



Digital Commons@

Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 17
Number 3 *Symposium: The War Powers
Resolution*

Article 3

6-1-1984

The War Powers Resolution: Sad Record, Dismal Promise

Michael J. Glennon

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Michael J. Glennon, *The War Powers Resolution: Sad Record, Dismal Promise*, 17 Loy. L.A. L. Rev. 657 (1984).

Available at: <https://digitalcommons.lmu.edu/llr/vol17/iss3/3>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

THE WAR POWERS RESOLUTION: SAD RECORD, DISMAL PROMISE

*Michael J. Glennon**

The death of Representative Clement Zablocki removes from the continuing war powers debate at a most untimely moment the man most responsible for the form and content of the War Powers Resolution.¹ Senator Jacob Javits and Senate co-sponsors of his version of the Resolution surely can take equal credit for its enactment into law, but the compromise agreed to by the 1973 Conference Committee was largely the handiwork of Representative Zablocki. That Committee dropped the "prior restraints" set forth in the Senate version which would have spelled out, in legally binding terms, those instances in which the President can introduce the armed forces into hostilities without statutory authorization.² In its place the committee inserted a non-binding, sense-of-the-Congress statement regarding the scope of the President's independent powers.³ The Conference Committee also retained the legislative veto set for the House version,⁴ which was absent in the Senate bill, and kept the House version's consultation requirement,⁵ also absent in the Senate version. Finally, the Conference Committee adopted a reporting requirement closely paralleling that of the House version.⁶ Representative Zablocki's success in the Conference Committee was no doubt attributable to his belief, shared by other House conferees, that no law would be preferable to the Senate bill, and also to the corresponding belief on the part of Senate conferees (with a few notable exceptions who actually preferred the House bill⁷) that the House version was to be preferred to no law at all.⁸ Given his

* Professor of Law, University of Cincinnati College of Law; Former Legal Counsel, Senate Foreign Relations Committee.

1. Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548 (1976) (hereinafter cited as Resolution). The text of the War Powers Resolution is reproduced in Appendix, 17 LOY. L.A.L. REV. 803 (1984).

2. S. 440, 93d Cong., 1st Sess. § 3, 119 CONG. REC. 25,119.

3. Resolution § 2(c).

4. Resolution § 5(c).

5. Resolution § 3.

6. Resolution § 4.

7. See, e.g., S. REP. No. 220, 93d Cong., 1st Sess. 34-35 (1973) (supplemental views of Sen. Fulbright).

8. On the other hand, Senator Thomas Eagleton, a co-sponsor of the Senate bill, ar-

role as chief architect of the conference report—which was enacted without further amendment over President Nixon's veto—it is therefore appropriate that Representative Zablocki's last major discussion of the Resolution be closely scrutinized.

His first principal conclusion—that "predictions that the Resolution would weaken the nation's ability to react to foreign policy crises have proven unwarranted"⁹—is difficult to quarrel with. Arguments to the contrary are for the most part unsupported and unsupportable assertions¹⁰ resting upon the major premise that anything and everything done by a President to halt the international communist conspiracy must perforce be constitutional.¹¹

These reflexive proponents of unfettered Presidential discretion fundamentally misapprehend the separation of powers concept. In place of the "divisiveness" engendered by the War Powers Resolution¹² they would substitute an "iron demand" of "cooperation" between Congress and the President—a cooperation that is, upon analysis, the cooperation of a valet with his master.¹³ Brandeis,¹⁴ Corwin,¹⁵ and other boat-rockers presumably are among those who would, if given the chance, have played into the hands of Hanoi and Moscow.¹⁶

gued that the absence of prior restraints rendered the conference report ineffectual as a check on presidential war-making. See 119 CONG. REC. 33,557 (1973).

9. Zablocki, *War Powers Resolution: Its Past Record and Future Promise*, 17 LOY. L.A.L. REV. 579, 597 (1984).

10. See, e.g., Turner, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful*, 17 LOY L.A.L. REV. 683, 711 (1984). "In El Salvador, where President Reagan is valiantly trying to dissuade Moscow and Havana from underwriting the overthrow of a popularly elected government, the prospects for meaningful peace are being 'jeopardized by the War Powers Resolution.'"

11. See, e.g., *id.* at 711-12. "Virtually every time the president speaks or acts firmly to deter the communists, his congressional critics cite the War Powers Resolution and tell the word . . . 'He can't do that!'"

12. See, e.g., *id.* at 692 (citing W.T. REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS* 49 (1981)).

13. For my comments on Reveley's book, see 22 VA. J. INT'L ON L. 911 (1982).

14. The doctrine of the separation of powers 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.

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

15. The Constitution, Corwin believed, provides "an invitation to struggle for the privilege of directing American foreign policy." E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 171 (4th ed. 1957).

16. See Turner, *supra* note 10, at 697: "[A] strong case can be made that the divisiveness in U.S. foreign policy during the 1970s was instrumental in Hanoi's decision to escalate the fighting in South Vietnam, and in Moscow's decision to deploy Cuban soldiers to seize control of the Angolan revolution."

"[C]ooperation should always be the goal."¹⁷ Whether one branch should play war-powers manservant to the other is perhaps an issue that could be argued either way, but it should suffice at this point to note that the question seems to have been ventilated and resolved in 1789, and I see no point in reopening the argument today.

Representative Zablocki is correct in his first conclusion only because he is quite wrong in his second—the Resolution has not hampered the President's ability to react to foreign policy crises precisely because it has *not* served to "restore the balance in the rights and responsibilities of the Congress and the President in the decision to commit troops."¹⁸ To the contrary, it has proven virtually ineffectual in achieving that statutorily-stated objective.¹⁹ Representative Zablocki observes that "there has been more non-compliance than compliance"²⁰ by the executive branch. Although I am not certain that compliance or noncompliance can be neatly quantified, I quite agree that the record of executive branch adherence to the requirements of the Resolution has been dismal, and I am thus somewhat nonplussed by Representative Zablocki's effusive assessment—set forth after a well-documented recounting of "halfhearted" consultation, inadequate reporting, and overall footdragging—that the product is "excellent," "workable" and that its "credibility . . . has never been higher."²¹ If credibility means the likelihood of compliance by future Presidents who, all things considered, would prefer to forget it, it seems to me that those chief executives will be on firmer ground than ever.

A truly collaborative war-making decisional framework between the legislative and executive branches, it seems to me, can be achieved only through a candid recognition of where and why Congress has failed. Rather than argue who is at fault for the Resolution's failure, however, I put forth the following criticism in the hope that it may prove in some way helpful in preventing a recurrence of the mistakes, misunderstandings, and misjudgments by the legislative branch that have led to the Resolution's fecklessness during the first decade of its operation. I emphasize congressional failures in the following comments because I think it is not terribly useful to rail against the executive branch, or to expect somehow to exhort or importune executive branch officials into good faith observance. Separation of powers dis-

17. *Id.*

18. Zablocki, *supra* note 9, at 597.

19. Resolution, § 2(a).

20. Zablocki, *supra* note 9, at 597.

21. *Id.* at 598.

putes are not won with congressional valentines. As Justice Jackson put it, "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."²²

Presidents thus cannot reasonably be expected to cede to the Congress any greater role in the decision-making process than the Congress *legitimately* and *clearly* demands. Those are, I think, the two principal reasons that the procedural requirements set forth in the War Powers Resolution have not been respected: executive branch officials, whatever some may occasionally have said for the purpose of avoiding political confrontation, have by and large doubted the constitutional legitimacy of the Resolution, and they have, in addition, been able to comport executive branch behavior with those doubts because the mandate of the Resolution is in critical respects unclear. I shall examine each point in turn.

Through Representative Zablocki's comments runs an implicit assumption of the Resolution's constitutionality. This surely should not be surprising on the part of that measure's legislative godfather. What is disappointing has been his repeated failure—and this applies to other House and Senate sponsors as well—to be *explicit* about *why* the Resolution is constitutional, and in light of that failure, his seeming inference of bad faith on the part of executive officials—who may well have come in good faith to an opposite conclusion. It simply does not do to assert flatly that the Resolution is constitutional because the Congress "receives the vast bulk of war powers under the Constitution,"²³ or to dismiss a claim of inherent presidential power to rescue endangered United States nationals because it "turn[s] logic on its head" and was "never accepted" by the "authors of the Resolution."²⁴ As a constitutional matter, the beliefs of the Resolution's authors are of the utmost inconsequence. They are sworn to uphold the Constitution, true, but so is the President, and what is needed from the Resolution's authors is a clear and succinct and convincing statement as to precisely *why* it is constitutional, which would in turn serve as an explanation to the President why he should feel bound to "take care" that the Resolution be "faithfully executed." For notwithstanding the obvious arguments to

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

23. Zablocki, *supra* note 9, at 582.

24. *Id.* at 585.

be made concerning a need for prior judicial invalidation before the President is free to disobey the law, the undoubted response of an ingenuous executive who objects to the Resolution would be that the duty of "faithful execution" extends only to laws not repugnant to the Constitution, a category of enactments that excludes the War Powers Resolution.

This failure of the Resolution's sponsors to articulate lucidly the reasons for its validity is disappointing because there exists a persuasive case for its validity. The argument is, in the sheerest outline, that the "fixed" powers approach to presidential power taken by the Supreme Court in *United States v. Curtiss-Wright Export Corp.*,²⁵ *United States v. Pink*,²⁶ and *United States v. Belmont*²⁷ has given way to the very different "fluctuating" powers approach set forth initially by Chief Justice Marshall in *Little v. Barreme*,²⁸ reiterated by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*,²⁹ and formally adopted by Justice Rehnquist in *Dames & Moore v. Regan*.³⁰ Under the latter approach, the scope of the President's power is a function of the concurrence or non-concurrence of the Congress; once Congress acts, its negative provides "the rule of the case."³¹ That analytical framework, it seems to me, provides a general foundation for the congressional mandate of consultation and reporting as well as the imposition of a time limit upon the use of the armed forces in hostilities—all of which, in the absence of a statement by the Congress, might fall within a "zone of twilight."³²

25. 299 U.S. 304 (1936).

26. 315 U.S. 203 (1942).

27. 301 U.S. 324 (1937).

28. 6 U.S. 170, 2 Cranch 157 (1804).

29. 343 U.S. 579 (1952).

30. 453 U.S. 654 (1981).

31. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 634 (Jackson, J., concurring).

32. *Id.* at 637. Professor Ides' argument, *see Ides, Congress, Constitutional Responsibility and the War Power*, 17 LOY. L.A.L. REV. 599 (1984), that the Resolution represents an unconstitutional delegation of legislative power to the President fails, I think, because the delegation doctrine appears to be a dead letter, and in any event does not apply in the realm of foreign relations. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). I am troubled by the same argument, however, when made from a policy standpoint. Although the Resolution disclaims an intent to confer upon the President any authority which he would not have had in its absence, Resolution § 8(d)(1), such a disclaimer is meaningless if the practical effect of section 5(b) is to recognize implicitly executive authority to use the armed forces in hostilities for up to 60 days without congressional approval. In light of the absence of prior restraints, *see supra* text accompanying note 2, and the oblivion into which section 2(c) has been cast, *see infra* text accompanying notes 33-34, Presidents seemed to assume congressional concurrence for such action. I continue to believe that the Resolution should be amended to include prior restraints, backed by funding prohibitions. *See Glen-*

One reason for the continued confusion^{32.1} is doubtless the wording of section 2(c). That section seems to be grounded upon the old "fixed" powers theory, which is more supportive of presidential than of congressional power. If the President's powers as "Commander-in-Chief" extend to "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces,"³³ by what authority can the Congress constitutionally preclude their use at the end of a sixty-day period? The Resolution seems internally inconsistent: an attack on United States armed forces in West Germany might be met without congressional authorization because the President possesses independent constitutional power, but that independent power lasts only sixty days. Surely independent power, if the concept has any meaning, implies immunity from congressional termination. Authority to recognize a foreign country could not be limited to a certain time period, nor could authority to carry out certain pardons.

The matter is further complicated by the provision's failure to recognize any presidential power to rescue endangered United States nationals located abroad. A strong case might be made that the President does possess such a power, albeit a narrow one: force may be used to rescue endangered Americans as a last resort after all reasonable diplomatic efforts have failed, provided that the scope of hostilities is strictly tied to and justified by the rescue objective. Such authority was recognized in the Senate version of the War Powers Resolution,³⁴ and the conference committee would have been wise to retain a carefully limited provision to that effect in the conference report. Because the military operations conducted in connection with the evacuation of Phnom Penh and Saigon, the seizure of the *Mayaguez*, the Iranian hostage crisis, and the Grenada invasion all were rescue missions, however, the section has come largely to be ignored—not only by executive branch officials but by the Resolution's sponsors as well. Nowhere in his comments, it is worth noting, does Representative Zablocki express any disagreement with the initial introduction of the armed forces into hostilities in Lebanon or Grenada—even though such actions are declared by section 2(c) to be flatly unconstitutional.

non, *Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions*, 60 MINN. L. REV. 1 (1975).

32.1 *Authors Note*: The confusion is illustrated in the following piece by Berdes and Huber, *Making the War Powers Resolution Work: The View From the Trench (A Response to Professor Glennon)*, 17 LOY. L.A.L. REV. 671 (1984), which fails to distinguish between the two approaches.

33. Resolution § 2(c).

34. S. 440, 93d Cong., 1st Sess. § 3(3) (1973).

If the absence of an articulated constitutional rationale for the Resolution has failed to strengthen its legitimacy with the executive branch, the articulation of palpably overreaching arguments for its constitutionality has actually undermined it. I refer, here, specifically to Representative Zablocki's contention that the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*³⁵ does not reach section 5(c) of the Resolution. I, too, wish that the Court had disposed of *Chadha* on narrower grounds; had it not founded its opinion on the statute's infringement on the judicial role, as Justice Powell wisely urged, it could at least have recognized that there exist different categories of legislative vetoes to which different constitutional principles might apply. But the majority selected neither such approach, holding instead that any action which has the purpose and effect of altering the legal "rights, duties and relations of persons . . . outside the legislative branch" is legislative in nature and therefore subject to the requirements of the presentment clause.³⁶

Unless this language somehow is viewed as *obiter dictum*—which seems an impossible argument insofar as it represents precisely the test applied by the Court to the congressional action at issue and the necessary base on which the invalidation of that action rests—it is hard to see how section 5(c) escapes the *Chadha* bludgeon. That provision clearly has the effect of altering the legal rights and duties of the President, and Representative Zablocki's two arguments to the contrary are wholly unconvincing. First, he contends that, because questions concerning the validity of the Resolution would likely be regarded by the Court as political, its provisions are somehow beyond the reach of constitutional limitations. Assuming, arguendo that a controversy concerning the Resolution does represent a political question (and there exists no readily apparent reason for viewing such a controversy as materially different from a dispute such as the *Steel Seizure Case*),³⁷ it is simply wrong that a holding of non-justiciability implies approval on the merits. Few principles are more fundamental to constitutional jurisprudence than the distinction between justiciability and validity. That a cause does not admit of judicial resolution has absolutely nothing to do with the constitutional validity of the conduct at issue.

Second, Representative Zablocki apparently contends that because the War Powers Resolution expressly disclaims any intent to delegate power to the Chief Executive, and because *Chadha* applies only to stat-

35. — U.S. —, 103 S. Ct. 2764 (1983).

36. *Id.* at —, 103 S. Ct. at 2784.

37. 343 U.S. 579 (1952).

utes that delegate power, *Chadha* does not apply to the Resolution. There are two problems with this argument. First, as noted above, there is absolutely no reason to believe that the Court intended to restrict the sweep of *Chadha* to statutes that delegate power to the President; to the contrary, the language and reasoning of the opinion extend to *all* legislation that subjects *any* presidential action to a legislative veto. Second, statutory delegation is not the only source of presidential war-making power: it is most emphatically not true that "Congress is given the exclusive power to commit troops into hostilities," as the War Powers Resolution itself expressly recognizes in section 2(c)(3)—and as Representative Zablocki himself has seemingly acknowledged in approving the various uses of the armed forces to rescue endangered American nationals, none of which was conducted pursuant to statutory authorization. Indeed, to the extent that the delegation issue is relevant, it seems to cut in the opposite direction: insofar as section 5(c) purports to subject non-delegated—which is to say independent—presidential power to a legislative veto, the provision is on weaker constitutional ground than the legislative veto struck down in *Chadha*.³⁸

The second reason for half-hearted compliance by the Executive is that fuller compliance has not been demanded—either legally by the Resolution, or politically by members of Congress. It vastly understates the problem to describe it, as Representative Zablocki does, simply as a matter of "tepid congressional oversight."³⁹ To cast the issue as one of oversight is to suggest that the need is merely for more hearings that generate more information. The problem has not been a lack of information, but Congress' failure to *act* on information—to act, specifically, by removing ambiguities in the Resolution and, more importantly, by living up to its responsibilities under the role it carved out for itself under the Resolution. At least three ambiguities have undermined the proper operation of the Resolution.

First, the Resolution should be amended to set forth a definition of "hostilities." In the absence of such a definition, officials of the executive branch and members of Congress engaged in a running argument whether United States military activities in Lebanon constituted "hostilities." When ten marines died in a twenty-day period after having been fired upon regularly by hostile forces, it seemed utterly disingenuous to claim, as the Reagan administration did, that the hostilities test was not met. Nonetheless, the term is not self-defining, and because

38. For the same reasons, I find Professor Ides' effort to distinguish the legislative veto in the War Powers Resolution unpersuasive. See Ides, *supra* note 32, at 630-31.

39. Zablocki, *supra* note 9, at 587.

the Resolution provides no guidance as to its meaning, a gradual escalation of hostilities can generate serious confusion as to the date on which the time limit is triggered. Similarly, there is no clear indication in the Resolution whether a variety of different activities are intended to fall within the "hostilities" test, such as exposure to minefields, missile attack, chemical or biological agents, or neutron rays. If Congress is serious about removing uncertainty and closing the door to semantic circumvention by the executive branch, it must define the term "hostilities."⁴⁰

Second, as Representative Zablocki indicates, consultation, time after time, has been perfunctory at best. This is true largely because the Executive has been allowed, time after time, to get away with perfunctory consultation. Aside from raising a political stink when such failure occurs—which congressional leaders have been loathe to do for fear of being mistakenly seen by the public as somehow critical of a military initiative—a Congress truly serious about consultation would amend the Resolution to specify precisely who is to be consulted, to make clear that "in every possible instance" does not include instances that present alleged security problems, and perhaps, to prohibit certain uses of the armed forces in the absence of genuine consultation.

Third, and most important, is the vagueness of the reporting requirement, which has led to the Resolution's virtual unraveling. Although the Executive's record here is clearly at odds with the Resolution's spirit, there is an argument to be made that presidential reports have complied with its letter. The reason is that there is in fact not one reporting requirement set forth in the Resolution, but three. Only one—that required by section 4(a)(1)—triggers the sixty-day time limit; those required by sections 4(a)(2) and 4(a)(3) are merely informational (although in the original House version of the Resolution they too triggered the time limitations). The problem arises in that the three situations overlap: facts that would require a report under section 4(a)(1) might also require a report under one of the two succeeding paragraphs, and the Resolution contains no requirement that the President specify which of the three reports he is submitting. Only the *Mayaguez* report (submitted after the military operations had terminated because they lasted less than forty-eight hours) referred expressly to section 4(a)(1). Consequently, the other reports effectively left unanswered the critical question whether the sixty-day time limit had been triggered.

40. See Glennon, *The War Powers Resolution: More Loophole Than Law*, *The Christian Science Monitor*, Nov. 17, 1982, at 22.

This fundamental flaw in the Resolution's procedural framework, along with the difficulties concerning the consultation provision, the "hostilities" terminology, and a variety of other problems, came to light during hearings of the Senate Foreign Relations Committee in 1977.⁴¹ At that time, the Committee considered legislation which would have, among other things, amended the Resolution to require that the President specify the paragraph of section 4(a) under which a report is submitted.⁴² But the measure was shelved because Representative Zablocki and his House colleagues made it clear to senators concerned about the Resolution's flaws that no amendment would be tolerated by the House. It was important, the Senate Foreign Relations Committee was told, that the Resolution not be amended; for some inexplicable reason, it still seemed a source of pride to Representative Zablocki that the measure "remains unamended."⁴³

The failure of Congress to remedy this defect has had catastrophic consequences. Following President Reagan's failure to submit a report clearly triggering the sixty-day time limit when fighting in Lebanon rapidly escalated in August and September of 1983, a dispute arose between Congress and the Executive that posed a fundamental question: whether the sixty-day time limit constrained President Reagan's use of the marines in Lebanon, which is part of the larger issue whether he had the constitutional power to keep them in hostilities without congressional consent.

The congressional interest lay in establishing that the time limit had been triggered and would require the marines' withdrawal, thereby establishing that the President lacked sole constitutional authority to use the marines in hostilities. The President's interests directly opposed those of Congress. As Representative Zablocki describes, his representatives resisted any hint that the Resolution posed a restraint on presidential war-making power, and they sought to establish instead that it lay within his independent constitutional authority to keep the marines fighting in Lebanon without congressional approval. As a political matter, however, they recognized the obvious utility of procuring congressional endorsement of a foreign policy that represented considerable risk in the upcoming election year.

41. *War Powers Resolution, 1977: Hearings on the Operation and Effectiveness of the War Powers Resolution Before the Senate Committee on Foreign Relations, 95th Cong., 1st Sess. (1977).*

42. See STAFF OF SENATE FOREIGN RELATIONS COMM., 95TH CONG., 1ST SESS., A BILL TO AMEND THE WAR POWERS RESOLUTIONS (Comm. Print No. 2 1977).

43. Zablocki, *supra* note 9, at 597.

The compromise? No presidential acknowledgement that the sixty-day time limit is binding, and no presidential acknowledgment that statutory authority is constitutionally required—but congressional consent to keep the marines in hostilities for eighteen months, with no guarantee that the President would respect even that longer time limit.

Congress obtained “major concessions”?⁴⁴ One wonders how Representative Zablocki emerged from these “tough negotiations”⁴⁵ without agreeing to apologize for his sponsorship of the War Powers Resolution.

The eighteen-month compromise does nothing to establish the legitimacy of the Resolution. The occasional references to the Resolution in the compromise are verbal window-dressing which together, as Representative Zablocki puts it, purport to “use . . . the War Powers Resolution to authorize the United States troop presence in Lebanon.”⁴⁶ Of course the Resolution is utterly irrelevant to any such authorization—which could just as easily have been enacted in the Resolution’s absence. The “unique mechanism of section 5(b)”⁴⁷ of the Resolution had nothing to do with what actually was agreed to: the sixty-day time period found by the Congress to have been triggered would never expire because that period was superseded by the eighteen-month compromise. The statement was, in effect, an academic contention which was agreed to by executive officials precisely because it would never be more, and also because the provision sets forth only the finding of the Congress that the Resolution’s time limit had been triggered. There is nothing in the compromise to suggest that the President agreed with Congress that the time limit had been triggered, and indeed, President Reagan suggested in his signature statement that he did not.⁴⁸ Representative Zablocki writes that “the fact that President

44. *Id.* at 593.

45. *Id.*

46. *Id.* *Author’s Note*: How Berdes and Huber can, on the one hand, acknowledge that the compromise “could have been enacted without the use of the War Powers Resolution,” Berdes & Huber, *supra* note 32.1 at 678, yet contend on the other hand that citations to it were more than verbal window-dressing, *id.*, is not readily apparent. In any event I do not, to reiterate, “advocate [the] approach” that the “Administration originally sought,” *id.*, and I cannot state the approach I would have preferred any more clearly than it is already stated in the text accompanying note 53.

47. *Id.* *Author’s Note*: That the only legislative history to be cited in support of the proposition that “the War Powers Resolution was written to enable Congress to invoke the sixty-day period,” Berdes & Huber, *supra* note 32.1, at 678, is a vague suggestion in the House Committee report that Congress might “take into account” the failure of the President to report, *id.*, demonstrates I think, that the argument is essentially frivolous.

48. President’s Statement on Signing S.J. Res. Into Law, 41 WEEKLY COMP. PRES. DOC. 1422-23 (Oct. 13, 1983). Rep. Zablocki and his colleagues apparently had been told during

Reagan signed the legislation into law represented an extremely meaningful Executive Branch acceptance of the War Powers Resolution [P]residential signature . . . represents a grudging but richer acceptance of the reality of the Resolution⁴⁹ Whether the "reality" of the Resolution is "richer" is hard to argue, but the notion that presidential signature connotes agreement—particularly in the case of the President's expressed disclaimer upon signing the measure—is absolute nonsense. Presidents have often signed bills about which they had constitutional reservations, frequently, for example, in the case of measures containing legislative vetoes. But as Congress found out in *Chadha*, a presidential signature meant nothing; the argument was, in fact, expressly and summarily dismissed by the Supreme Court.⁵⁰

It is worth pointing out, in addition, that the Lebanon compromise contained nothing to suggest that, in its absence, the President would be without constitutional authority to use the marines in hostilities in Lebanon. The Administration never acknowledged that statutory authorization is constitutionally required. To the contrary, Secretary of State George P. Shultz testified that the compromise was not constitutionally necessary and, in fact, that the administration just might feel free to keep the marines in Lebanon beyond the eighteen-month limit.⁵¹ Nonetheless, all this represents, for Representative Zablocki, a "positive experience."⁵² Had the congressional negotiators had the backbone, they could easily have protected the congressional constitutional prerogative. They could have told the President's representatives that they had a choice: either file a report expressly citing section 4(a)(1) of the War Powers Resolution and recognize the constitutional necessity for statutory authorization, or go it alone—and be prepared to have President Reagan take the heat himself when the casualties in Lebanon mount.⁵³

the negotiations that the President would make such a statement upon signing the compromise.

49. Zablocki, *supra* note 9, at 595.

50. — U.S. —, 103 S. Ct. 2764, 2779 (1983). "The assent of the Executive to a bill which contains a provision contrary to the Constitution," the Court said, "does not shield it from judicial review." *Id.* at 2779 n.13.

51. *War Powers Bill Wins Initial Approval*, N.Y. Times, Sept. 23, 1983 at A16. *Author's Note*: It is comforting to know that the Administration "privately made clear" to Berdes and Huber that the Lebanon compromise "would be observed." Berdes & Huber, *supra* note 32.1, at 678. Would that they had relayed this intelligence to the many members of the House and Senate who were discomfited by the public testimony of Secretary of State Shultz, who apparently was misinformed.

52. Zablocki, *supra* note 9, at 596.

53. See Glennon, *Some Compromise*, The Christian Science Monitor, Oct. 24, 1983 at 16.

In the face of the administration's truculence, however, Congress' response carried all the logic of a homeowner's allowing an arsonist to torch his house so as to avoid the humiliation of having it done without his consent. To paraphrase Justice Hugo Black, another such "positive experience" and we shall be undone.⁵⁴

Given the disposition of the Lebanon war powers dispute, Representative Zablocki could hardly have been surprised that, when invading Grenada, the President again "skirted section 4(a)(1) requirements."⁵⁵ Thanks in large part to the efforts of Representative Zablocki, a most useful precedent had been established in the Lebanon compromise: the President has the option of triggering or failing to trigger the sixty-day time limit, and, if he elects not to do so, the Congress will exercise the same choice. Of course this procedure stands the Resolution's methodology on its head: the whole point was that the triggering of the Resolution's time limits would be *automatic*, that no discretion would inhere in the Executive, and that Congress, as a consequence, would not be involved at all at the outset of the process—except for consultation. As a result of Representative Zablocki's efforts to "invoke" the War Powers Resolution, a measure that was intended to be self-invoking, Congress now found itself, upon the invasion of Grenada, precisely where it would have been in the absence of the Resolution: attempting to enact a statutory time limitation. Rather than confronting the issue in a more dispassionate setting sixty days after the triggering event, Congress found itself hit by a wave of pro-Executive emotion when it attempted to state statutorily that the time period had been triggered. Even members of Congress who, like Congressman Zablocki, fell over themselves attempting to avoid "casting judgment on the foreign policy merits of the Grenadan invasion"⁵⁶ faced the specter of being labeled boat-rockers. And, as Representative Zablocki notes, no triggering legislation was ever enacted. The "threat of congressional action"⁵⁷ became more hollow as the days went on, demonstrating the *ineffectiveness* "of the Resolution in forcing collective decision on troop commitment"⁵⁸

In his belated recognition that amendment of the Resolution is re-

54. *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (Black, J., dissenting).

55. Zablocki, *supra* note 9, at 596.

56. *Id.*

57. *Id.* at 597.

58. *Id. Author's Note*: Messrs. Berdes and Huber seem not to have understood the point of this paragraph. I do not suggest that Congress "should have confronted the Grenada issue" sixty days after the triggering event. Berdes & Huber, *supra* note 32.1, at 679. To the contrary, the whole point is that, had the Resolution worked properly and had the Congress

quired, Representative Zablocki finally seemed willing to acknowledge at least two of its more serious shortcomings. The most serious problem—the role reversal between the President and the Congress that has occurred at the outset of the process—can be overcome by requiring specificity in presidential reports. Similarly, Congress can strengthen its case for meaningful consultation by tightening up the requirements of section 3.

But these and other modifications⁵⁹ of the Resolution will not, in themselves, “insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities”⁶⁰ Ten years later, it has become clear that the Resolution’s sponsors were naive to believe that any law could achieve that objective. The most that a statute can do, however artfully drawn, is to facilitate the efforts of individual members of Congress to carry out their responsibilities under the Constitution.⁶¹ To do that requires understanding, and it also requires courage: it demands an insight into the delicacy with which our separated powers are balanced, and the fortitude to stand up to those who would equate criticism with lack of patriotism. For a Congress comprised of such members, no War Powers Resolution would be necessary; for a Congress without them, no War Powers Resolution will be sufficient.

wished to consider a statutory extension of the sixty-day period, *then* that issue could have been considered later, in “a more dispassionate setting.”

59. See generally Glennon, *supra* note 32. *Author's Note*: I may have missed something, but in re-reading this article I find nothing advocating the Resolution’s “dismantlement,” Berdes & Huber, *supra* note 32.1, at 679-80. I find only the preceding phrase and a sentence in note 32, *supra*, manifesting my “nostalgic, almost religious, devotion to the so-called ‘recognized powers’ section of the Senate version of the War Powers Resolution,” Berdes & Huber, *supra* note 32.1, at 673. I admit to believing that the “prior restraints” approach of the Senate was in 1973, and is today, better than that of the “subsequent limitations” approach of the House (which is the approach of the Resolution). I argued this point in 1975. See Glennon, *supra* note 32. It is apparently my 1975 article to which their article responds, leaving me somewhat bewildered concerning their contention that I do “not tell [them] what [my] alternative would be.” Berdes & Huber, *supra* note 32.1, at 681.

60. Resolution § 2(a).

61. See Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law*, 78 AM. J. INT’L L., — (1984).