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*I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.*

(*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring)).

## THE WAR POWERS RESOLUTION AFTER THE CHADHA DECISION

*by Daniel E. Lungren\**

*Mark L. Krotoski\*\**

### I. INTRODUCTION

For more than two centuries, the United States has been involved in roughly two hundred uses of armed forces abroad to protect our country's interest or in conflict situations.<sup>1</sup> However, Congress declared war in only five of these instances, the last declaration occurring in 1941.<sup>2</sup>

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1. See E. COLLIER, INSTANCES OF USE OF U.S. ARMED FORCES ABROAD, 1798-1983, CONGRESSIONAL RESEARCH SERVICE, REP. NO. 83-204 F (November 4, 1983); see also 119 CONG. REC. 25,066-76 (1973).

2. FOREIGN AFFAIRS DIVISION, CONGRESSIONAL RESEARCH SERVICE, BACKGROUND INFORMATION ON THE USE OF U.S. ARMED FORCES IN FOREIGN COUNTRIES, (Comm. Print 1975) [hereinafter cited as BACKGROUND INFORMATION ON ARMED FORCES]. According to the report, "[a]lthough Congress has 'declared war' in the sense that a formal resolution has been enacted, four of the five 'declarations' have recognized the prior existence of war. The only exception was the War of 1812." *Id.* at 47.

In 1973, after three years of debate, Congress enacted the War Powers Resolution<sup>3</sup> over the veto<sup>4</sup> of President Richard Nixon. The War Powers Resolution was a congressional "effort to place limits on the President's use of troops abroad."<sup>5</sup> It attempted to do so by establishing a specific procedural mechanism which the Congress and the President would use in making decisions involving their shared war powers.

Despite the passage of the War Powers Resolution, debate concerning the precise contours of presidential and congressional war powers continues. In fact, it is argued that the Resolution has made the "zone of twilight"<sup>6</sup> between the shared powers even hazier and there is greater potential for conflict which could reach constitutional dimensions. Indicative of the questionable effectiveness of the Resolution is that to date each President filing a report to Congress has used language indicating that he is reserving all constitutional powers to the executive office.<sup>7</sup>

This article explores the central enforcement features, sections 5(b) and (c), of the War Powers Resolution. After the President submits a report, or is required to submit a report, indicating participation of United States Armed Forces abroad in hostile situations or circumstances likely to become hostile, section 5(b) allows Congress to force a withdrawal of these troops within sixty days unless one of three events occurs: (1) Congress cannot physically meet as a result of attack, (2) Congress declares war or otherwise authorizes use of United States troops in combat, or (3) the safety of the troops requires an additional thirty days in order to promptly remove them. Section 5(c) permits Congress to require the removal of the forces by a two House veto or concurrent resolution.

Although the decision in *Immigration and Naturalization Service v. Chadha*<sup>8</sup> is widely perceived as disabling section 5(c), this article contends that the conceptual underpinnings of the Supreme Court opinion extend much further. The *Chadha* decision, nullifying the one House veto and the Supreme Court's summary affirmance of lower court decisions striking down the two House veto,<sup>8.1</sup> raises grave constitutional

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3. 50 U.S.C. §§ 1541-1548 (1976).

4. Veto of the War Powers Resolution, PUB. PAPERS 893 (October 24, 1973).

5. BACKGROUND INFORMATION ON ARMED FORCES, *supra* note 2, at 35.

6. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

7. See *infra* note 109-12.

8. — U.S. —, 103 S. Ct. 2764 (1983).

8.1. See *infra* note 43.

questions concerning section 5(b) whereby the use of armed forces abroad can be terminated by congressional inaction. While certainly other constitutional issues remain in light of this landmark decision,<sup>9</sup> this paper devotes its inquiry to sections 5(b) and (c), regarded as the heart of the War Powers Resolution.

Before applying the *Chadha* decision to sections 5(b) and (c), an examination of the Framers' intent in crafting the checks and balances between the legislative and executive branches will be made. This brief background will be practical in assessing the *Chadha* opinion as it relates to the War Powers Resolution.

Several key issues are raised concerning the constitutionality of section 5(b). First, this provision of the War Powers Resolution is the functional equivalent of a one House legislative veto. Second, this section denies the President his legislative participatory role in deciding to sign or veto legislative matters. The result of creating the functional equivalent of a one House veto and bypassing presentment of legislation to the President establishes new rules for congressional policy making in the war powers area. Next the issue of whether section 5(b) is a valid sunset provision will be explored. Thus far, the War Powers Resolution has been ineffective because of its inability to define the contours of the legislative and executive war powers. Finally, *Chadha* does not render the legislative branch powerless in the war powers area because other competent legislative tools are available.

## II. THE BASES FOR THE FEDERAL WAR POWERS BETWEEN BRANCHES

### A. *On Changing "Make War" to "Declare War"*

The precise boundaries of war powers between the Congress and the President have been debated endlessly and inconclusively for more than two hundred years. It is useful to examine the bases of the war powers authority to better obtain an understanding of the respective war powers.

On August 17, 1787, during the debate at the Federal Convention, the war powers dispute began when James Madison and Elbridge Gerry were successful in amending the proposed draft to grant Congress the authority to "declare" war as opposed to "make" war.<sup>10</sup> By

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9. See, e.g., *The United States Supreme Court Decision Concerning the Legislative Veto: Hearings Before the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. 2, 17-21 (1983) (statement of Stanley M. Brand, Gen. counsel to the Clerk, House of Representatives). [hereinafter cited as *Hearings on Legislative Veto*].

10. The proceedings were recorded as follows:

reading the record of the debate on the Madison-Gerry motion broadly, some scholars have construed extensive war powers authority to the Executive. According to the testimony of Mr. William Rehnquist, then serving as an Assistant Attorney General, the motion to replace the word "declare" for the word "make" left "to the Executive," in the words of the drafters of the amendment, "the power to repel sudden attacks."<sup>11</sup>

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Mr. PINCKNEY opposed the vesting of this power in the legislature. Its proceedings were too slow. It would meet but once a year. The House of Representatives would be too numerous for such deliberations. The Senate would be the best depository, being more acquainted with foreign affairs, and most capable of proper resolutions. If the states are equally represented in the Senate, so as to give no advantage to the large states, the power will, notwithstanding, be safe, as the small have their all at stake, in such cases, as well as the large states. It would be singular for one authority to make war, and another peace.

Mr. BUTLER. The objections against the legislature lie, in a great degree, against the Senate. He was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the nation will support it.

Mr. MADISON and Mr. GERRY moved to insert "declare," striking out "make" war, leaving to the executive the power to repel sudden attacks.

Mr. SHERMAN thought it stood very well. The executive should be able to repel, and not to commence, war. "Make" is better than "declare," the latter narrowing the power too much.

Mr. GERRY never expected to hear, in a republic, a motion to empower the executive alone to declare war.

Mr. ELLSWORTH. There is a material difference between the cases of making war and making peace. It should be more easy to get out of war than into it. War, also, is a simple and overt declaration; peace, attended with intricate and secret negotiations.

Mr. MASON was against giving the power of war to the executive, because not safely to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging, rather than facilitating, war; but for facilitating peace. He preferred "declare" to "make."

On the motion to insert "declare," in place of "make," it was agreed to.

Connecticut (Connecticut voted in the negative; but, on the remark, by Mr. King, that "make" war might be understood to "conduct" it, which was an executive function, Mr. Ellsworth gave up his objection, and the vote was changed to *ay.*), Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, *ay*, 8; New Hampshire, *no*, 1; Massachusetts, *absent*.

Mr. PINCKNEY'S motion, to strike out the whole clause, was disagreed to, without call of states.

Mr. BUTLER moved to give the legislature the power of peace, as they were to have that of war.

Mr. GERRY seconds him. Eight senators may possibly exercise the power, if vested in that body, and fourteen if all should be present, and may, consequently, give up part of the United States. The Senate are more liable to be corrupted by an enemy than the whole legislature.

On the motion for adding "and peace," after "war," it was unanimously negatived.

Adjourned.

5 ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 438-39 (1845) (emphasis in original) (footnote omitted) [hereinafter cited as ELLIOT].

11. *Congress, the President, and the War Powers: Hearings Before the Subcomm. on Nat'l Security Policy & Scientific Developments of the House Comm. on Foreign Affairs*, 91st Cong.

Another author has suggested that "declaring war" took on a special connotation in the eighteenth century:

[A]t the time of the Constitutional Convention of 1787 a formal declaration of war was neither required by conventional international law nor practiced as customary international law. On the contrary, studies of the period indicate that less than 10 percent of the international conflicts between 1700 and 1870 were accompanied by formal declarations of war. This has led one legal scholar to conclude: "The founders were fully aware of the lack of power actually contained in the war declaration clause because hostilities were rarely preceded by formal declarations of war."<sup>12</sup>

However, other commentators interpreting the same debate record contend that the Madison-Gerry amendment afforded Congress broad war powers. Indeed, from the 1973 Senate Report on the War Powers Resolution comes this passage:

It is noteworthy that the delegates who spoke on this [Madison-Gerry] change of wording all expressed concern with the possible enlargement of Presidential power. Elbridge Gerry, for example, declared that he "never expected to hear in a republic a motion to empower the Executive talons to declare war." George Mason firmly expressed himself as "against giving the power of war to the executive," on the ground that he was "not to be trusted with it."<sup>13</sup>

In addition, supporters of broad presidential war powers can point to the final vote during the Convention and conclude that overwhelmingly the Framers intended that the Executive have the authority to

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2d Sess. 211 (1970) (statement of William H. Rehnquist, Assistant Attorney General). Mr. Rehnquist observed:

Here then was the Convention's recognition of the need for swift Executive response in certain situations. Rufus King supported substitution of the word "declare" on the ground that the word "make" might be understood to mean "conduct war" which he believed to be an Executive function. It is interesting to note that when the first vote on the motion was taken, there were two votes in favor of retaining "make," whereas the other eight or nine votes were for "declare."

However, after Mr. King made his point regarding the conduct of hostilities, the representative from Connecticut, Mr. Ellsworth, changed his vote to support the substitution. Thus, the only dissenting vote was that of New Hampshire. Pinckney's motion to strike out the whole clause and thereby presumably vest the entire warmaking power in the Executive was then defeated by voice vote.

12. R. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE* 16 (1983).

13. *WAR POWERS*, S. REP. NO. 220, 93d Cong., 1st Sess. 10 (1973) (quoting *War Powers Legislation: Hearings on S. 440 Before the Senate Comm. on Foreign Relations*, 93d Cong. 1st Sess. 14 (1973) (statement of Raoul Berger)).

"conduct war." On the contrary, those who advocate that Congress has "the power to wage war"<sup>14</sup> note the fact that all of the Convention delegates expressed concern over an expansion of executive jurisdiction. Additionally, these congressional advocates cite the "absence of extended debate over the war powers in the Constitutional Convention [as] attest[ing] to the near unanimity of the Founding Fathers as to where that authority was meant to be placed."<sup>15</sup> As we have seen, the record of the Constitutional Convention leaves undefined the precise contours of the executive and legislative war powers. Accordingly, the outcome turns primarily on which interpretation is applied to the Convention debate.

*B. Constitutional Sources for Congressional and Executive War Powers*

A review of other related Constitutional provisions granted to Congress and the Executive similarly leaves the matter unresolved. Congress has the express constitutional authority:

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water[;] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years[;] To provide and maintain a Navy[;] To make Rules for the Government and Regulation of the land and naval Forces[;] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions[;] To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service to the United States . . . .<sup>16</sup>

And, importantly, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law."<sup>17</sup> Likewise, it is well recognized that the President has the exclusive power to serve as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ."<sup>18</sup> It is equally acknowledged that the Ex-

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14. WAR POWERS, S. REP. NO. 220, 93d Cong., 1st Sess. 10 (1973) (quoting James Madison from 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. (1966) [hereinafter cited as FARRAND])).

15. WAR POWERS, S. REP. NO. 220, 93d Cong., 1st Sess., 10 (1973).

16. U.S. CONST. art. I, § 7, cls. 11-16.

17. U.S. CONST. art. I, § 9, cl. 7.

18. U.S. CONST. art. II, § 2, cl. 1.

ecutive has the authority to "repel sudden attacks."<sup>19</sup>

Presumably, the President, under his Commander-in-Chief powers can direct the armed forces in any manner he wishes as long as the use is "short of war." However, the delineation between what constitutes war or an activity just "short of war" is the crux of the constitutional dilemma. In fact, Professor Corwin has suggested that the determination of when the "war" threshold is crossed is clouded by the fact that "there is not only 'the war before the war,' but the 'war after the war.'"<sup>20</sup> Professor Moore has suggested that "criteria delimiting the congressional and Presidential roles" should be such that "congressional authorization might be required 'in all cases where regular combat units are committed to sustained hostilities.'"<sup>21</sup>

The approach taken in the War Powers Resolution in demarcating those activities that trigger congressional war powers authority continues to be the subject of intense debate. In the absence of positive congressional action,<sup>22</sup> section 5(b) is set in motion when United States troops are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."<sup>23</sup> The House Report on the War Powers Resolution elaborated on what circumstances constitute "hostilities" or "imminent hostilities" and therefore commence the sixty day clock of section 5(b):

The word *hostilities* was substituted for the phrase *armed conflict* during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, *hostilities* also encompasses a state of confrontation in which . . . there is a clear potential either for such a state of confrontation or for actual armed conflict.<sup>24</sup>

Against this backdrop, and with historical precedent serving as a guide, some have claimed that the Executive's Article II war powers are

19. ELLIOT, *supra* note 10, at 439.

20. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 262 (1975) [hereinafter cited as CORWIN].

21. *Congress, the President, and the War Powers: Hearings Before the Subcomm. on Nat'l Security & Scientific Developments of the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. 124, 126-27 (1970) (statement of John Norton Moore, Professor of Law, University of Virginia School of Law) (emphasis added).

22. See 50 U.S.C. § 1544(b) (1976) (termination of the use of armed forces abroad is forced after 60 days unless Congress cannot physically meet as a result of an armed attack or unless Congress declares war or otherwise authorizes use of United States troops in combat).

23. 50 U.S.C. § 1543(a)(1) (1976).

24. WAR POWERS RESOLUTION OF 1973, H.R. REP. NO. 287, 93d Cong., 1st Sess. 7 (1973) (statement of Clement Zablocki) (emphasis in original).



wide in scope. These proponents assert that the potential uses of armed forces at the President's command are undefineable and comprehensive at the same time.

The War Powers Resolution explicitly acknowledges three instances where the President has constitutional authority to act. The President may "introduce United States armed forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."<sup>25</sup>

However, Monroe Leigh, former Legal Adviser to the Department of State, believes that the President's authority extends beyond these situations to at least six other areas: "to protect and rescue U.S. nationals abroad, to protect U.S. embassies and legations, and under certain circumstances to carry out our security commitments contained in treaties."<sup>26</sup> He also argues that the section "fails to mention the President's authority to use American forces to forestall any direct and imminent threat of attack upon the United States, to suppress civil insurrection, and to implement the terms of an armistice of cease-fire designed to terminate hostilities involving U.S. forces."<sup>27</sup> Mr. Leigh adds that neither he nor any "group of lawmakers or constitutional scholars could produce a single list of circumstances that clearly and adequately encompasses every situation in which the President's Commander-in-Chief authority could be exercised."<sup>28</sup>

President Franklin Delano Roosevelt, in what is one of the broadest claims of executive war powers authority in our country's history, asked Congress to pass legislation allowing the President to stabilize the cost of living. "In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act."<sup>29</sup> According to Professor Corwin, President Roosevelt's statement was a

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25. 50 U.S.C. § 1541(c) (1976).

26. *War Powers Resolution: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 72-73 (1977) (statement of Hon. Monroe Leigh).

27. *Id.* at 73.

28. *Id.* at 74. Interestingly, the bill that passed the Senate in 1973 proposed "to reconfirm and to define with precision the constitutional authority of Congress to exercise its constitutional war powers with respect to 'undeclared' wars and the way in which this authority relates to the constitutional responsibilities of the President as Commander-in-Chief." See S. REP. NO. 220, *supra* note 12, at 2.

29. President Roosevelt's message to the Congress states:

I ask the Congress to [repeal a certain provision of the Emergency Price Control Act] by the first of October. Inaction on your part by that date will leave me

"peremptory demand" to the Congress that in effect, "[u]nless you repeal a certain statutory provision forthwith, I shall nevertheless treat it as repealed."<sup>30</sup> Professor Corwin added that the President was asking "to suspend the Constitution in a situation deemed by him to make such a step necessary."<sup>31</sup> Similarly, President Lincoln commented after he suspended the writ of habeas corpus: "[A]re all the laws *but one* to go unexecuted, and the Government itself go to pieces lest that one be violated?"<sup>32</sup>

Conversely, some scholars have noted that it is the Congress which has virtually exclusive war powers authority to act. Aside from the President's ability to conduct the war as Commander-in-Chief and to *repel* attacks, these proponents maintain that the residual of the government's war powers belongs to the Congress.

Illustrating this school of thought, Professor Richard B. Morris told the Senate Foreign Relations Committee:

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with an inescapable responsibility to the people of this country to see to it that the war effort is no longer imperiled by threat of economic chaos.

In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act.

...

The President has the powers, under the Constitution and under Congressional acts, to take measures necessary to avert a disaster which would interfere with the winning of the war.

I have given the most thoughtful consideration to meeting this issue without further reference to Congress. I have determined, however, on this vital matter to consult with the Congress.

There may be those who will say that, if the situation is as grave as I have stated it to be, I should use my powers and act now. I can only say that I have approached this problem from every angle, and that I have decided that the course of conduct which I am following in this case is consistent with my sense of responsibility as President in time of war, and with my deep and unalterable devotion to the processes of democracy.

The responsibilities of the President in wartime to protect the Nation are very grave. This total war, with our fighting fronts all over the world, makes the use of Executive power far more essential than in any previous war.

If we were invaded the people of this country would expect the President to use any and all means to repel the invader.

The Revolution and the War between the States were fought on our own soil, but today this war will be won or lost on other continents and remote seas.

I cannot tell what powers may have to be exercised in order to win this war.

The American people can be sure that I will use my powers with a full sense of my responsibility to the Constitution and to my country. The American people can also be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our own safety demands such defeat.

When the war is won, the powers under which I act automatically revert to the people—to whom they belong.

88 CONG. REC. 7042, 7044 (1942).

30. CORWIN, *supra* note 20, at 251.

31. *Id.* at 252.

32. *Id.*

[T]he framers of the Constitution were concerned, first of all, that the war powers would remain lodged in the legislative branch of the Government, wherein they had previously vested.

....

Considering the stakes involved, it attests to the degree of unanimity among the Founding Fathers that the clause in the Constitutional draft 'to make war' stirred up so little debate. . . .

....

[T]he Constitution clearly distinguishes between declaring war and supporting it on the one hand and conducting its operations on the other.<sup>33</sup>

In testifying before the same committee, Professor Henry Steel Commanger essentially joined Professor Morris' remarks by quoting Madison to the effect that

the power to declare war including the power of judging the causes of war, is *fully and exclusively vested in the Legislature*, that the executive has no right in any case, to decide the question whether there is or is not cause for declaring war, that the right of convening and informing Congress whenever such a question seems to call for a decision, is all the right which the Constitution has deemed requisite or proper.<sup>34</sup>

Thus, after two centuries of reflection and a review of the Convention debate and the Constitution, the exact parameters of the shared war powers between the executive and legislative branches remains in controversy. Moreover, as will be shown, the recent Supreme Court decision concerning the one House legislative veto added to the dispute because it put into doubt the constitutionality of the "heart" of the War Powers Resolution.

### III. THE CHADHA DECISION

On June 23, 1983, the Supreme Court in the 7 to 2 landmark decision of *Immigration and Naturalization Service v. Chadha*,<sup>35</sup> ruled that the congressional veto provision in the Immigration and Nationality

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33. *War Powers Legislation: Hearings Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 75, 79-80 (1972) (statement of Richard B. Morris).

34. *Id.* at 19 (statement of Henry Steel Commanger) (quoting J. Madison) (Hunt, ed. VI, at 174, 1793)).

35. — U.S. —, 103 S. Ct. 2764 (1983).

Act<sup>36</sup> was unconstitutional because it violated the principle of separation of powers by failing to comply with the bicameralism and presentment requirements for legislative action. In the majority opinion, Chief Justice Burger wrote that "[t]here is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process."<sup>37</sup>

The *Chadha* decision is generally believed to have struck down section 5(c) of the War Powers Resolution,<sup>38</sup> which permits the Congress to direct the President to remove the armed forces from a hostile situation by passage of a concurrent resolution.<sup>39</sup>

Sections 5(b) and (c), reprinted in the appendix, are the central enforcement features of the War Powers Resolution and constitute its core.<sup>40</sup> "That the automatic termination provision of section 5(b) was 'the heart' of the War Powers Resolution is made clear by the absence of any controversy over the reporting and consultation provisions, which many regarded simply as redundant, or the codification of past practices."<sup>41</sup> As then House Majority Leader Thomas P. O'Neill, Jr., stated on the floor of the House: "[T]he congressional action provisions contained in this resolution are the heart of any effective war powers legislation."<sup>42</sup>

In light of the *Chadha* decision, and other recent decisions invalidating the two House legislative veto,<sup>43</sup> serious questions about the constitutionality of section 5(b) are raised. Nearly three months after the *Chadha* decision, Senate Minority Leader, Robert C. Byrd, pro-

36. 8 U.S.C. § 1254(c)(2) (1982).

37. — U.S. at —, 103 S. Ct. at 2788.

38. *Hearings on Legislative Veto*, *supra* note 9, at 2-3 (statement of Stanley H. Brand, General Counsel to the Clerk, House of Representatives).

39. 50 U.S.C. § 1544(c).

40. These two provisions were the center of the controversy over the War Powers Resolution. In *Veto of the War Powers Resolution*, PUB. PAPERS 893-95 (Oct. 24, 1973), President Nixon stated:

I believe that both these provisions are unconstitutional . . . [the provision to] automatically cut off certain authorities after sixty days unless the Congress extended them. Another . . . to eliminate certain authorities merely by the passage of a concurrent resolution—an action which does not normally have the force of law, since it denies the President his constitutional role in approving legislation.

*See also* 119 CONG. REC. 24,663 (1973).

41. *Hearings on Legislative Veto*, *supra* note 9, at 2, 17-18 (statement of Stanley H. Brand, General Counsel to the Clerk of House of Representatives).

42. 119 CONG. REC. 24,697 (1973). (Congressional action is the heading in the statute for section 5).

43. *Consumers Energy Council of Am. v. Federal Energy Regulatory Comm'n*, 673 F.2d 425 (D.C. Cir. 1982), *reh'g denied*, — U.S. —, 104 S. Ct. 40 (1983); *Consumers Union of the United States v. Federal Trade Comm'n*, 691 F.2d 575 (D.C. cir. 1982) (*en banc*) *aff'd*, — U.S. —, 103 S. Ct. 3556 (1983).

posed an amendment to the Department of State Authorization bill which would remedy the unconstitutional concurrent resolution provision in section 5(c) by permitting the withdrawal of troops by joint resolution.

Senator Byrd stated the reasons for his amendment on the Senate Floor: "It cures a constitutional flaw in the law."<sup>44</sup> "I believe it is very important to dispel the constitutional murkiness which now surrounds this provision as a result of the *Chadha* decision."<sup>45</sup> Because section 5(c) deals with a period of less than sixty days, the Senate Minority Leader continued, "[i]n such an emergency situation, the last thing I want is for the Congress and the President to get tangled up in the courts over the constitutionality of a concurrent resolution of withdrawal."<sup>46</sup> "Nevertheless, the *Chadha* decision has driven us to attempt to correct what would probably be a constitutional crisis at exactly a time the Nation could not afford it."<sup>47</sup> However, according to Representative Zablocki, then Chairman of the House Committee on Foreign Affairs, Byrd's amendment was opposed "on the grounds that such an action would be unwise at this stage."<sup>48</sup> Moreover, Zablocki stressed that agreement had been reached by the conference committee to a Senate proposal establishing

expedited procedures in the Senate for the consideration of a bill or joint resolution directing the withdrawal of U.S. Armed Forces from hostilities abroad in the absence of a declaration of war or specific statutory authorization. I would emphasize that this provision does not amend the War Powers Resolution in any way nor does it affect in any way the procedures and rules of the House for consideration of such measures.<sup>49</sup>

If the amendment offered by Senator Byrd had been applicable to the House of Representatives, it would have completely reinstated Congress' reply to executive use of armed forces abroad to passage of a joint resolution by both chambers, giving the President the option to

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44. 129 CONG. REC. S14,165 (daily ed. Oct. 19, 1983).

45. *Id.* at S14,163.

46. *Id.* at S14,165.

47. *Id.* at S14,164.

48. 129 CONG. REC. H10,332 (daily ed. Nov. 17, 1983).

49. *Id.* See also CONGRESSIONAL RESEARCH SERVICE, THE WAR POWERS RESOLUTION: A DECADE OF EXPERIENCE REP. NO. 84-22 F. (E. Collier ed. 1984). ("The priority procedures embraced by this provision apply in the Senate only. Handling of such a joint resolution by the House is apparently left to that Chamber's discretion. The implications of this congressional action are not fully apparent at the moment."). *Id.* at 11.

sign the measure, or of vetoing it and subjecting it to a veto override attempt. Ironically, this attempt to substitute a joint resolution for a concurrent resolution would have essentially restored the congressional response, in areas of legislative authority, to the same that it had always been prior to the passage of the War Powers Resolution.<sup>50</sup>

#### IV. INTENT OF THE FRAMERS

Before reviewing what ramifications the *Chadha* decision may hold for section 5(b) of the War Powers Resolution, it is important to examine the rationale of the Framers in crafting the checks and balances and separation of powers provisions in the Constitution. As the Supreme Court noted in *Chadha*, "it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency."<sup>51</sup>

In the context of our inquiry, two central concerns of the Framers emerge from a review of the debates and writings surrounding the drafting of the Constitution. During the deliberations, it was widely agreed that a veto would provide a necessary check for the Executive on legislative actions because "[w]ithout such a self-defence, the legislature can at any moment sink [the Executive] into non-existence."<sup>52</sup> Moreover, as noted by Colonel Mason, presidential veto was necessary to restrain "unjust and pernicious laws" passed by the legislature.<sup>53</sup>

In *The Federalist*, Alexander Hamilton and other contemporary

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50. HOUSE COMM. ON SCIENCE AND TECHNOLOGY, 98TH CONG., 1ST SESS., LEGISLATIVE MANUAL 7 (3d ed.) (Comm. Print 1983).

#### DRAFTING LEGISLATION

##### Forms of Legislation

Deschler defines four forms of legislation in the House. These are described as follows:

(2) "H.J. Res.—" A *House Joint Resolution* is treated exactly the same way as an H.R. numbered bill. The H.J. Res. is traditionally used to change either a minor item in an existing law or to handle a matter or urgency which requires speedy action. The term "joint" does not signify simultaneous introduction and consideration in both Houses.

(3) "H. Con. Res.—" A *House Concurrent Resolution* is used to express a non-legislative point of view of the Congress. A concurrent resolution must be approved by both Houses, although it does not require Presidential approval. On approval by both Houses, a concurrent resolution is published in a special part of the Statutes at Large.

51. — U.S. at —, 103 S. Ct. at 2788.

52. ELLIOT, *supra* note 10, at 151 (Mr. Wilson).

53. *Id.* at 347 (Col. Mason). More recently the Court of Appeals for the District of Columbia has noted:

To hold that the presidential veto power does not have a policy purpose in the legislative review context would logically require that the same holding be applied to all legislation, a result that would alter the balance of Executive-Legislative power so radically that no court could conceive of adopting it.

writers spoke of the tendency of the legislature to intrude on the other departments, the inadequacy of a written delineation of the boundaries between the branches, and the exigency for a system of checks and balances "in the Executive upon the acts of the legislative branches."<sup>54</sup> The major concern was that without either an absolute or qualified veto, the Executive "might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands."<sup>55</sup>

In order to reach agreement on the precise form that the presidential veto should take, two issues were debated at length during the Constitutional Convention. The first issue was whether the veto should be absolute—permitting the President to completely nullify legislation passed by the Congress—or whether the veto should be qualified—allowing either a three-fourths or two-thirds override vote of both Houses of the Congress. While there was complete agreement "against enabling any one man to stop the will of the whole,"<sup>56</sup> it was also recognized that the Executive needed a sufficient defense against the legislature. Madison pointed out that "if a proper proportion of each branch should be required to overrule the objections of the executive, it would answer the same purpose as an absolute negative."<sup>57</sup>

After considerable debate, providing an absolute veto in the Executive was unanimously rejected.<sup>58</sup> In September of 1787, it was decided that an override of an executive veto by both Houses of Congress would be achieved by two-thirds rather than three-fourths vote in each House.<sup>59</sup>

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Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 463 (D.C. Cir. 1981), *aff'd*, — U.S. —, 103 S. Ct. 3556 (1983).

54. THE FEDERALIST, No. 73, at 468-69 (A. Hamilton) (B. Wright ed. 1961).

55. *Id.* at 469.

56. ELLIOT, *supra* note 10, at 152 (R. Sherman).

57. *Id.* (J. Madison).

58. *Id.* at 154.

59. *Id.* at 538.

It is noteworthy that nearly one month earlier, the committee had by the same vote margin agreed that a three-fourths vote should constitute an override of the executive veto. During that debate in August, James Wilson had remarked, "After the destruction of the king in Great Britain, a more pure and unmixed tyranny sprang up in the Parliament, than had been exercised by the monarch." *Id.* at 430. But it is important to note that Madison pointed out "When three fourths was agreed to, the President was to be elected by the legislature, and for seven years." *Id.* at 537-38. When the final veto override motion was considered, the President was to serve for a term of four years and be elected by the people. *Id.* The debate did not focus on the propriety of a check against usurpation by the legislature over the executive, but rather on what type of procedure should be implemented in provid-

The second main issue argued in the summer of 1787 concerning the scope of the veto was whether there should be joint use of the veto by the executive and the judiciary in order to counteract the power of the legislature.<sup>60</sup> Again, the reason for such a construction for the veto was to serve the dual purposes of providing "more wisdom and firmness to the executive."<sup>61</sup> Further, Madison thought that it would provide the third branch "an additional opportunity of defending itself against legislative encroachments . . . . [N]otwithstanding this cooperation of the two departments, the legislature would still be an *overmatch* for them."<sup>62</sup> Finally, by a four-to-three vote, with two states split, it was decided that a sharing of the reversionary power by the executive and the judiciary was not appropriate.<sup>63</sup> The fundamental reason was that it would have made "the expositors of the laws the legislators."<sup>64</sup>

And, as the Supreme Court carefully pointed out in the *Chadha* decision,<sup>65</sup> Madison had articulated his doubts that if the executive veto "was confined to *bills* it would be evaded by acts under the form and name of Resolutions, votes &c. . . ."<sup>66</sup> While Madison's motion was originally defeated, Randolph's motion to remedy the situation by

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ing the veto. Thus, at all times, the chief concern of the Framers was to afford the other departments protection against legislative entrenchment.

60. One amendment that was considered would have allowed that:

Every bill which shall have passed the two Houses shall, before it becomes a law, be severally presented to the President of the United States, and to the judges of the Supreme court, for the revision of each. If, upon such revision, they shall approve of it, they shall respectively signify their approbation by signing it; but if upon such revision, it shall appear improper to either, or both, to be passed into a law, it shall be returned, with the objections against it, to that House in which it shall have originated, who shall enter the objections at large on their Journal, and proceed to reconsider the bill; but it, after such reconsideration, two thirds of that House, when either the President or a majority of the judges shall object, or three fourths, where both shall object, shall agree to pass it, it shall, together with the objections, be sent to the other House; by which it shall likewise be reconsidered, and, if approved by two thirds, or three fourths of the other House, as the case may be, it shall become a law.

*Id.* at 428.

61. *Id.* at 344 (O. Ellsworth).

62. *Id.* at 345 (J. Madison) (emphasis added).

James Madison based these conclusions on experience at that time in the states which had "evinced a powerful tendency in the legislature to absorb all power into its vortex." *Id.* at 345. Legislative encroachment "was the real source of danger to the American constitutions," according to Madison and he suggested "the necessity of giving every defensive authority to the other departments that was consistent with republican principles." *Id.*

63. *Id.* at 349.

64. *Id.* at 345 (E. Gerry).

65. — U.S. at —, 103 S. Ct. at 2782.

66. ELLIOT, *supra* note 10, at 431 (J. Madison).



"putting votes, resolutions, &c., on a footing with bills"<sup>67</sup> was approved on the very next day by a vote of nine to one with one state absent.<sup>68</sup> Thus, it is clear from the debate and writings that the qualified veto for the President was largely designed to operate as a shield against legislative encroachment and to provide the Executive a participatory legislative role, in approving or disapproving legislation passed by both Houses.

#### V. APPLYING THE *CHADHA* DECISION TO SECTION 5(b) OF THE WAR POWERS RESOLUTION

Depending upon which federal powers are being employed, certain constitutional requirements may have to be met in order for those "carefully crafted restraints" to be satisfied. Under the *Chadha* decision, two primary questions must be addressed to determine what action constitutes a sufficient legislative exercise. Since the President is constitutionally given a participatory legislative role through the presentment clauses,<sup>69</sup> one must first examine whether the congressional action falls "within any of the express constitutional exceptions authorizing one House to act alone."<sup>70</sup> Second, one must consider whether that action "was an exercise of legislative power" and hence "subject to the standards prescribed in Article I."<sup>71</sup> Since section 5(b) does not concern an impeachment, presidential appointment, ratification of a treaty, or a constitutional amendment,<sup>72</sup> it obviously does not fall into the exception permitting actions which may be taken by one House. Our main inquiry, therefore, surrounds the second issue: whether section 5(b) is a proper *exercise of legislative power*.

In *Chadha*, the Supreme Court relied on an 1897 Senate Committee Report to determine what action constitutes an exercise of legislative power thereby necessitating that a bill be presented to the President.<sup>73</sup> The committee found that in order for an action to be an

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67. *Id.* See U.S. CONST. art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote to which the concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President.").

68. ELLIOT, *supra* note 10, at 431.

69. U.S. CONST., art. I, § 7, cls. 2 & 3.

70. — U.S. at —, 103 S. Ct. at 2787.

71. *Id.*

72. *Id.* at —, 103 S. Ct. at 2786.

73. *Id.* at —, 103 S. Ct. at 2784.

The Senate Committee on the Judiciary had been directed by the Senate to, among other things, report whether concurrent resolutions must be submitted to the president. "The Constitution," notes the report, "looks beyond the mere form of a resolution . . . and looks rather to the subject-matter." S. REP. NO. 1335, 54th Cong., 2d Sess. 1 (1897). Hence

exercise in legislative power, the measure must "contain matter" which would be properly "regarded as legislative in its *character and effect*."<sup>74</sup> The Court found that the immigration statute had a *legislative effect* because it altered the "legal rights, duties and relations of persons, including [executive branch officials and others], all outside the legislative branch."<sup>75</sup> Utilizing this standard, section 5(b) has undoubted significance in altering the legal rights, duties and relations of persons outside the legislative branch. Unless some other contingent event under the statute occurs,<sup>76</sup> the President shall terminate any use of the United States Armed Forces with respect to which a report under section 4(a)(1) is required to be submitted. Therefore, in the event that Congress is unable to come to an agreement to support the President's use of the armed forces or in the event of inaction on the part of not only the Congress but either chamber, the President's use of the armed forces is explicitly terminated.

In *Chadha*, it was the "action" of one House which altered Chadha's legal position; whereas pursuant to section 5(b), the mere *inaction* of Congress has the effect of altering the troops' legal status. Since *Chadha*, in which the action of one House in the context of a legislative veto was held unconstitutional, it is seriously doubted that legislative expression less than a one house action—mere inaction—is constitutional. Unless the *Chadha* holding is to be based on form and not substance, the Supreme Court's decision must have had adverse implications for section 5(b). If this were not the case, the constitutional standards of presentment and bicameralism could be circumvented by rewriting the statute to allow congressional inaction to veto a presidential action or decision. The controlling issue would simply become one of statutory drafting. More importantly, such statutory construction would provide the legislative branch with the ability to upset the principle of separation of powers, referred to as "the heart of our Constitution."<sup>77</sup>

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it is the legislative substance of the resolution, not the legal form, which is controlling. The report continued, "every exercise of 'legislative powers' involves the concurrence of the two Houses; and every resolution not . . . involving the exercise of legislative powers, need not be presented to the President." *Id.* at 8.

74. *Id.* (emphasis added).

75. *Id.*

76. *E.g.*, Congress declares war, extends the 60-day period, or is physically unable to meet, or the president certifies the necessity of extending the 60-day period for not more than 30 more days. 50 U.S.C. § 1544(b).

77. *Consumer Energy Council of America v. Federal Energy Regulatory Comm'n*, 673 F.2d 425, 471 (D.C. Cir. 1982), *reh'g denied*, — U.S. —, 104 S. Ct. 40 (1983) (quoting *Buckley v. Valeo*, 424 U.S. 103, 119 (1976)).

Examination of the action as to *legislative effect* does not end our inquiry. It still remains to be evaluated whether section 5(b) can be regarded as *legislative in character*. According to *Chadha*, "[t]he legislative character of the one-House veto . . . is confirmed by the character of the Congressional action it supplants."<sup>78</sup> It is clear that section 5(b) is *legislative in character* because in the *absence* of section 5(b), a congressional order to the President to terminate use of United States Armed Forces could only be accomplished through a proper exercise of legislative power. (This, of course, assumes that Congress has the authority to act and is not interfering with some plenary war power authority of the President, e.g., repelling a sudden attack).

The Supreme Court is clear on this requirement. Original passage requires that the conditions of bicameralism and presentment are met. Similarly, "[a]mendment and repeal of statutes, *no less than enactment*, must conform with Art. I."<sup>79</sup> No lesser standard, therefore, constitutes an appropriate exercise of legislative power. If the Congress can bypass the legislative process of bicameralism and presentment set forth in Article I, it can potentially "weaken executive powers under article II and render them vulnerable to congressional manipulation."<sup>80</sup> As Chief Justice Burger wrote in the *Chadha* opinion:

To preserve [the checks and balances], and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express *procedures* of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President.<sup>81</sup>

*A. Section 5(b), the Functional Equivalent of a One House Legislative Veto*

In light of the *Chadha* decision, the question is raised: Can Congress do by inaction what it can not do by concurrent resolution, the two House veto, or by a one House veto?<sup>82</sup>

The legislative history of the War Powers Resolution reveals that Congress attempted to preserve for itself the option of a one House or

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78. — U.S. at —, 103 S. Ct. at 2785 (emphasis added).

79. *Id.* (emphasis added).

80. Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. ON LEGIS. 735, 758 (1979).

81. — U.S. at —, 103 S. Ct. 2787 (emphasis added).

82. This analysis leaves aside, for the moment, the constitutional issue of whether Congress can circumscribe a President's action pursuant to areas of his Article II authority.

two House legislative veto. There is no doubt that section 5(c) is a two House legislative veto whereas section 5(b) is at minimum the functional equivalent of a one House legislative veto. Conceivably, if Congress attempted to utilize the two House veto in section 5(c) and was unable to obtain passage of a resolution in one chamber, the legislative body disapproving of the President's use of United States Armed Forces could prevent both Houses from reaching agreement permitting the continued presence of troops. Because both Houses would not be acting collectively, section 5(b) would operate and therefore the removal of the armed forces would be mandated.

In fact, Congressman Zablocki noted that:

[o]ur purpose [in drafting sections 5(b) and (c)] essentially was to provide Congress with a two-barrel approach—as we call it—to ending a commitment of troops ordered by the President. The first of that so-called *two barrel approach* involves the 60-day period at the end of which the President would have to end the commitment of troops unless Congress, in effect exercises its exclusive warmaking powers by endorsing or approving the action through a declaration of war or a specific authorization. . . . The second barrel so to speak, or the other approach, involves the concurrent resolution which we regard as a statutorily legal method of ending the commitment of troops.<sup>83</sup>

The two-barrel approach gives tremendous power to the entire legislature as well as to one body of Congress which does not extend to other areas of legislation. If one chamber is determined to bring the troops home, it can attempt to convince the other body to agree with it. However, if the determined chamber fails, it can rely on the fact that section 5(b) would become operative. Rather than encouraging legislative accommodation, the potential for legislative conflict becomes enhanced.

Section 5(b) is not only less than enactment but arguably, it is less than even a one House veto because it is operative when neither chamber acts. At least one chamber is acting in a one House veto situation.

Section 5(b) has a significant effect because the action or inaction of one House can terminate the use of armed forces abroad. While it is

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83. *War Powers: A Test of Compliance, Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the Subcomm. on Intern'l Security & Scientific Affairs of the House Comm. on Internat'l Relations*, 94th Cong., 1st Sess. 93 (1975) (emphasis added) [hereinafter cited as *Compliance Hearings*].

true that section 5(b) does not contain express language providing for a one House legislative veto, this is irrelevant since the operational force of the section is the functional equivalent of a one House legislative veto. Clearly, without this provision, the bicameralism and presentment requirements would have to be met if the Congress were to force the withdrawal of United States Armed Forces.

### *B. Denying Presentment to the President*

Under section 5(b) and (c) the President is denied presentment, or the opportunity to sign his approval or return his disapproval. If a one or two House resolution without presidential approval is unconstitutional, how can congressional inaction overturning a presidential decision be constitutional? It is likely that a complete reversal of a presidential action by congressional inaction will result. It is ironic because even a declaration of war is signed by the President.<sup>84</sup> Although

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84. The five declared wars were:

War of 1812:

"On June 18, two days after Britain had removed the chief cause for war, President Madison signed the declaration which began the War of 1812."

R. LECKIE, *THE WARS OF AMERICA* 234 (1968); *see also* 2 Stat. 755 (1845).

Mexican War, 1846:

"The vote was 174 to 14 in the House, 40 to 2 in the Senate. On May 13, 1846, Polk signed the War bill into law."

LECKIE, at 327; *see also* 9 Stat. 9 (1851).

Spanish-American War:

At about four o'clock, the doorkeeper Leoffler appeared with the joint resolution, which Congress had quickly passed. McKinley arose and received the document, asking Webb to request the presence of Attorney General Griggs and to arrange a table. Vice-President Hobart had sent a pen for the signature. Webb fetched a second pen and the left-hand glass inkwell from the desk at the end of the Cabinet table. Griggs came upstairs, and sat down with McKinley to examine the wording of the resolution, which declared that a state of war existed, and had existed since April 21, between the United States and Spain. Everything was in order. The President signed.

M. LEECH, *IN THE DAYS OF MCKINLEY* 192-93 (1959); *see also* 30 Stat. 364 (1899).  
World War I: "Forster handed the resolution to the President, who seating himself at the desk of I.H. Hoover, Chief Usher, signed 'Approved 6 April, 1917, Woodrow Wilson.'"

THE PAPERS OF WOODROW WILSON 557 (A. Link ed. 1983); *see also* 40 Stat. 1, 429 (1919).

World War II:

December 7, 1941, the first wave of Japanese planes bombed the fleet anchored in Pearl Harbor. . . . The next day the President went before a joint session of Congress and asked it to declare that since the Pearl Harbor attack "a state of war has existed between the United States and the Japanese Empire."

In less than an hour, with only one dissenting vote in the House, Congress passed the war resolution, The President signed it that afternoon.

A. DE CONDE, *A HISTORY OF AMERICAN FOREIGN POLICY* 609-10 (1971); *see also* 55 Stat. 795-97 (1942); (56 Stat. 307 (1943).

all declarations of wars have been made at the President's request,<sup>85</sup> through presentment, the President still has an opportunity to veto the declaration just as in any other joint resolution or bill that he may consider.

Presentment is not a mere formality. As already stated above, the Framers intended that the executive veto perform two vital functions. First, it was "based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed."<sup>86</sup> Madison was concerned that "if the [veto] of the President was confined to *bills*, it would be evaded by acts under the form and name of resolutions, [or] votes . . . ."<sup>87</sup> Second, the participatory role of the President in the consideration and enactment of legislation was designed "to prevent popular or factious injustice" on the part of the legislature.<sup>88</sup>

Sections 5(b) and (c) totally bypass the purposely "crafted restraints" of presentment in the legislative process. The one and two House legislative vetos significantly modify the balance of power between the branches established by the Founding Fathers. One commentator has written:

The availability of the legislative veto encourages ill-considered legislation by permitting Congress to avoid making thorough public policy judgments in the initial passage of laws. As long as legislators know that they will have an easy "second chance" to make statutory policies or alter their execution, the incentive for detailed research and precise drafting is greatly diminished. The resulting broadly-drafted laws only serve to enhance the power of the federal government.<sup>89</sup>

Moreover, the constitutional standard for enactment of legislation is lowered since less than a two-thirds vote under the War Powers Resolution has the same effect as a two-thirds vote required for a normally presented resolution previously vetoed by the President. Consequently, section 5(b) can keep the war powers decision of terminating the use of armed forces abroad within one chamber.

There are two noteworthy implications for the presentment issue as a result of the "two-barrel approach." First, the drafters of the War

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85. BACKGROUND INFORMATION ON ARMED FORCES, *supra* note 2, at 28. ("The precedents show that Congress has never refused to declare war when requested by the President."). *Id.*

86. — U.S. at —, 103 S. Ct. at 2782.

87. ELLIOT *supra* note 10, at 431.

88. *Id.* at 538 (J. Madison).

89. Henry, *supra* note 80, at 761.

Powers Resolution intended to apply sections 5(b) and (c) to all presidential considerations in the use of armed forces. Ironically, in the Constitutional Convention of 1787, Mr. Wilson urged that the "silent operation [of an absolute veto for the president] would therefore preserve harmony and prevent mischief [by the legislature]."<sup>90</sup> Mr. Zablocki's "two-barrel approach" works in the opposite direction creating a "silent operation" in favor of the Congress over the Executive.<sup>90.1</sup>

Second, section 5(b) forces the withdrawal of troops after the passage of sixty days, unless Congress takes specific action affirming the President's position or is unable to meet as a result of an armed attack. A result which in the absence of section 5(b) would require that at least the President have an opportunity to approve or disapprove the congressional intent to withdraw the armed forces.

The Supreme Court has indicated that presentment serves the important function of ensuring that a "national" perspective is made a part of legislative consideration.<sup>91</sup> This is especially true to the extent that one believes the President has considerable war power authority under the Constitution, and that the people of the country may vote for or against the President as a result of the exercise of this power.

*C. Modifying the Constitutional Standard to  
Exercise Legislative Power: New Rules for Congressional  
Policy Making in the War Powers Area*

Not only is the President denied proper presentment, but new rules are established allowing a policy bias in favor of troop withdrawal through congressional inaction. Section 5(b) permits two results. One House can effectively veto or check a presidential use of troops abroad. Or, neither House need act to bring the troops home and thereby achieve the same result required under the Constitution through passage by a majority of both the House and the Senate, pre-

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90. ELLIOT, *supra* note 10, at 152 (Wilson).

90.1. This is consistent with Representative Fraser's statement during the debate on the War Powers Resolution that in the event both houses could not reach agreement "the *presumption lies with the Congress*, and its constitutional responsibility to *declare war or not to declare war*, rather than leaving the presumption in favor of the president to continue on with a military action for which he has no specific authority." 119 CONG. REC. 24,692 (1973) (emphasis added).

91. — U.S. at —, 103 S. Ct. at 2782-83 (quoting *Myers v. United States*, 272 U.S. 52, 123 (1926)).

The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide . . . .

sentment to the President, signature or disapproval by the President, and, potentially a two-thirds override in each legislative body. The net result is that it becomes easier for the Congress to influence the President in the war power areas.

A review of the legislative history of the Resolution reveals that sections 5(b) and (c) were deliberately intended to provide additional leverage to Congress. Presuming that the President would veto a disapproval by the Congress on a presidential use of armed forces, Zablocki expressed concern during the House floor debate on the Resolution that "[o]ne-third of either body will thwart the will of the majority" if both Houses were not able to override the President's revision.<sup>92</sup> He continued, "I do not think that one-third of either body, either the House or the Senate, should control the constitutional question of war powers."<sup>93</sup>

During deliberation in the House, the point was made that if the President vetoed a bill passed by both chambers halting the commitment of armed forces, and a two-thirds override was not attainable, an option existed for the Congress. As Representative Whalen stated, "there is another alternative, and that is to use the provisions of section 4(c) [the substantive provision of section 5(c), allowing for a concurrent resolution, was at this point in the debate numbered as section 4(c)]."<sup>94</sup> The House Report on the War Powers measure is explicit on this matter. Subsection (c) "authorizes the use of a concurrent resolution to 'veto' or disapprove an action of the President committing United States Armed Forces to hostilities."<sup>95</sup> One can take this legislative option one step further. In the event that one of the Houses changes its mind subsequent to the original passage of the bill, the inaction on the part of one House would invoke section 5(b), thereby achieving the intended result of terminating the use of armed forces abroad.

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92. 119 CONG. REC. 24,689 (1973).

93. *Id.* Similar comments were echoed by Rep. Findley on the consideration of an amendment to require action through a joint resolution, stating that under the amendment "Presidents in the future [would] be able to continue indefinitely Presidential wars simply by retaining the support of one-third of either House." *Id.* at 24,690. Mr. Mailliard noted that the amendment could create "a situation where 50 out of 535 Members of this Congress could totally thwart the will of the President of the United States and the remainder of the Congress." *Id.* at 24,657.

It is also interesting to note the comments by Mr. Frelinghuysen:

I do not know whether [Mr. Zablocki] is suggesting that we should not have a bicameral legislature. Because of the nature of the legislative beast it is not easy to reach a decision. That is no excuse to say, because it is not easy, that on a matter of highest national consequence we should affect the result by doing nothing.

*Id.* at 24,689.

94. *Id.* at 24,686.

95. WAR POWERS RESOLUTION OF 1973, H.R. REP. NO. 287, 93d Cong., 1st Sess. 11 (1973) (statement of Clement Zablocki).



Without discussing the unique merits of any situation which may require the use of armed forces abroad, and with all due respect to the effort and energy that Representative Zablocki devoted toward the drafting of the War Powers Resolution, his position presumes that the troops should not be sent or remain abroad. This creates a bias towards withdrawal of United States Armed Forces whereas the circumstances of the moment may require that the troops be used.

Additionally, just because the Resolution deals with a war powers situation does not mean that the constitutional standard of enactment of legislation should be upset to favor one presumption over another. By giving greater influence to a single chamber over the executive, the balance of power intended by the Framers is changed. The constitutional requirements of bicameralism and presentment are avoided. The significance of this can be appreciated in considering that many times during each congressional session legislation will pass or fail by only a few votes. Conceivably, one vote itself can have the effect of changing the law of the land.<sup>95.1</sup> There is no doubt that those with a certain policy disposition in any area of the law may prefer that it would be procedurally and legislatively easier to maintain that policy position. However, to allow such a result in selected policy areas of the law would be to circumvent the constitutional standard for legislative enactment.

In response to a similar argument that the one House legislative veto is necessary because "it takes a long time for Congress to work its legislative will,"<sup>96</sup> the Court of Appeals for the District of Columbia pointed out that

[t]he delays in enacting an affirmative and amendable legislative remedy are a result of nonconstitutional congressional rules of procedure which can be changed by Congress acting alone. . . . To the extent there is *not* a consensus, the failure to act is not an undesirable "delay" but rather exactly the outcome of the legislative process envisioned by the Framers. The bicameralism and presentation requirements in Article I, Section 7 are not unfortunate by-products of a poorly designed scheme but rather carefully constructed impediments to the Legislature's exercise of power.<sup>97</sup>

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95.1. Ironically, the passage of the War Powers Resolution itself demonstrates how close a vote can be. In the House, the vote on the veto override passed by only a 4 vote margin. 119 CONG. REC. 36,221-22.

96. Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. Rev. 455, 462 (1977).

97. *Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n*, 673 F.2d

Hence, only action which satisfies the constitutional standards for enactment—bicameralism and presentment—can be used in passing legislation. Absent section 5(b), the influence that it purports to exert over the Executive could have only been achieved by statute or constitutional amendment.

Section 5(b) undermines the carefully designed separation of powers intended by the Framers. Thus, Congress is able to effectuate a result which it otherwise would be unable to do by adhering to a procedure which is “less than” the constitutional standard. The doctrine of separation of powers, noted Justice Brandeis, “was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”<sup>98</sup>

#### *D. Is Section 5(b) Sunset Legislation?*

James Madison is quoted in a footnote in the *Chadha* opinion as commenting during the debate of the Constitutional Convention in 1787 that “[a]s to the difficulty of repeals, it was probable that in doubtful cases the policy would soon take place of limiting the duration of laws as to require renewal instead of repeal.”<sup>99</sup> Additionally, in a separate footnote, the Supreme Court adds that “other means of control, such as durational limits on authorizations and formal reporting requirements, lie well within Congress’ constitutional power.”<sup>100</sup> These two references raise the issue that section 5(b) of the War Powers Resolution may be in essence a sunset provision, a “provision to end a program or . . . [authorization] by a target date unless it is renewed by legislative action.”<sup>101</sup>

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425, 476 (D.C. Cir. 1982), *aff’d*, — U.S. —, 103 S. Ct. 3557 (1983) (footnote omitted) (emphasis in original).

The words of James Madison echo the concern of the Framers. “The legislative department derives a superiority in our government from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments.” THE FEDERALIST No. 48, at 344 (J. Madison) (B. Wright ed. 1961).

98. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

99. — U.S. at —, 103 S. Ct. at 2785 n.18 (quoting FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 14, at 587).

100. — U.S. at —, 103 S. Ct. at 2786 n.19.

101. STAFF OF HOUSE COMM. ON RULES, REPORT ON STATE SUNSET STATUTES, 98TH CONG., 1ST SESS. 1 (Comm. Print 1983).

In order for section 5(b) to operate as a sunset provision, it would have to pertain to an area in which Congress has war powers authority to act. In other words, the authority which Congress would be sunset-ting, or limiting, would have to be one which Congress has the power to restrict. On the other hand, if the President has the constitutional power to act in the war powers area, this power cannot be circumvented either before or after sixty days. "[F]rom a legal point of view . . . Congress cannot by statute circumscribe a power which is derived from the Constitution."<sup>102</sup> As a result, the issue remains the unresolved two century old debate on the exact scope and demarcation of the war powers.

Assuming arguendo that Congress was acting in an area where it delegated some of its war powers authority to the President, the *Chadha* opinion states clearly that "[e]xecutive action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require."<sup>103</sup> The reason the Constitution does not provide such a condition is because presidential action based on congressional delegation is already subject to the checks of "the terms of the legislation that authorized it" or, in the event that the delegated "authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely."<sup>104</sup> Hence, even if the authority is delegated, Congress is proscribed from checking that authority by congressional veto. "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."<sup>105</sup>

Section 5(b) cannot be a sunset provision because a provision in the statute specifically denies that any part of the War Powers Resolution constitutes a delegation.<sup>106</sup> Senator Javits buttressed this point in a

102. *Compliance Hearings*, *supra* note 83, at 29 (statement of Monroe Leigh, Legal Advisor to Secretary of State).

103. — U.S. at —, 103 S. Ct. at 2785 n.16.

104. *Id.*

105. *Id.* at —, 103 S. Ct. at 2786 (footnote omitted).

106. In the interpretation of the Act, § 8(d) explicitly provides that no grant of authority to the executive from the statute is to be construed:

(d) Nothing in this joint resolution—

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

50 U.S.C. § 1547(d).

1975 House hearing. The key to the War Powers Resolution is that "[i]t does not involve any legal power or grant of authority. The legal power in the War Powers Resolution is that we can decide when the stop loss provisions of the War Powers Resolution should be applied."<sup>107</sup> Therefore, even if Congress was attempting to delegate some of its war powers authority to the President, the statute expressly prohibits it. If Congress doesn't have the authority to delegate to the Executive, there is no way that it can establish a sunset provision. Congress would have to create the power in the President in order to withdraw it. Additionally, if the President is able to use his own executive power, Congress should not be able to intrude upon his exercise of it.

#### VI. THE UNRESOLVED CONSTITUTIONAL ISSUE: THE CONTOURS OF LEGISLATIVE AND EXECUTIVE WAR POWERS

The War Powers Resolution never resolved the issue of what the respective *parameters* of executive and legislative war powers are. As a result, it is ineffective and has the potential for, as Senator Byrd noted, "a constitutional crisis."<sup>108</sup>

In the eleven reports issued pursuant to the War Powers Resolution,<sup>109</sup> Presidents have been extremely cautious not to relinquish any of their Article II powers. Former President Gerald R. Ford noted in a speech in 1977 that "[t]he United States was involved in six military crises during my presidency. . . . In none of those instances did I believe the War Powers Resolution applied. . . . Furthermore, I did not concede that the resolution itself was legally binding on the President on constitutional grounds."<sup>110</sup> In the one instance that President Carter reported under the War Powers Resolution to rescue American hostages in Iran, he wrote "[b]ecause of my desire that Congress be informed on this matter and *consistent with* the reporting provisions of the [act], I submit this report."<sup>111</sup> He also added that the "operation was ordered and conducted pursuant to the President's powers under

107. *Compliance Hearings*, *supra* note 83, at 62-63 (statement of Sen. Javits).

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

109. Collier, *War Powers Resolution: Presidential Compliance*, THE LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, FOREIGN AFFAIRS AND NATIONAL DEFENSE DIVISION, Issue Brief No. IB81050, at 10-11 (updated January 6, 1984).

110. "The War Powers Resolution, Striking a Balance between the Executive and Legislative Branches," speech by former President Gerald R. Ford, University of Kentucky, Louisville (April 11, 1977), reprinted in *Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 325, 327 (statement of Gerald R. Ford).

111. STAFF OF THE SUBCOMM. ON INTERN'L SECURITY & SCIENTIFIC AFFAIRS OF THE HOUSE COMM. ON FOREIGN AFFAIRS, THE WAR POWERS RESOLUTION, RELEVANT DOCUMENTS, CORRESPONDENCE, REPORTS, 98TH CONG., 1ST SESS. 47 (Comm. Print 1983) (em-

the Constitution as Chief Executive and as Commander-in-Chief . . . , expressly recognized in Section 8(d)(1) . . . ." President Reagan, in six instances of reporting under the Resolution, followed President Carter's "consistent with" language, and either cited his "constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief of the United States Armed Forces" or added language noting that "I want to emphasize that there is no intention or expectation that U.S. Armed Forces will become involved in hostilities."<sup>112</sup> None of these reports was written in complete compliance with the War Powers Resolution. Thus, to date, the effectiveness of the War Powers Resolution has been suspect.

The War Powers Resolution has inadequately addressed the two century old boundary dispute.<sup>113</sup> This by no means suggests that such

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phasis added); see also Legal Opinion of May 9, 1980, by Lloyd Cutler, Counsel to President Carter, on War Powers Consultation Relative to the Iran Rescue Mission. *Id.* at 50.

112. See, e.g., *id.* at 57-85. See also Will, *War Powers: An Act of Folly*, WASH. POST, Sept. 15, 1983, at A23; Collier, *War Powers Resolution: Presidential Compliance*, THE LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, FOREIGN AFFAIRS AND NATIONAL DEFENSE DIVISION, Issue Brief No. IB81,050 (updated Jan. 6, 1984), at 10-11; Congressional Research Service, *The War Powers Resolution: A Decade of Experience*, H.R. REP. NO. 84-22 F, 37 (Feb. 6, 1984) (commenting on the view that the War Powers Resolution has been ineffective: "Presidents have continued to introduce United States armed forces into hostilities without consulting Congress and without congressional authorization, and this has been obscured by emphasis on the reporting requirements and time limitation provisions. They have cited § 4(a)(1) on only one occasion—Mayaguez—and never in a situation that has been likely to continue beyond 60 or 90 days.").

113. The Senate had hoped "to reconfirm and to define with precision the constitutional authority of Congress to exercise its constitutional war powers with respect to 'undeclared' wars and the way in which this authority relates to the constitutional responsibilities of the President as Commander-in-Chief." See WAR POWERS, S. REP. NO. 220, 93d Cong., 1st Sess. 2 (1973).

Additionally, the Senate report on the War Powers states:

The overall purposes of the War Powers Act are to codify the "emergency" powers of the Commander-in-Chief, in the absence of a declaration of war, to introduce the armed forces of the United States in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, and, very importantly, to establish a methodology to assure that Congress is not foreclosed by the practice of undeclared war from exercising its constitutional responsibilities respecting the awesome decision of putting the nation at war.

See WAR POWERS, S. REP. NO. 220, 93d Cong., 1st Sess. 31 (1973).

The House version of the War Powers Resolution was intended to establish a procedure for considering the shared war powers between the executive and legislative branches. Yet, the House report also cautioned that it "[s]pecifies that the measure is in no way intended to alter the constitutional authority of the Congress or the President, or the provisions of existing treaties." See WAR POWERS RESOLUTION OF 1973, H.R. REP. NO. 287, 93d Cong., 1st Sess. 5 (1973).

After enactment, the purpose of the resolution was codified:

It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States

a bright line test should be delineated. Just as it had been prior to passage of the War Powers Resolution, the answer to this question on the scope of the branches' war powers still depends on the construction of the Madison-Gerry "make war"- "declare war" amendment, the express constitutional powers granted to the Congress and the President, and on historical precedent.

As Justice Jackson wrote in *The Steel Seizure Case*, "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."<sup>114</sup> His well-known three-part analysis proves useful in illustrating how important the construction is in the war powers area. First, "when the President acts pursuant to an express or implied authorization of Congress, his authority is *at its maximum*, for it includes all that he possesses in his own right plus all that Congress can delegate."<sup>115</sup> This part of the analysis is the easiest, for the President acting under his authority and in conjunction with delegations of Congress is without doubt constitutional. An example for this first category is the Multinational Force in Lebanon Resolution,<sup>116</sup> enacted on October 12, 1983, in which Congress authorized that United States Armed Forces could participate in the Multinational Force in Lebanon for eighteen months.

The second prong of the test is the one into which most presidential uses of the armed forces fall:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a *zone of twilight* in which he and Congress may have concurrent authority, or in which its distribution is uncertain . . . . In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.<sup>117</sup>

If Monroe Leigh is correct in his analysis that the President has authority, not specified in the War Powers Resolution, "to forestall any direct and imminent threat of attack upon the United States" or, for example,

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Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by circumstances, and to the continued use of such forces in hostilities or in such situations.

See WAR POWERS, CONFERENCES REPORT, H.R. REP. NO. 547, 93d Cong., 1st Sess. 1, reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2363-64.

114. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

115. *Id.* (emphasis added).

116. Pub. L. No. 98-119, 97 Stat. 805 (1983).

117. 343 U.S. at 637 (emphasis added).

"to protect and rescue U.S. nationals abroad,"<sup>118</sup> the inaction of Congress would create a direct conflict under section 5(b). However, the effect of section 5(b) is to presume that after sixty days Congress has sole authority in this area. The President is then given only a sixty day "grace period"<sup>119</sup> despite the fact that he could be acting directly under his Article II war power. Importantly, were it not for section 5(b), the absence of congressional grant or denial of authority would not have any impact on the President's exercise of his war power. The effect of section 5(b) is to create a conflict situation where none would otherwise exist after the sixty days have expired.

Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at *its lowest ebb*, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."<sup>120</sup> Without a doubt the shared war powers under the War Powers Resolution would be in conflict in this third category. Applying Justice Jackson's analysis, "[c]ourts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject."<sup>121</sup>

Hence, one can see that under the three-part analysis of Justice Jackson, the impact of section 5(b) is twofold: first, it creates added situations of doubt, confusion and conflict. Second, it collapses Justice Jackson's category II on the sixtieth day, unless Congress moves the war powers authority in question into category I by acting pursuant to section 5(b) in declaring war, is physically unable to meet as a result of an attack, otherwise authorizes the use of force, or the President requires thirty extra days to extricate the troops. Thus, express presidential authority which is in either category I or II on the fifty-ninth day, moves into category III on the sixtieth day. This means that the President's authority to act, according to this analysis, could change within twenty-four hours from being at its maximum power or in the zone of twilight to its lowest ebb.

Leigh noted that it was Alexander Bickel who once stated that attempts to delineate the President's war powers in statute would "run the risk . . . of being either too restrictive in their definitions of Presi-

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118. *War Powers Resolution: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 72, 73 (1977) (statement of Hon. Monroe Leigh).

119. 129 CONG. REC. S14,164 (daily ed. Oct. 19, 1983) (statement of Sen. Byrd). Senate Minority Leader Byrd stated that: "The President was in effect given a 60-day period as a 'grace period to exercise what were intended to be warmaking powers exclusively given to the Congress under the Constitution.'"

120. 343 U.S. at 637 (emphasis added).

121. *Id.* at 637-38.

dential power, or else of becoming, like the lamentable Tonkin Gulf resolution, blank checks."<sup>122</sup> According to Monroe Leigh, this is the heart of the problem.

Either the enumeration of powers in the War Powers Resolution will be incomplete, or it will be so broad that the President can justify any action he wishes to take under its sweeping provisions.

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

On the other hand, if the statute is worded broadly enough to encompass every instance in which the President has constitutional authority to act, it runs the risk of being overbroad, and of giving the President authority he would not otherwise have had.<sup>123</sup>

There is a particular policy reason to be concerned with a strict sixty day so-called "grace period" on such an important constitutional issue involving the country. Even the Senate Report on the War Powers Resolution recognized that "[t]he choice of thirty days, in a sense, is *arbitrary*. However, it clearly appears to be an *optimal* length of time with respect to balancing two vital considerations. . . ."<sup>124</sup> (The original version of the War Powers Resolution in the House contained a provision for 120 days, while the Senate version would have allowed the President thirty days. The sixty day limit was the result of a compromise worked out in conference and later agreed to by both the Senate and the House).

The criteria that was used to determine the "optimal length of time" is unclear. In each situation, it is hard to say whether the sixty day limit is too long or too short a time period. Certainly, under some interpretations of the war powers authority, no time limit will be able to void presidential constitutional power. A case by case evaluation for the need of United States Armed Forces will adequately address the

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122. *War Powers Resolution: Hearings Before Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 72, 78 (1977) (statement of Alexander Bickel).

123. *Id.* at 78.

124. See S. 440, 93d Cong., 1st Sess. 28 (1973); S. REP. NO. 220, 93d Cong., 1st Sess. 28 (1973), H.R. REP. NO. 287, 93d Cong., 1st Sess. 9 (1973) (emphasis added).



unique merits of each situation. The complete contrast between Lebanon and Grenada stands out when examining the use of United States Armed Forces in 1983. The procedural rules in the war powers area must be flexible enough to allow for the particular exigencies of the moment.

Furthermore, one should ask whether the historical uses of the war powers represent the complete range of executive and legislative responses or whether these branches will be constitutionally required to respond differently in the future.

While it is difficult to find a direct analogy, it is significant to note the congressional experience when dealing with time limits in the appropriations process. At the end of recent fiscal years there have occurred late midnight sessions and threats that the government will "shut down" because of a lack of a comprehensive "stop gap" appropriations resolution. If the objective in the war powers area is to make the best possible decision on the special merits of the situation, then a broad and constant time limit may very well force a premature determination.

Because the War Powers Resolution attempts to establish a bright line test based upon the occurrence of hostilities or imminent hostilities and endeavors to create a fairly strict procedural framework, the war powers issue becomes one of procedural compliance rather than one of deliberation on the urgencies of the moment. Therefore, the debate wanders from the substance of the issues to the conformity with procedure. The tendency becomes one of the process prevailing over the merits.

Disputes inevitably center on the applicability of the legislative meanings of "hostilities" or "situations where imminent involvement of hostilities is clearly indicated by the circumstances."<sup>125</sup> As a result, a President's credibility is undercut in any situation where troops are involved abroad. Therefore, the bias against presidential action is enhanced by the very dispute itself. Moreover, as international terrorism mounts, this problem is intensified. Some countries seek war-like ends through equally violent, but nonetheless indirect means. The Resolution then makes it difficult to contemplate troops in peace keeping missions since a message may be perceived that if potential enemies sustain enough terroristic attacks against United States forces they will create the "hostility" which initiates the sixty day clock.

After two hundred years, constitutional scholars and members of

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125. 50 U.S.C. §§ 1541-1548 (1976).

the executive and legislative branches are still in disagreement over the precise contours of the federal war powers authority. Are the uses of United States Armed Forces thereby effectively limited to those situations where a declaration of war is desirable and obtainable?

One may ask if stretching the contours of the War Powers Resolution, which is bound to result from a struggle between two powerful branches of the federal government, may so distort the publicly perceived realities of the situation so as to unnecessarily invite cynicism and confusion from the public at large. Members of Congress were made aware of public questioning of presidential action during the initial debate on Lebanon. The questions were not on the substance of the President's action but rather the President's decision because it was framed in the context of "hostilities." The public was perceiving the use of the term "hostilities" not in the strict legal interpretation of the law but in the common usage of the word.

It is incorrect to argue that the War Powers Resolution is necessary because without it Congress would have no power in this area. The power of the purse has been effectively utilized in the past. This express power has been available to the Congress since the ratification of the Constitution: "No money shall be drawn from the Treasury, but in consequence of appropriations made by Law."<sup>126</sup> In a supplemental appropriations measure in 1973, Congress passed and President Nixon signed legislation which "barred the use of any past or existing appropriations for financing directly or indirectly United States combat activities in, over or off the shores of North Vietnam, South Vietnam, Laos or Cambodia."<sup>127</sup> In the midst of the War Powers congressional debate, President Nixon sent a letter to the Speaker of the House and the Senate Majority Leader expressing his concern over the funding limitation on the Cambodian bombing. "The working of the Cambodia rider is unmistakable; its intent is clear. The Congress has expressed its will in the form of law and the administration will obey that law. I cannot do so, however, without stating my grave personal reservations concerning the dangerous potential consequences of this meas-

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126. U.S. CONST. art. I, § 9, cl. 7.

127. Act of July 1, 1973, Pub. L. No. 93-50, § 307, 87 Stat. 99, 129 (1973).

None of the funds herein appropriated under this act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam or off the shores of Cambodia, Laos, North Vietnam and South Vietnam by the United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other Act may be expended for such purposes.

ure . . . ."<sup>128</sup>

The message in this letter is in direct contrast to President Nixon's letter read on the floor of the House by Minority Leader Gerald Ford nearly two and a half weeks earlier where it was publicly learned that Nixon would veto any War Powers Resolution that contained language similar to subsections 5(b) or (c).<sup>129</sup> In fact, in his veto message concerning the War Powers Resolution, President Nixon declared his belief that subsections 5(b) and (c) were unconstitutional. However, in the same letter he commented,

the proper way for the Congress to make known its will on such foreign policy questions is through a positive action, with full debate on the merits of the issue and with each member taking the responsibility of casting a yes or no vote after considering those merits. *The authorization and appropriations process represents one of the ways in which such influence can be exercised.*<sup>130</sup>

Why is it necessary to superimpose the War Powers Resolution over the appropriations process that is constitutionally well established? This power provides a forum for a clear cut debate on the substance of the question—i.e., the advisability of a commitment of troops in any location. In exercising its power of the purse, Congress is required to act openly and unambiguously through a constitutionally mandated legislative process in accordance with its requisite bicameralism and presentment standards.

Commenting on a disagreement between Congress and the Executive on the appropriate level of fighting a war, the Court of Appeals for the First Circuit in 1971 noted:

When the executive takes a strong hand, Congress has no lack of corrective power. Congress has the power to tax, to appropriate, to impound, to override a veto. The executive has only the inherent power to propose and to implement, and the formal power to veto. The objective of the drafters of the Constitution was to give each branch "constitutional arms for its own defense." But the advantage was given the Congress, Hamilton noting the "superior weight and influence of the legislative body in a free government, and the hazard to the

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128. *Cambodia Bombing Ban: August 17 Cutoff Date Set*, CONG. Q. ALMANAC 862 (1973).

129. See *supra* note 89.

130. Veto of the War Powers Resolution, PUB. PAPERS 893, 894-95 (Oct. 24, 1973) (emphasis added).

Executive in a trial of strength with that body.”<sup>131</sup>

Not only does this power give Congress an effective tool in negotiation with the executive branch, it also has constitutional authority “to raise and support Armies” and “to provide and maintain a Navy.”<sup>132</sup> As Justice Jackson wrote in the *Steel Seizure Case*, “[t]his certainly lays upon Congress primary responsibility for supplying the armed forces. Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement.”<sup>133</sup>

Additionally, as the *Chadha* opinion suggests, Congress may utilize the legislative process to withdraw or modify the use of United States Armed Forces abroad by meeting the bicameralism and presentment requirements, including if necessary, a veto override. Each of these legislative options meets the “carefully crafted restraints” of the Constitution and separation of powers concerns of the Founding Fathers. Furthermore, each of these powers has existed since the ratification of the Constitution as well as concurrently with the War Powers Resolution during the past eleven years.

The words of Circuit Judge Wilkey, in a case ruling the one House veto unconstitutional which was affirmed on the merits by the Supreme Court, are most appropriate:

The power to cure the perceived problem lies entirely within congressional control both before it delegates power at all and after the administrators exercise their discretion . . . . But if change is necessary, it must come either from a congressional reassertion of its right, and indeed responsibility, to provide meaningful standards for administrative action or from an amendment to the Constitution.<sup>134</sup>

## VII. CONCLUSION

While the Supreme Court in *Chadha* did not specifically rule upon the constitutionality of sections 5(b) and (c), it is widely recognized that the opinion had broad implications for statutes containing legislative veto provisions.<sup>135</sup> As Stanley M. Brand, General Counsel to the Clerk

131. *Massachusetts v. Laird*, 451 F.2d 26, 34 (1st Cir. 1971) (citations omitted) (quoting THE FEDERALIST No. 23, at 476, 478 (A. Hamilton) (Mod. Lib. ed. 1937)).

132. U.S. CONST. art. I, § 8, cls. 12, 13.

133. 343 U.S. at 643 (Jackson, J., concurring).

134. *Consumer Energy Council of America v. Federal Energy Regulatory Comm'n*, 673 F.2d 425, 476-77 (D.C. Cir. 1981), *aff'd*, — U.S. —, 103 S. Ct. 3557 (1983).

135. — U.S. —, 103 S. Ct. at 2792 (1983) (White, J., dissenting). In his dissent, Justice White stated: “Today the Court not only invalidates § 244(c)(2) of the Immigration and

of the House of Representatives, who served as counsel to the House in the *Chadha* case, told the House Committee on Foreign Affairs: "We in Congress delude ourselves to the extent that we ignore the clear 'storm warnings' of the *Chadha* ruling and insist, like those who after the discovery of America continued to believe that the earth was flat, that legislative vetoes are still valid."<sup>136</sup>

Thus, in light of the *Chadha* decision this question must be asked: Irrespective of the legitimate ends, are the means justified? While there may be agreement among those concerned in some instances on a particular end or for a specific application, if the means are *not* legitimate, they may one day be used for the pursuit of some future end which in itself is also *not* legitimate. This is certainly true during those moments when a country engages in war or in times of national crises.

This is the essence of the *Chadha* opinion and goes to the heart of the Framers' intent of carefully designing the separation of powers provisions. The Chief Justice emphasized this point in the *Chadha* decision, stating:

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. . . . With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."<sup>137</sup>

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Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.' " *Id.* In appendix I, Justice White included § 5 of the War Powers Resolution and the concurrent resolution provision as among some 56 statutes he believed to be affected by the decision. *Id.* at 2811.

136. *Hearings on Legislative Veto, supra* note 9, at 15-16 (statement of Stanley M. Brand, General Counsel to the Clerk, House of Representatives).

137. — U.S. at —, 103 S. Ct. at 2788.

# APPENDIX

## WAR POWERS RESOLUTION

PUBLIC LAW 93-148; 87 STAT. 555

[H.J. Res. 542]

Joint Resolution concerning the war powers of Congress and the President.

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

### SHORT TITLE

Section 1. This joint resolution may be cited as the “War Powers Resolution”.

### [50 U.S.C. § 1541] PURPOSE AND POLICY

Sec. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

### [50 U.S.C. § 1542] CONSULTATION

Sec. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is

clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

[50 U.S.C. § 1543] REPORTING

Sec. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

## [50 U.S.C. § 1544] CONGRESSIONAL ACTION

Sec. 5. (a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress had adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

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

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

[50 U.S.C. § 1545] CONGRESSIONAL PRIORITY  
PROCEDURES FOR JOINT RESOLUTION OR BILL

Sec. 6. (a) Any joint resolution or bill introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Com-



mittee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determined by the yeas and nays.

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

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

(d) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 5(b). In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

#### [50 U.S.C. § 1546] CONGRESSIONAL PRIORITY PROCEDURES FOR CONCURRENT RESOLUTION

Sec. 7. (a) Any concurrent resolution introduced pursuant to section 5(c) shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Any concurrent resolution so reported shall become the

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

(c) Such a concurrent resolution passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted upon within three calendar days, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

#### [50 U.S.C. § 1547] INTERPRETATION OF JOINT RESOLUTION

Sec. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended

to constitute specific statutory authorization within the meaning of this joint resolution.

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

(c) For purposes of this joint resolution, the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Nothing in this joint resolution—

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

#### [50 U.S.C. § 1548] SEPARABILITY CLAUSE

Sec. 9. If any provision of this joint resolution or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby.

#### EFFECTIVE DATE

Sec. 10. This joint resolution shall take effect on the date of its enactment.

Passed over Presidential veto Nov. 7, 1973.