. Neither war nor peacetime deployments are self-limiting concepts, however; thus, the power of Congress and the President clash in that broad range of military activity which is neither clearly war-making nor clearly peacetime deployments. In this middle category of war threatening actions, control is determined not according to legal formulae but by political struggle between Congress and the President.

Forms of Congressional Authorization

This analysis of the war powers began with a focus on the requirement that war receive some form of congressional authorization to be constitutionally valid. It is time now to examine the forms which congressional authorization of war can take. They are threefold: express, implied, and presumed.

Express authorization needs little elaboration. It may consist of a formal declaration of war or of a simple statutory authorization.[62] The provisions of a treaty, however, cannot constitute express authorization since only the Senate participates in treaty ratification.[63]

Implied authorization may take many forms. Virtually every court

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the war continued to vote for the appropriations supporting it simply to avoid abandoning the men engaged in combat. Congress did attempt an appropriation cut-off of the 1973 Cambodia bombing, but that was a case where sudden disengagement would not have exposed American troops to any danger. *See* Drinan v. Nixon, 364 F. Supp. 854 (D. Mass. 1973) for a summation of that congressional action.

61. *See* Drinan v. Nixon, 364 F. Supp. at 860–64 (D. Mass. 1973) for an interesting account of the political impact and resulting compromise involved in President Nixon's veto of Congress' attempt to cut off appropriations for the 1973 Cambodia bombing. By applying political pressure through this action, Congress was able to force the end of the bombing despite its inability to pass the actual appropriation measure over the President's veto.

62. *See* Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40–41, 43, 45 (1800) (holding that Congress authorized the undeclared naval "war" with France).

63. The Framers considered giving the Senate the power to declare war. 2 M. FARRAND, *supra* note 19, at 250–53, but ultimately decided that that power should be vested in the full Congress. *Id.* at 318–19. Further, it is well established that if a war were conducted under the auspices of a treaty, congressional opposition to the war would nullify the treaty authorization. *See* Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889).

that reviewed the Vietnam War took a very broad view of what constitutes adequate congressional authorization, holding that the particular method chosen is a matter for congressional discretion and that continuation of appropriations and of the selective service system was a sufficient expression of congressional approval to support the President's actions.[64] Thus, if Congress wishes to withhold authorization of a war it must do so unequivocally.

The third category of congressional authorization — presumed authorization — involves a novel approach and thus merits extended analysis. There are two types of presumed congressional authorization of war. They arise in situations which are analytically distinct and thus each deserves special attention. Both types of presumed authorization, however, derive from the fact that Congress in supplying the President with armed forces has given him the ability to respond to emergencies.

The first type of presumed congressional authorization of war arises in the event of attack or threat of imminent attack on the territory of the fifty states. Although the Framers wanted to give the Congress virtually total control over the authorization of war, they also recognized that war might well be forced on the United States by an invading enemy and that the President was far better equipped than Congress to defend against invasion.[65] Therefore, the original draft of the Constitution[66] was changed to empower Congress to "declare war" instead of

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64. *E.g.*, Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971); Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971). While it is true that the Vietnam conflict was initially approved by Congress in the Gulf of Tonkin Resolution, courts continued to hold that congressional appropriations and continuation of the selective service system constituted authorization of the war, even after the Resolution was repealed in 1970. *See* DeCosta v. Laird, 448 F.2d 1368, 1369 (2d Cir. 1971). Two courts did, however, hold that the Vietnam War was not authorized by Congress and that it was therefore unconstitutional. *See* Mitchell v. Laird, 488 F.2d 611, 615 (D.C. Cir. 1973) (holding appropriation vote not equivalent of approval of war in view of the danger to American troops which a cut-off would pose); Holtzman v. Schlesinger, 361 F. Supp. 553, 563 (E.D.N.Y. 1973), *rev'd on other grounds*, 484 F.2d 1307 (2d Cir. 1973) (holding that post peace treaty bombing in Cambodia not authorized by general Vietnam military appropriations).

65. Alexander Hamilton, perhaps the most prominent supporter of a strong executive, argued forcefully that the conduct of war, whether it was initiated by a hostile attack on the United States or was declared by Congress, was exclusively the province of the President. Hamilton, *supra* note 27, at 379–80. Under his proposed version of the Constitution, the President would have had explicit power to engage in war which was begun by another nation. 1 M. FARRAND, *supra* note 19, at 292. Even George Mason, who advocated circumscribing executive power by having a three-person executive council instead of a single executive, conceded that one of the main advantages of a unitary executive was the speed, energy and secrecy with which he could conduct war. 1 M. FARRAND, *supra* note 19, at 112.

66. The Committee of Detail submitted a first draft of the proposed Constitution in

"make war," after a debate which made it clear that the Framers intended the President to have the "power to repel sudden attacks."[67] By establishing and maintaining the armed forces during a time of peace[68] and thus subjecting them to the President's command authority,[69] the Congress can be presumed to have authorized their use in defending the territory of the United States itself. Indeed, it is hard to imagine a more appropriate or legitimate use for a standing army. No court has ever questioned such a use of force by a President, notwithstanding the absence of express or even implied congressional authorization for the specific action taken.[70]

In fact, there is much which suggests not only that congressional authorization of the defense of American soil may be presumed, but also that such a presumption is constitutionally irrebutable and that the President, as Commander-in-Chief, has a duty to act on that authorization. In the *Prize Cases,*[71] cases challenging President Lincoln's blockade of Confederate ports without express or implied congressional authorization, the Supreme Court upheld the President's action saying, "[i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force."[72] Although this language in the *Prize Cases* is dictum since the cases involved insurrection not invasion and since Congress later ratified the blockade,[73] the Court's position that a President who has been provided by Congress with armed forces[74] has a duty to defend the nation's sovereignty has constitutional roots beyond the "establish and maintain" armed forces and "Commander-in-Chief" clauses. Article IV, Section 4 (the Guarantee Clause) of the Constitution requires the United States to "protect each of [the States] against Invasion. . . ."[75] This constitutional obligation

late July, 1787. This draft incorporated the Convention's work for the first two months. According to its provisions, Congress had the power to "make war." 2 M. FARRAND, *supra* note 19, at 168.

67. *Id.* at 318.

68. *See* note 4 *supra.*

69. *See* note 6 *supra.*

70. *See, e.g.,* Prize Cases, 67 U.S. (2 Black) 635, 668 (1982), which contain perhaps the most ringing judicial endorsement of such a use of force, although arguably in dictum. Unquestioning recognition of the legitimacy of unilateral use of force by a President in defense against an attack on the United States continued through the relatively recent Vietnam cases. *See e.g.,* Mitchell v. Laird, 488 F.2d 611, 613 (D.C. Cir. 1973).

71. 67 U.S. (2 Black) 635 (1862).

72. *Id.* at 668.

73. *Id.* at 671.

74. Either in the form of a standing army or in the form of state militia activated for federal service.

75. U.S. CONST. art. IV, § 4.

of the United States obviates the need for a congressional determination of the appropriateness of war if a State is invaded. The President, as Commander-in-Chief of the armed forces provided by Congress, is constitutionally presumed to have been authorized to respond to the attack and is automatically under an obligation to determine what response to the invasion is tactically appropriate. While it is conceivable that for tactical reasons defense of a particular State might be unwise or impossible and that this obligation could not be fulfilled, it is the President, as Commander-in-Chief, not the Congress, who must make such an assessment because these decisions are clearly questions of wartime tactics. Thus the presumed authorization is irrebuttable.

This authorization of the President to defend against actual attacks on the nation naturally includes authorization to defend against the threat of imminent attack. Such an extension is clearly necessary in the technologically shrunken world of the twentieth century, but even in the early 1800's the power of the President to respond to "imminent danger of invasion" was recognized.[76] While this would not justify fighting the Communists in Vietnam to avoid fighting them in California, it would surely justify intercepting enemy bombers bound for American shores. The limiting principle here is simply that the nation must be actually under attack or about to be attacked.[77]

This irrebuttable presumption of authorization is not, of course, a license which would allow the President to respond to a border skirmish with a massive offensive invasion. The presumed authorization is based on an obligation to defend the States; while it does not require the President to halt operations at the border, neither does it allow him to go beyond those measures necessary to reestablish the nation's security.

The second presumption of congressional authorization of war arises in the event of a threat to the interests of the United States which is so grave that Congress clearly would approve of war but is unable to do so

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76. Martin v. Mott, 25 U.S. (12 Wheat.) 19, 29 (1827). This case involved a challenge by a New York militiaman to the President's power during the War of 1812 to activate the militia before the British had actually invaded. In an opinion by Justice Story, the Supreme Court held the constitutional power to repel invasions included the authority to "provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place." *Id.* at 29.

77. "About to be attacked" should, of course, be read very narrowly. It would not, for example, include a ground or naval attack on Canada or Great Britain, although it could conceivably cover a missile attack against those allies. Generally, if there is any doubt concerning the possibility of attack on the United States itself, entrance into war is not required by the Constitution, but is discretionary. Such situations give rise to the second type of presumed congressional authorization. *See* text at note 78 *infra*.

within the time available for decision. In today's world of virtually instantaneous communications and weapons delivery, threats to United States interests can easily be imagined which require immediate military response even though they do not involve attacks on the United States itself.[78] If Congress cannot act within the period required to defend the nation's interests but may safely be presumed to desire that these interests be protected by military action, if necessary, there is no reason for the President to refrain from taking the required action. However, since presidential power in this situation rests solely upon a presumption that Congress would have authorized war if time to consider the situation had been available, the presumption of authorization evaporates once Congress has had the time necessary to make an informed decision. If Congress then disapproves of the war already initiated by the President, it can compel him to terminate American participation in the conflict.[79] Thus, in contrast to the first type of presumed authorization, the presumption of authorization in grave threat situations is rebuttable.

Presumed authorization of war in grave threat situations is not explicitly recognized in the early cases which consider the war power.[80] Three early Supreme Court cases dealt with the legal status of ships captured during the early nineteenth century American-French naval conflicts and each involved an interpretation of Congress' express authorization of the hostilities. None discussed the possibility of emergency action by the President on the basis of presumed authoriza-

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78. Indeed, there has evolved in the years following World War II a theory of collective self-defense under which nations with various common national interests have united themselves against nations perceived as common enemies. *See* Note, *supra* note 5, at 1782–84. Much of this collective self-defense has been manifested in multilateral defense agreements or treaties, whereby the signatories agree to treat an attack on any party as an attack on all parties. *See* examples cited in Note, *supra* note 5, at 1782–83. While it is highly doubtful that any of these treaties could be construed as advance congressional approval of war thereby binding the United States to respond to an attack on an ally, the fact that such agreements are common suggests that both the President and the Senate at various times have agreed that certain American interests abroad are so vital to the nation's security that they merit military protection.

79. There are, to be sure, many problems with enforcing such a withdrawal order, given the foreign policy and military problems which the unauthorized use of force would itself create. *See* Mitchell v. Laird, 488 F.2d 611, 613 (D.C. Cir. 1973), holding that the issue of whether or not President Nixon's actions in Vietnam constituted withdrawal was a political question. These problems will be discussed further below. See note 154 *infra*.

80. Only five cases before 1850 actually dealt with the war power. *See* Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800); Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827); United States v. Smith, 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342).

tion.[81] One early Circuit Court opinion involving an incident in Spanish Florida does imply that the President cannot make war without express congressional authorization in any situation except an actual invasion of the United States.[82] But the case did not involve an emergency situation in which Congress was unable to act and the apparent sweeping prohibition of presumed authorization of war in such situations is merely dictum.

The failure of these early cases to recognize presumed congressional authorization of war in grave threat situations could also be explained by the fact that at the time they were decided, only an invasion could actually threaten the vital interests of the United States. However, in the modern world "the difference between safety and cataclysm can be a matter of hours or even minutes,"[83] and, not surprisingly, modern courts have recognized the possibility of a rebuttable presumption of congressional authorization, although it has never been so labelled.

The Vietnam War was, of course, the catalyst for virtually all of the modern judicial review of the war powers. By the time the first lawsuits challenging the war actually came before the courts, Americans had

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81. The question in Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800), and in Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801), was whether the United States and France were at war, thus justifying the capture of vessels under French control. The Court recognized that no formal declaration of war had been made, but held that Congress had authorized a limited war which would support the captures. There was therefore no need for the Court to consider the independent power of the President to order such seizures on the basis of presumed authorization.

Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804), on the other hand, held that the President was without authority to order the seizure of the ship there in question. However, *Little* did not involve the capture of a French vessel as a war prize, but rather concerned the seizure of what was thought to be an American ship trading with France in violation of the Non-Intervention Act. In spite of the fact that *Little* has been cited as relevant to the war power, *see, e.g.*, Rostow, *supra* note 24, at 856–57, it is really a case which circumscribes the President's power to seize American property during a national emergency. Like Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1951), which, as noted earlier, also dealt with emergency domestic seizures during wartime, *Little* actually has very little to say about the President's authority to make war in an emergency. In addition, even if *Little* had addressed the question of emergency authorization of war its objection to the President's actions was based on their violation of congressional legislation not on the absence of congressional authorization.

82. United States v. Smith, 27 F. Cas. 1192, 1230–31 (C.D.N.Y. 1806) (No. 16,342). This case has virtually no precedential value, never having been cited in any subsequent case. Further, its statements concerning war power were expressly predicated on a "manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration." *Id.* Such a dichotomy is clearly invalid in the modern world.

83. Fulbright, *American Foreign Policy in the 20th Century Under an 18th Century Constitution*, 47 CORNELL L.Q. 1, 3 (1961).

been heavily involved in the fighting for at least four years,[84] and virtually no one was maintaining that the war could be justified on the basis of presumed authorization.[85] Nevertheless, some courts have examined presumed authorization, although in a somewhat cursory manner and under the label of emergency power.[86] While not clearly defining this form of authorization, they have recognized its existence, both in its irrebuttable and rebuttable aspects.[87] A typical example is the following passage from *Mitchell v. Laird*:[88]

> Without at this point exhaustively considering all possibilities, we are unanimously of the opinion that there are some types of war which, without Congressional approval, the President may begin to wage: for example, he may respond immediately without such approval to a belligerent attack, or in a grave emergency he may, without Congressional approval, take the initiative to wage war. Otherwise the nation would be paralyzed. Before Congress could act the nation might be defeated or at least crippled. In such unusual situations necessity confers the requisite authority upon the President. Any other construction of the Constitution would make it self-destructive.[89]

It seems clear that in a world made small by modern communications and weapons technology, the multitude of circumstances which would conceivably threaten vital national security interests necessitates the recognition of a presumed though rebuttable congressional authoriza-

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84. United States military assistance to South Vietnam in the form of training and advising began almost immediately after the French withdrew in 1954. It was steadily expanded and by 1962 fully 12,000 uniformed American advisors were in Vietnam. *War Without Declaration, supra* note 11, at S14181. The earliest lawsuits challenging the war effort were not heard at the district court level until 1966, at least four years after the heavy personnel commitment commenced and fully two years after the initiation of open American involvement in combat. *E.g.*, Luftig v. McNamara, 252 F. Supp. 819 (D.D.C. 1966), *aff'd* 373 F.2d 664 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 945 (1967).

85. *But see* Department of State, *The Legality of U.S. Participation in the Defense of Vietnam*, 75 YALE L.J. 1084, 1100–01 (1966).

86. *See, e.g.*, Orlando v. Laird, 317 F. Supp. 1013, 1018 (E.D.N.Y. 1970) where the court held that the war effort clearly needed congressional approval and thus felt no necessity to determine whether the President could initiate war in any but pure defensive situations.

87. *See* Mitchell v. Laird, 488 F.2d 611, 613–14 (D.C. Cir. 1973); Massachusetts v. Laird, 451 F.2d 26, 30 (1st Cir. 1971); Drinan v. Nixon, 364 F. Supp. 854, 859 (D. Mass. 1973). *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645 (1951) (Jackson, J., concurring); United States v. Smith, 321 F. Supp. 424, 430 (C.D. Cal. 1971).

88. 488 F.2d at 613–14.

89. While the court did not specifically qualify its use of "congressional approval" as express or implied, this is because the conceptualization of emergency war power as presumptively authorized by Congress has not been heretofore articulated. This concept, although novel, accurately reflects the Constitution's allocation of the war power.

tion of the President to act in situations which defy a more specific definition than "grave emergencies."[90]

This recognition of a rebuttable presumption of authorization to make war is as dangerous as it is inevitable. The limits on the power are simply that Congress not have time to act and that the United States' interests at stake be so vital that Congress would in all probability have approved the President's actions if time had been available. These are not clear limits such as those which apply to the case of the irrebuttable presumption of authorization which can arise only in the event of an attack or imminent attack on the United States itself. Since a myriad of circumstances might require emergency action for the protection of "vital" interests, a catalog specifically defining all such circumstances is impossible to construct. Thus, Congress can rebut presumptions of authorization only by responding in an *ad hoc* manner to each situation which might call for their invocation. This has led commentators such as Professor Eugene Rostow and Senator William Fulbright to suggest that modern Presidents possess virtually limitless power to conduct war.[91]

Such a suggestion, however, overstates the President's power for two reasons. First, genuine emergencies that would justify actually making war before going to Congress for express authorization will be very rare and probably very dramatic. An example might be a sudden Soviet invasion of Western Europe. In such situations the drastic nature of the actions involved will serve to insure that the President act in good faith, making war only when he is confident of subsequent congressional support. Second, if the President should ever wrongly presume congressional authorization, Congress can quickly order him to terminate his actions since the presumption is valid only so long as Congress has been unable to act. Once Congress has expressed opposition to the President's actions his authority to continue them ceases.[92]

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90. What constitutes a "grave emergency" is, of course, very difficult to say. But the problem is not as critical as it first appears, for if the Congress disagrees with the President's assessment of a particular situation, it can order his withdrawal. *See* text at note 92 *infra.*

91. *See* Rostow, *supra* note 5; Fulbright, *supra* note 83.

92. It has been forcefully suggested by both courts and commentators that the President's institutional advantage over Congress in dealing with sensitive information provides constitutional justification for the President's continuance of war making in the face of congressional opposition. *See, e.g.,* Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948). *See also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). *See generally* Rostow, *supra* note 5; Monaghan, *supra* note 5; Fulbright, *supra* note 83. If such a contention is supported merely by the Presi-

Of course, there still remains the problem that a war once started is difficult to end.[93] That problem is not solved, however, by forbidding the President to initiate war in emergencies while at the same time entrusting the President with command of the armed forces. As long as he has the ability to order troops to war, the possibility of his abusing his power and the problem of terminating an improperly initiated war will exist. The only real check against such an abuse is a strong and vigilant Congress that makes clear to the President what it will tolerate and what it will not. This is precisely what the Congress was attempting to accomplish when it enacted the War Powers Resolution.

THE WAR POWERS RESOLUTION OF 1973

The War Powers Resolution of 1973[94] attempts to maximize Con-

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dent's greater access to this information, it loses all force at the point when Congress becomes sufficiently well informed to make a decision in a particular case of war making. Since Congress is the branch best suited to determine when it has overcome that "information gap," a good faith assertion by Congress that it has made an informed decision to terminate presidential war making should be conclusive. *See* Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 221 (1971).

If it is further argued that the inability of Congress to safeguard sensitive information justifies presidential war making based on information withheld from Congress, the analysis is different, but the result is the same. Courts have indicated that the President justifiably might withhold certain foreign affairs information from the judicial branch on a competency rationale. *E.g.*, United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973); United States v. Butenko, 494 F.2d 593, 605 (3rd Cir. 1974). *But see* Zwiebon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) (requiring prior judicial approval of foreign intelligence wiretaps). But no such rationale would support the President's withholding such information from Congress, given its constitutional role in decision-making involving military and foreign affairs. Concern over congressional handling of sensitive material is certainly well founded, an example of Congress' inability to insure continued secrecy of sensitive information being the celebrated leak by the House of Representatives of classified information related to the Central Intelligence Agency. N.Y. Times, Jan. 27, 1976, § 1, at 1, col. 6. (Even the executive branch has its problems with secrecy. One of the nation's most spectacular leaks, which originated in the executive branch, was the publication of the Pentagon Papers in June, 1971. *See* E. SHEEHAN, THE PENTAGON PAPERS ix (1971).) But this concern is insufficient to overcome the constitutional mandate for congressional control of war making. Further, in cases involving truly sensitive information, some accommodation involving disclosure of the critical data to a few selected congressional leaders would surely evolve. In the extraordinary circumstances justifying a President's unilateral use of war making force, it is almost inconceivable that Congress would order withdrawal of committed American forces if an informed congressional leadership assured the American people that such a commitment of forces was necessary.

93. *See* Mitchell v. Laird, 488 F.2d 611, 615–16 (D.C. Cir. 1973) on problems of withdrawal. *See also* Note, *supra* note 5, at 1776, on Congress' reluctance to oppose the President once hostilities have begun — the *fait accompli* problem.

94. *War Powers Resolution*, Pub. L. No. 93–148, 87 Stat. 555 (1973). The Resolution was synthesized from H.J. Res. 542, 93d Cong., 1st Sess. (1973) and S. 440, 93d Cong., 1st Sess. (1973). It is titled a resolution instead of an act in deference to the original

gress' control over United States military activity. It contains four major provisions: first, a broad definition of the military activity which it attempts to regulate; second, strict limits on presidential initiation of such activity; third, procedures for requiring the termination of such activity when not approved by Congress; and, fourth, consultation and reporting requirements to keep Congress well informed. The Resolution also contains a fifth, less important, set of provisions concerning interpretation of the Resolution, war related legislation and United States treaties. In the five sections which follow, the four major provisions and the interpretation provisions will be summarized and evaluated. The evaluation will proceed on three levels. First, the provisions will be analyzed in terms of the Constitution's allocation of power over peacetime deployments and war threatening actions. Second, insofar as they apply to war, the provisions will be evaluated in terms of the Constitution's requirement of congressional authorization of war —either express, implied, or presumed. Finally, careful attention will be given to any effect the various provisions might have on the role of the courts in deciding disputes which could arise in the war powers area.[95]

The Breadth of Coverage of the Resolution

The Resolution describes in broad terms military activity it is intended to govern:

> It is the purpose of this joint resolution . . . to insure that the collective judgment of the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.[96]

"[H]ostilities" and "situations where imminent involvement in hostilities is clearly indicated by the circumstances" are the key definitional

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House version which was designed to "elaborate" on the war powers rather than give an "itemized definition" of them. *See* H.R. REP. No. 287, 93d Cong., 1st Sess. 6 (1973). Despite its title, Congress treated the Resolution as an enactment of law in passing it over President Nixon's veto.

95. For other discussions of the Resolution *see* Note, *1973 War Powers Resolution: Congress Re-Asserts Its Warmaking Power,* LOY. CHI. L.J. 83 (1974); Statutory Comment, *The War Powers Resolution: Statutory Limitation on the Commander-in-Chief,* 11 HARV. J. LEGIS. 181 (1974).

96. War Powers Resolution, Pub. L. No. 93–148, § 2(a), 87 Stat. 555 (1973).

phrases. The breadth of these phrases turns on the meaning of the word "hostilities". The term is not defined in the Resolution itself but the Resolution's legislative history shows that "hostilities" includes both "armed conflict" and "a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict."[97] The legislative history then describes "imminent hostilities" as a situation in which there is a "clear potential" for "hostilities."[98] Thus the Resolution's key definitional phrase encompasses all military activity involving even a "clear potential" for a "state of confrontation in which there is a clear and present danger of armed conflict."

The phrase is made even more inclusive by a special provision in the Resolution elaborating the meaning of "introduction of United States Armed Forces":

> . . . the term 'introduction of United States Armed Forces' includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged in hostilities.[99]

Thus the Resolution attempts to regulate even the assignment of advisors to foreign military forces faced with merely a "clear potential" for such a "state of confrontation."

To illustrate the breadth of the Resolution's coverage in concrete terms, the following are examples of recent executive uses of force which would have been covered by the Resolution: President Eisenhower's deployment of troops to Lebanon;[100] President Kennedy's blockade of Cuba;[101] President Johnson's deployment of troops to the Dominican Republic;[102] and the initial advisory activity in Vietnam.[103] President Nixon's "incursion" into Cambodia[104] was arguably an expansion of the Vietnam War that would have merited independent regulation under the Resolution.[105] Both the rescue of the Mayaguez[106]

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97. H.R.REP. No. 287, 93d Cong., 1st Sess. 7 (1973).
98. *Id.*
99. War Powers Resolution, Pub. L. No. 93-148, § 8(c), 87 Stat. 555 (1973).
100. *See War Without Declaration, supra* note 11, at S14180.
101. *Id.* at S14181.
102. *Id.*
103. *Id.*
104. *Id.*
105. For a discussion of when a radical change in the character of war operations

and the evacuation of the Vietnamese Refugees in the Spring of 1975[107] did fall within the Resolution's coverage.

This broad coverage creates significant constitutional difficulties, particularly with regard to control of peacetime deployments and war threatening actions. As noted earlier, the critical factors in determining whether a use of force is a peacetime deployment, war threatening action or act of war are its magnitude and political content.[108] Once a particular use of force has been classified by means of these two criteria, it can then be determined if Congress can prevent or halt that use of force. Only if a use of force is of such magnitude and political content that it constitutes war does it require congressional authorization. If the use of force is merely a peacetime deployment, Congress can assert no control over it whatsoever, and, if the use of force is war threatening, Congress can control it only through political struggle with the President. Political struggle may, however, include use of the appropriations power.[109]

The War Powers Resolution, by including under its regulations all uses of force which entail armed conflict or the clear potential for it,[110] purports to impose congressional control over all three categories of military action. Peacetime deployments, despite their small scale and apolitical character, might involve a clear potential for limited armed conflict or even an actual exchange of fire.[111] War threatening actions by definition involve at least a clear potential for armed conflict. Thus, the Resolution attempts to subject some peacetime deployments and all war threatening actions to direct congressional control.

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requires special authorization, *see* Holtzman v. Schlesinger, 361 F. Supp. 553 (E.D.N.Y. 1973) *rev'd* 484 F.2d 1307 (2d Cir. 1973); DeCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973); Mottola v. Nixon, 318 F. Supp. 538, 540 (N.D. Cal. 1970) *rev'd* 464 F.2d 178 (9th Cir. 1972).

106. *See War Powers: A Test of Compliance, Hearings before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations,* 94th Cong., 1st Sess. 76–77 (1975) (President Ford's report in compliance with section 4(a)(1) of the War Powers Resolution) [hereinafter *Compliance Hearings*].

107. *Id.* at 4, 5–6, 7.

108. *See* Figure I at note 34 *supra,* and accompanying discussion.

109. These three stages of congressional power are described respectively in text at notes 7–21, 24–34, and 35–46 *supra.*

110. In the discussions below, military activity which the Resolution attempts to regulate will be described as "military activity involving armed conflict or the clear potential for it." This shorthand description is intended to convey the broad scope of the Resolution's coverage. At the same time, it is probably less inclusive than the Resolution's own wording.

111. *See* text at note 34 *supra.*

The Resolution's Initiation Provisions

The Resolution states that the President may initiate military activity involving armed conflict or the clear potential for it[112] only pursuant to: 1) a declaration of war, 2) specific statutory authorization, or 3) a national emergency created by an attack upon the United States, its territory or possessions, or its armed forces.[113] This allows the President to act without prior express congressional approval only in the event of an attack upon the United States, its territories or possessions, or its armed forces, and the attack must have created a "national emergency."

This provision poses severe constitutional problems with regard to executive use of force short of war. Since the Resolution applies to all war threatening force,[114] these criteria would, if valid, deprive the President of all power to initiate war threatening actions except in the enumerated situations. Since these situations do not exhaust the set of circumstances in which war threatening force might be used, they impermissibly intrude on the President's authority to use war threatening force without congressional authorization. Further, the initiation provisions could operate to deny the President authority to order some peacetime deployments, for, as noted earlier, peacetime deployments can sometimes come within the broad ambit of the Resolution's coverage.[115] This application of the Resolution is even more clearly unconstitutional.

The initiation provisions are also subject to constitutional attack in their attempt to regulate war. Although the Resolution's initiation provisions recognize the presumed authorization of war that arises from the direct attack situation, they attempt an exhaustive enumeration of the situations in which a rebuttable presumption of authorization might arise, *i.e.,* attacks on American territories, possessions, and troops. The Constitution, however, allows such a presumption to arise during any "grave emergency" which the President has good reason to believe would cause Congress to authorize war if it had time to consider the situation.[116] For example, if Canada were subjected to an unexpected attack by a mutual enemy, a presumption would certainly arise which

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112. As discussed in note 110 *supra,* "military activity involving armed conflict or the clear potential for it" is the shorthand phrase that will be used in these discussions to describe the range of actions which the Resolution attempts to regulate.

113. War Powers Resolution, Pub. L. No. 93–148, § 2(c), 87 Stat. 555 (1973).

114. *See* text at note 111 *supra.*

115. *Id.*

116. *See* text at note 78 *supra.*

would enable the President to assist Canada's resistance by use of war making force. The Resolution's initiation provisions bar the President from rendering such assistance save pursuant to a declaration of war or specific statutory authorization.

It is true that under the Constitution Congress can rebut the presumption arising from a grave threat situation once it has had time to evaluate that situation. After such consideration, Congress can then issue an order legally binding the President to disengage American forces.[117] However, the nature of the situations which give rise to the rebuttable presumption requires that congressional rebuttal of such presumed authorization be accomplished on an *ad hoc* basis after assessment of the circumstances of the particular situation involved.[118] It is conceivable that Congress could with regard to a particular "emergency," rebut a presumption by the President of congressional authorization to make war prior to its invocation.[119] Congress cannot, however, issue a blanket prohibition against all future presumptions of congressional authorization to engage in war during "grave emergencies." Any such blanket proscription would, in the words of the D.C. Circuit, leave the nation "paralyzed."[120] The Resolution's initiation provisions attempt, with the exception of the four enumerated authorizations, just such a blanket prohibition and are therefore unconstitutional. Indeed, the initiation provisions attempt to restrict the presumption of authorization of war in grave threat situations so severely that some members of Congress who debated the Resolution considered these provisions to be merely a preamble.[121]

Ironically, a primary effect of the initiation provisions may be to increase the power of the President, since they seem to authorize war in any national emergency created by attack on United States terri-

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117. *See* text at note 92 *supra.*

118. *See* text at notes 90–91 *supra.*

119. For example, Congress might anticipate the possibility of a flare-up in the Middle East and forbid United States military intervention in advance. This is essentially what occurred in relation to anticipated presidential action in Angola in 1976. *See* N.Y. Times, Dec. 20, 1975, at 1, col. 1; N.Y. Times, Jan. 18, 1976, at 18, col. 5; N.Y. Times Jan. 28, 1976, at 1, col. 8, for a contemporary account of the course of the struggle between the President and Congress regarding U.S.-financed covert operations in Angola.

120. *See* Mitchell v. Laird, 488 F.2d 611, 613 (D.C. Cir. 1973).

121. CONG. REC. S18,992–96 (daily ed. Oct. 10, 1973) (remarks of Senator Eagleton, D.-Mo.); *but compare id.* at S18,986 (remarks of Senator Javits, R.-N.Y.). Congress may have confirmed this preamble theory when it failed to object to President Ford's use of force to rescue Americans from Vietnam and Cambodia and to rescue the Mayaguez from its Cambodian captors. All of the incidents involved armed conflict but none had advance congressional authorization. *See Compliance Hearings, supra* note 106.

tories, possessions, or troops.[122] A shot across the bow of a PT boat could be used by the President to justify making war under such provisions.[123] While it is true that to satisfy the Resolution such an incident would have to be a "national emergency," Congress and the courts have historically deferred to a President's factual claims concerning hostile foreign actions and to his subsequent assertions of the existence of a "national emergency."[124] This pattern of deference could translate the Resolution's initiation provisions into implied authorization of almost any war effort which a President might undertake in connection with a crisis involving United States troops or possessions.[125] Indeed, several congressmen expressed opposition to the Resolution on precisely these grounds.[126]

It could be answered that the Resolution's reference to "national emergency" essentially restricts presidential war making to situations where Congress would have given its approval. In other words, the Resolution arguably does no more than recognize the rebuttable grave threat presumption in specified circumstances. This construction is bolstered by Section 8(d)(2) which declares that nothing in the Resolution should be construed to give the President any authority which he would not have had in its absence.[127]

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122. War Powers Resolution, Pub. L. No. 93–148, § 2(c)(3), 87 Stat. 555 (1973).

123. The Gulf of Tonkin Resolution was a response to alleged attacks by the North Vietnamese on two United States destroyers.

124. *See e.g.* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 29–32 (1827). An excellent contemporary example is the Gulf of Tonkin Resolution. On the basis of presidential allegations Congress described the North Vietnamese as having "deliberately and repeatedly attacked United States naval vessels lawfully present in international waters" and as having "created a serious threat to international peace." 112 CONG. REC. 1841 (1964). Congress was probably misled by the President. *See The Gulf of Tonkin, the 1964 Incidents, Hearings before the Senate Comm. on Foreign Relations,* 90th Cong., 2d Sess. (1968) (testimony of Robert S. McNamara, Secretary of Defense).

125. This arguably would be an abdication by Congress of its responsibility to control war making. *See* Velvel, *The War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable,* 16 KAN. L. REV. 449 (1968); Wormuth, *The Vietnam War: The President versus the Constitution,* in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 711 (R. Falk ed. 1969); *War Power Legislation Hearings on S. 731, S.J. Res. 18 and S.J. Res. 59 before the Senate Comm. on Foreign Relations,* 92d Cong., 1st Sess. 549, 554–55, 560–63 (1972) (testimony of Alexander M. Bickel). But the Supreme Court seems to view almost any delegation of authority by Congress to the President in the area of foreign affairs to be proper. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 324 (1936); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1951). *See also* Jones, *The President, Congress, and Foreign Relations,* 29 CALIF. L. REV. 565, 575 (1941).

126. *See* 119 CONG. REC. S18,992–94 (daily ed. Oct. 10, 1973) (remarks of Senator Eagleton, D.-Mo.); Eagleton, *A Dangerous Law,* N.Y. Times, Dec. 3, 1973 at 39, col. 3 (city ed.).

127. War Powers Resolution, Pub. L. No. 93–148, § 8(d)(2), 87 Stat. 555 (1973).

Even granting the conceptual validity of this argument, a President may, as a practical matter, find it easier to engage in war making under the explicit language of the Resolution than he would if acting pursuant to a more nebulous rebuttable presumption of authorization.[128] Consequently, fears of increased presidential power as a result of the Resolution cannot be dismissed.

In summary, the Resolution's initiation provisions state that the President can employ military force involving armed conflict or the clear potential for it without prior congressional approval only in the event of a national emergency created by an armed attack on the United States, its territories or possessions, or its armed forces. This is unconstitutional insofar as applied to peacetime deployments or war-threatening actions. The initiation provisions are also unconstitutional insofar as they are intended to negative presumed authorization of war in grave threat situations other than those involving American troops or possessions. Finally, as a practical matter, the initiation provisions dangerously increase the potential for independent presidential war making by seeming to authorize war in a large number of situations.

The Resolution's Termination Provisions

The Resolution provides for the termination of all military activity involving armed conflict or the clear potential for it after a maximum of sixty days of deliberation. It employs two termination provisions to achieve this end.

The first is the sixty day cut off provision contained in Section 5(b). If the President uses military force involving armed conflict or the clear potential for it in the absence of a declaration of war, he must report his actions to Congress within forty-eight hours.[129] If Congress has not already authorized this use of force with specific legislation and does not either enact such legislative authorization or declare war within sixty days, the President must terminate the military activity.[130] If the President certifies to Congress that he needs time to withdraw safely the armed forces he has deployed, Congress can give him up to thirty days to do so.[131] Under this provision, Congress' failure to enact

128. *See* text at note 78 *supra.*
129. War Powers Resolution, Pub. L. No. 93–148, § 4(a), 87 Stat. 555 (1973).
130. *Id.* § 5(b).
131. *Id.*

authorization suffices to obligate the President to terminate his use of force. Since termination, consequently, is required even absent a specific congressional vote of opposition, the President's veto power is circumvented. A simple majority of Congress can, therefore, successfully terminate executive war making by voting against the passage of any authorization bill.

A second termination provision is contained in Section 5(c). Here, Congress provides itself with authority to order the President by concurrent resolution to withdraw immediately "armed forces engaged in hostilities outside the territory of the United States, its possessions and territories." [132] Since a concurrent resolution is merely an expression of the majority will of both houses of Congress, it does not go to the President for his signature. Thus, the President's veto power is again circumvented.

These two termination provisions are coupled with priority procedures designed to insure swift congressional action.[133] Once the President reports a use of force to Congress, any member of Congress can introduce a bill supporting or opposing the President's actions. Under the Resolution's procedures, any such bill would move swiftly through committee, and would be submitted to a vote by the full Congress within a maximum of sixty days. These procedures serve to answer the objection that war can be terminated by congressional inaction. They operate to insure that any bill which would authorize executive war making will be considered and voted on in some form by both houses.[134]

The main effect of the Resolution's termination provisions is to expeditiously transform congressional nonapproval of military activity into a legal obligation to halt such activity. The Resolution attempts to accomplish this result by making continuation of unapproved military activity beyond its deadlines unlawful. This creates several constitutional difficulties.

First, there is the problem of congressional regulation of peacetime deployments and war threatening actions which has been discussed

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132. *Id.* § 5(c).

133. *Id.* §§ 6, 7.

134. The Resolution allows suspension of these priority procedures, however, by voice vote. War Powers Resolution, Pub. L. No. 93–148, §§ 6(a)-(c), 7 (a)-(c), 87 Stat. (1973). Using a voice vote to delay beyond the sixty day limit a vote by roll call on an authorization bill would enable individual congressmen to avoid personal accountability for their failure to authorize a controversial presidential action.

above.[135] As noted at that point, any congressional attempt to regulate peacetime deployments would be unconstitutional.[136] Of more interest would be an application of the termination provisions to war threatening actions. In view of the shared nature of authority over war threatening actions, any attempt by Congress to legally bind the President simply by a majority vote to terminate such activity would be invalid.[137]

However, if the Resolution's procedures and the resulting order to terminate are interpreted as merely facilitating the expression of congressional will for the purpose of exerting political pressure on the President, their application to war threatening actions would be valid. Unified and unambiguous congressional opposition might itself be enough to force the President to end such a use of force. A public outcry might accompany Congress' opposition and pressure the President into disengagement or encourage Congress to employ more effective means of opposition such as a cut-off of appropriations. All of these potential effects of congressional utilization of the termination provisions would be constitutional. But efforts under the Resolution to force the termination of war threatening force by means of a legally binding order to the President would be unconstitutional.

The second constitutional difficulty with the termination provisions involves their effect on actual war making. As has been shown, there are two types of presumed authorization of war — one irrebuttable and the other rebuttable — and the termination provisions' treatment of each presents different problems.

The Resolution, in its initiation provisions, recognizes the irrebuttable presumption arising from the direct attack situation. However, the Resolution would allow Congress to force the President to stop defending the nation against direct attack. Congress simply does not have the authority to order the termination of such defensive actions by a President.[138] While it is most unlikely that Congress would ever wish to abandon one or more of the States to foreign invasion, it is conceivable that in the midst of a war effort, defense of part of the nation might have to be abandoned for tactical reasons. That decision,

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135. *See* text at notes 29–33 and 39–44 *supra.*
136. *See* text at notes 29–33 *supra.*
137. *See* text at note 54 *supra.*
138. *See* text at note 75 *supra.*

however, must be made by the President as Commander-in-Chief, not by the Congress.[139]

This constitutional restriction on congressional authority does not apply to grave threat situations which give rise to a rebuttable presumption of authorization, even if those situations involve defense of United States' possessions, territories or troops.[140] Congress can order the President to terminate a war effort in such situations, and he must make a good faith attempt to withdraw from the hostilities.[141] However, despite Congress' recognized authority in these situations, three constitutional objections might be made to the Resolution's treatment of them.

It might first be argued that the President can make war in grave threat situations, in spite of congressional opposition, if he possesses sensitive information or special expertise which make his judgment superior to that of Congress.[142] While this argument is not without support, it has been examined above[143] and should be rejected.

The second possible objection to the termination provisions is that by forcing Congress to approve or disapprove of presidential war making within sixty days, they unconstitutionally restrict Congress' ability to review and respond to grave threat situations in an *ad hoc* manner. In response to this objection, it can first be noted that the termination provisions do not prevent Congress from evaluating each situation on its own merits. Secondly, while they do seem to limit the time which Congress can spend evaluating any one situation to sixty days, there is nothing in the Resolution to prevent Congress from giving itself more time by authorizing a President's use of force temporarily.[144] This would allow Congress to consider the war making itself more extensively or to put continued pressure on the President to end his use of force without resorting to overt confrontation.[145] A temporary authori-

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139. *Id.*

140. *See* text at note 92 *supra.*

141. What constitutes good faith withdrawal from hostilities is a difficult question. *See* Mitchell v. Laird, 488 F.2d 611, 616 (D.C. Cir. 1973).

142. *See* Monaghan, *supra* note 5, at 31–33: "The doctrine of separation of powers should, at least in the area of foreign affairs, be viewed as essentially a political, not a legal, construct. . . . Any attempt to circumscribe on constitutional grounds the president's power to use the armed forces abroad confuses political with constitutional issues." *See* note 92 *supra.*

143. *See* note 92 *supra.*

144. The Resolution does require that authorization be "specific." War Powers Resolution, Pub. L. No. 93–148, § 8(a)(1), 87 Stat. 555 (1973). A time limit would be a reasonable element of specificity.

145. Congress often is constrained by the perception that conflicts between it and the

zation is to some degree, however, an imprimatur,[146] and by forcing Congress in some situations to resort to its use, the termination provisions do restrict Congress' political options somewhat. But the judgment of whether they limit the political options of Congress too severely can only be reached by balancing the loss of political flexibility against the gain of decisive action. Congress more than any other branch of government is in a position to evaluate the factors involved. In imposing a sixty day limit on its consideration of grave threat situations, Congress has struck the balance in favor of decisive action. Its judgment on this issue should be honored.[147]

The third and perhaps most substantial objection to the termination provisions is that they require American forces to be withdrawn from hostilities under time pressures which might make safe withdrawal impossible. Withdrawal of American forces from hostilities is required either upon the failure by Congress to authorize within sixty days the hostilities in question[148] or upon the passage by Congress of a concurrent resolution ordering withdrawal even before the sixty days have expired.[149] At such a point American involvement in a war effort might have become so pervasive and intense that an orderly and safe withdrawal of American forces would not be immediately possible. This problem could be remedied in some cases by the use of the provision in Section 5(b) of the Resolution under which Congress can give the President up to thirty days to make a staged withdrawal from unauthorized hostilities.[150] But situations may still arise in which the President has run out of time to end American involvement in a conflict but immediate withdrawal of American forces would result in greater casualties than would a more prolonged withdrawal.

In such situations it would seem that the President's only obligation would be to make a good faith effort to end the United States involvement as quickly as possible. This, of course, would not justify conducting a protracted withdrawal in order to further some foreign policy

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President "discourage the confidence of our allies and encourage the actions of our enemies." Note, *supra* note 5, at 1796.

146. Once approval of war making has been expressed, even if in limited terms, it is difficult to recant. The Gulf of Tonkin Resolution unleashed a war machine that Congress was powerless to control. *See U.S. Commitments to Foreign Powers, Hearings before the Committee on Foreign Relations of the United States Senate,* 90th Cong., 1st Sess. (1967); and S. REP. No. 797, 90th Cong., 1st Sess. (1967).

147. *See* Cox, *supra* note 92, at 221.

148. War Powers Resolution, Pub. L. No. 93–148, § 5(b), 87 Stat. 555 (1973).

149. *Id.* § 5(c).

150. *Id.* § 5(b).

objective since Congress presumably rejected such a course of action when it ordered immediate withdrawal. But it would allow the President to withdraw in a manner perceived by him to involve the least risk of American casualties.

It is, however, very unlikely that this problem would ever develop. By the time American forces became so deeply involved in a conflict that their immediate withdrawal would be impossible, Congress would be very reluctant to order an end to the hostilities.[151] One of the strengths of the Resolution is that it forces Congress to act quickly with regard to American military involvements so that an order to terminate can be given before the situation gets out of control.

Swift and decisive congressional action under the Resolution's termination provisions has another important effect. It increases the possibility of judicial resolution of disputes over military activity. Once Congress has clearly declared its opposition to a particular military activity, constitutional principles come into play which should govern disputes over the continuation of that activity.[152] If it were clear that either Congress or more likely the President were acting unlawfully in such a dispute, it might be appropriate for a court to condemn the unlawful conduct. The dispute would have to be presented to the court as a genuine controversy ripe for adjudication by parties with legally protected interests in its outcome.[153] The court would have to be able

151. This is another manifestation of the *fait accompli* problem. *See* notes 92 and 145 *supra.*

152. These principles, derived from the constitutional analysis already presented, may be stated simply. The President has exclusive control over peacetime deployments, and Congress may not interfere with them even through the appropriations process. War-threatening uses of force are subject to the joint control of the President and the Congress, permitting the President to employ such force without congressional authorization and permitting the Congress to limit their use by use of the appropriations power or other means available to it. War can only be initiated pursuant to congressional authorization, express, implied or presumed. In cases of presumed authorization of the rebuttable type, war must be terminated when opposed by Congress.

153. This aspect of justiciability involves both the article III "case and controversy" restriction on judicial power and the court made "rules of practice" designed to postpone judicial resolution of issues that could be more "prudently" handled under different circumstances. *See* Scharpf, *Judicial Review and the Political Question,* 75 YALE L.J. 517, 520–35 (1966). A. BICKEL, THE LEAST DANGEROUS BRANCH (1962). Functional as well as constitutional considerations are involved.

On the requirement of genuine controversy, *see generally* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 102–20 (2d ed. 1973) [hereinafter HART & WECHSLER]; Scharpf, *supra.*

As to ripeness, *see generally* HART & WECHSLER, *supra* at 120–49; Davis, *Ripeness of Governmental Action for Judicial Review,* 68 HARV. L. REV. 1122 (1955); Scharpf, *supra.*

Standing is considered in HART & WECHSLER, *supra* at 150–214; Davis, *The Liberalized Law of Standing,* 37 U. CHI. L. REV. 601 (1968); Jaffe, *Standing Again,* 84 HARV. L. REV. 633 (1971); Scharpf, *supra.*

to ascertain and evaluate the relevant facts, to discover manageable standards for resolution of the issues, and to administer a meaningful remedy on behalf of the aggrieved party.[154] While it might be a rare occurrence for all of these conditions to be satisfied in a dispute over military activity, it is possible to conceive of several such lawsuits.

For example, a soldier might petition for habeas corpus to prevent his deployment to an unauthorized war;[155] a congressman might seek an injunction to enforce congressional opposition to a war or at least a declaratory judgment to ratify the binding nature of Congress' opposition;[156] the Comptroller General might seek to enjoin the Secretary of Defense from violating congressional spending limitations.[157] Each of these examples presents a controversy which is real and mature. Each of the parties can satisfy a test for standing imposed in the past.[158] If it is assumed that the military activity in each case clearly falls into one of the peacetime deployments, war threatening actions or war categories, there should be no significant factual disputes[159] and the legal standards to be applied will be judicially manageable: war continued in the fact of congressional opposition is unlawful;[160] appropriations limitations, unless they interfere with peacetime deployments must be obeyed.[161] Finally, the remedies sought might be effective means to resolve the controversies at hand. Freeing individual soldiers from their duty to report to battle might be a quick and simple way to

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154. The political question doctrine addresses more the suitability of a particular issue for judicial resolution than the suitability of a particular case. The doctrine can best be analyzed in functional terms: are the means available to the judiciary sufficient to actually resolve the issue presented? *See* Scharpf, *supra* note 153. Other interpretations have been given to the doctrine, but these alternate explanations seem less satisfying. *Compare* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) *with* L. HAND, THE BILL OF RIGHTS (1958) *and* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

155. *See, e.g.*, Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971) (serviceman with orders to fight in Vietnam challenging the legality of the war).

156. *See, e.g.*, Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973) (congressmen seeking declaratory judgment and injunction against the Vietnam War); *Compare with* Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973) (congressmen challenging the bombing of Cambodia held not to have standing).

157. *Compare with, e.g.*, Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972) *aff'd* 411 U.S. 911 (1973) (suit to enjoin expenditures by Secretary of Defense for Vietnam War).

158. *See* notes 153, 155–57 *supra*.

159. Whether a use of force is a peacetime deployment, war threatening or war making in character depends upon questions of fact or questions of evaluation of fact which will often be impossible to resolve. The passage of time, however, can serve to clarify the nature of a particular military situation. United States involvement in Vietnam exemplifies this well.

160. *See* text at note 92 *supra*.

161. *See* text at notes 44–45 *supra*.

end a war.[162] Rendering a declaratory judgment ratifying the binding authority of congressional opposition to a war might be the critical factor in forcing a President to comply with Congress' will.[163] Upholding a spending limitation could lay to rest a presidential claim to exclusive authority over a war threatening action, while striking down a spending limitation could end congressional interference with a peacetime deployment.

It is clear, then, that the termination provisions do provide some basis for an increase in judicial resolution of disputes over allocation of the war power. However, many such disputes will still be beyond the reach of the courts. It is likely, for example, that a contested military action would not fit neatly into one of the peacetime deployments, war threatening actions, or war categories and thus would not be susceptible to the application of manageable standards.[164] It is possible that the remedies available to a court would aggravate rather than assist the resolution of a particular controversy.[165] And it will often be the case that war powers disputes will involve war threatening force and thus require political resolution until they reach the stage of presidential defiance of a cut-off of appropriations.[166]

In summary, the termination provisions of the Resolution force Congress to act decisively in response to presidential uses of force. When the response is disapproval, these provisions validly operate either to impose a legal obligation on the President to terminate war making in grave threat situations or to help orchestrate Congress' political opposition to war threatening actions. However, congressional interference which might result from these provisions with either peacetime deployments or defense against direct attack on the nation would be unconstitutional. Finally, the termination provisions increase to some extent the possibility of judicial resolution of disputes concerning the nation's war power.

The Resolution's Consultation and Reporting Provisions

The Resolution contains consultation and reporting provisions de-

162. It could also be disastrous. In Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973), the Vietnam War was declared unlawful but the mode of withdrawal was left to the President's discretion.

163. It is far more difficult for a President to defy a confirmed legal obligation than to defy mere political opposition from Congress.

164. *See* note 154 *supra.*

165. *See* Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).

166. *See* text at notes 39–43 *supra.*

signed to keep Congress sufficiently informed to exercise the control over United States military activity which the Resolution entrusts to it. Under Section 3, the President must consult with Congress in "every possible instance" [167] before initiating military activity involving armed conflict or the clear potential for it. The President must consult "regularly" with Congress while such military activity continues. The process of consultation, according to the Resolution's legislative history, should involve a genuine interchange of ideas and not merely a report of information.[168]

Under Section 4 the President must report to Congress any initiation of military activity involving armed conflict or the clear potential for it[169] and any significant deployment or build up of United States Armed Forces abroad.[170] The report must be made within forty-eight hours of the President's use or deployment of troops[171] and must set forth the authority under which the President acted and the estimated scope and duration of his actions.[172] In addition, the President may be required to report any other information that "Congress may request in the fulfillment of its constitutional responsibilities with respect to the committing of the Nation to war and to the use of United States Armed Forces abroad." [173] The President is relieved of these reporting obligations only if Congress has declared war.[174]

These provisions respond to Congress' legitimate need for information concerning United States military activity. Congress' war powers and its other grants of authority cannot be responsibly exercised without the relevant war related information.[175] However, there is the countervailing consideration of the President's recognized needs for secrecy in the conduct of foreign and military affairs.[176] While it is certain that basic information pertinent to war making should not be withheld from Congress, it is by no means clear that all war related data should be disclosed to the whole of Congress. Indeed, in situations where, due to its institutional incapacity for rapid complex decision making, Con-

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167. War Powers Resolution, Pub. L. No. 93–148, § 3, 87 Stat. 555 (1973).
168. H.R. REP. No. 287, 93d Cong., 1st Sess. 6–7 (1973).
169. War Powers Resolution, Pub. L. No. 93–148, § 4(a)(1), 87 Stat. 555 (1973).
170. *Id.* § 4(a)(2)–(3).
171. *Id.* § 4(a).
172. *Id.* § 4(a)(A), (B), (C).
173. *Id.* § 4(b).
174. *Id.* § 4(a).
175. *See* note 92 *supra.*
176. *Id.*

gress would have little use for sensitive information, it would seem that disclosure by the President should not be required. With all of these competing considerations present at one time or another, it is inevitable that disputes will arise over access to war related information.[177]

In theory, the consultation provisions seem to indicate that such disputes over information would be legal disputes which a court could resolve.[178] Whatever the validity of that view, it is clear as a practical matter that such disputes should be resolved through the political process. Congress can hardly use the courts to force the President to report on matters about which Congress has no knowledge. Nor could the courts hope to tell the President and Congress how they should consult with one another. Finally, if the President reports a use of force but refuses to divulge his reasons for it, or reports inaccurate or incomplete information, congressional disapproval of his actions and various political sanctions are available to force the President to act more cooperatively.

In summary, the consultation and reporting provisions serve legitimate congressional needs for information but may conflict with valid presidential requirements for secrecy. Further, Congress' inability to make complex decisions swiftly militates against the extensive degree of consultation mandated by the Resolution. It is certain that disputes will arise over access to war related information but these disputes should be resolved by political means rather than by any legal formulae which might be derived from the terms of the Resolution's consultation and reporting provisions.

The Resolution's Interpretation Provisions

The Resolution contains several provisions concerning interpretation of the Resolution itself, of other war related legislation, and of United States treaties. While these sections raise virtually no constitutional problems, they do have an impact on the exercise of the war power and thus merit brief discussion. The first is Section 8(a)(1) which elaborates the meaning of "specific statutory authorization." In order for legislation to specifically authorize military activity involving armed

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177. This has been the primary difficulty under the Resolution thus far. *See Compliance Hearings, supra* note 106, at 53–88.

178. The Resolution employs the word "shall." War Powers Resolution, Pub. L. No. 93–148, § 3, 87 Stat. 555 (1973).

conflict or the clear potential for it, the legislation must 1) be specific and 2) explicitly refer to the War Powers Resolution.[179] Unfortunately, it is not clear from the Resolution or its legislative history how specific a "specific statutory authorization" must be. Furthermore, no matter how specific a presently existing statutory authorization might be, it is impossible for it to contain a reference to the War Powers Resolution of 1973 if it was enacted before 1973.

The requirement of specificity grows out of a history of presidential claims to war making authority under the general language of various United States treaties and resolutions and out of the tendency of courts to treat appropriations for Vietnam as authorization of that war. The language of treaties and resolutions is often general in nature so that it can express policies of the United States without committing the nation to specific actions which in the future might become undesirable.[180] Appropriations bills are often passed by Congress not because Congress approves of a war but because it fears endangering the safety of troops already committed to battle.[181] These actions by Congress are unsatisfactory means of authorizing war simply because they are not necessarily intended to have that effect. If Congress' intent were made clear there would be no difficulty.[182] Thus, the Resolution should be interpreted as requiring merely that authorizations of war manifest a clear intent to confer war making power. Any further requirements, such as time limits, area limits, or purpose limits, might in some situations create an unnecessary burden of detail in an area fraught with complexity.[183]

Applying this principle to legislation passed prior to the Resolution reveals that three "area resolutions" seem to empower the President to make war without further authorization from Congress: the "Formosa Resolution,"[184] the "Middle East Resolution,"[185] and the "Cuban

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179. *Id.* § 8(a)(1). *See* S. REP. No. 220, 93d Cong., 1st Sess. 24 (1973).

180. *See* Note, *supra* note 5, at 1800 (treaties), 1802 (resolutions).

181. *Id.* at 1799–1800.

182. *Id.* at 1803.

183. Of course, in some situations time limits, area limits, or purpose limits might be appropriate. *See* text at note 145 *supra;* Note, *supra* note 5, at 1803.

184. 50 U.S.C. app. n. prec. § 1 (1970) (originally enacted as Pub. L. No. 84–4, 69 Stat. 7 (1955)). The President is authorized "to employ the Armed Forces of the United States as he deems necessary for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack. . . ."

185. 22 U.S.C. § 1962 (1970). "[I]f the President determines the necessity thereof, the United States is prepared to use armed forces to assist any nation . . . requesting assistance against armed aggression from any country controlled by international communism. . . ."

Resolution."[186] However, the requirement of specific reference to the War Powers Resolution remains. The Resolution's legislative history indicates that Congress must reconsider these prior authorizations to sustain their validity.[187]

A similar analysis must be made of United States treaties. It is complicated, however, by two additional provisions of the Resolution. Section 8(a)(2) requires that a treaty, in order to constitute an authorization of war making, must be accompanied by implementing legislation which 1) is specific and 2) refers explicitly to the War Powers Resolution.[188] The purpose of this provision is to insure that the House of Representatives participates in the authorization process[189] and that grants of war making authority in treaties possess the same clarity of intent as such grants in legislation.[190] However, Section 8(d)(1) states that the Resolution is not intended to alter the provisions of existing treaties.[191] If, absent the Resolution, existing United States treaties would have authorized war making by the President, such treaties arguably should be exempt from the implementing legislation and specific authorization requirements of Section 8(a)(2). The weight of authority on this issue, however, is that no existing United States treaties empower the President to make war without further authorization from Congress.[192] Thus the implementing legislation and specific authorization requirements do not alter any existing treaties but merely specify how such treaties must be amended if they are to authorize war.

There is one final provision of the Resolution to be discussed. Section 8(d)(2) provides that nothing in the Resolution is intended to give the President any authority which he would not have had in the absence of the Resolution.[193] This provision was briefly discussed above in the context of the Resolution's initiation provisions but merits further examination. Its apparent purpose was to assuage the fears of those members of Congress who viewed the Resolution as a license to the President to act even more independently in the use of military force

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186. Pub. L. No. 87–733, 76 Stat. 697 (1962). The United States is determined "to prevent by whatever means necessary, including the use of arms, . . . [any Cuban aggression in the Western Hemisphere]."

187. S. REP. No. 220, 93d Cong., 1st Sess. 24 (1973).

188. War Powers Resolution, Pub. L. No. 93–148, § 8(a)(2), 87 Stat. 555 (1973).

189. S. REP. No. 220, 93d Cong., 1st Sess. 26 (1973).

190. *Id.*

191. War Powers Resolution, Pub. L. No. 93–148, § 8(a)(1), 87 Stat. 555 (1973).

192. *See* Note, *supra* note 5, at 1798–1801.

193. War Powers Resolution, Pub. L. No. 93–148, § 8(d)(2), 87 Stat. 555 (1973).

than was possible absent the Resolution.[194] The provision would have answered such fears if the balance of war making power between the President and Congress depended on legal principle. However, since most uses of force are war threatening and not acts of war, control in the majority of cases depends on political power.[195]

The Resolution increases Congress' political power by forcing it to act decisively in response to presidential war making.[196] But the Resolution also weakens Congress by limiting Congress' political options.[197] Under the Resolution, Congress may not maintain a neutral posture for longer than sixty days in order to evaluate the information, policies and events involved in a particular military engagement unless temporary authorization is given, which is itself a form of congressional approval. It may not delay decision in the face of a presidential claim that more data is available for Congress' consideration. It may not oppose the President in ways more subtle and potentially less damaging to an ongoing military effort than an overt declaration of the illegality of that effort.[198] Although the end result is uncertain, history seems to indicate that when Congress is faced with an absolute "yes" or "no" decision regarding an assertedly necessary use of force, approval is the likely result.[199] Once a military adventure receives initial congressional approval, it can be almost impossible to contain.[200] It will thus take a vigilant Congress to prevent the fear of inflated presidential power from becoming a reality.

CONCLUSION

While the War Powers Resolution may be unconstitutional in some of its possible applications, especially with regard to peacetime deployments and war threatening actions, it could prove to be a useful tool for increasing Congress' participation in the decisions which commit the United States to war. By forcing Congress to act decisively in response to presidential uses of force, the Resolution insures that the

194. *See* note 126 *supra.*

195. *See* text at notes 35–46 *supra.*

196. *See* text at notes 133–34 *supra.*

197. *See* text at notes 144–47 *supra.*

198. Congress is often constrained by the perception that conflicts between it and the President "discourage the confidence of our allies and encourage the actions of our enemies." Note, *supra* note 5, at 1796.

199. *See* notes 123–24 *supra* and accompanying text.

200. *See* note 146 *supra.*

legal status of actual war making will be clearly established and that disfavored war threatening actions will be subjected to the constraints of well orchestrated political pressure. This creates a tremendous incentive for the President to cooperate with Congress and for Congress to take its role in United States military affairs seriously. It also makes possible judicial support for Congress' legitimate assertions of authority in the disputes that will inevitably arise over the limits of presidential power.

President Ford has already complied with the Resolution on three occasions,[201] and if nothing else this begins to establish a pattern of executive cooperation with the legislature concerning United States military ventures. Such a pattern is in marked contrast to the claims of independent authority that characterized the administrations of Truman through Nixon and the passive response by Congress at the time to those claims. Hopefully, cooperation between the President and Congress will become sufficiently established to insure that the Dog of War will never be loosed without the consent of those who ultimately must pay its price.

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201. *See Compliance Hearings, supra* note 106, at 4–7.