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THE FORCE OF LAW: JUDICIAL ENFORCEMENT OF THE WAR POWERS RESOLUTION*

*by Michael Ratner** and David Cole****

I. INTRODUCTION

Throughout the Vietnam War, federal courts refused to adjudicate challenges to presidential war-making. The constitutional mandate that Congress initiate war thus went unenforced for the duration of our longest and most unpopular war. In response to this constitutional crisis, Congress passed the War Powers Resolution in 1973. The Resolution establishes a procedural mechanism to implement the constitutional allocation of war powers. But the Resolution can redress the constitutional imbalance only if it is given the force of law. Recent presidents have been as reluctant to honor the War Powers Resolution as earlier presidents had been to follow the war powers clause. If Congress is to regain its rightful war powers, then, judicial review of presidential war-making is required. The present constitutional crisis can be resolved, but only with the active participation of a heretofore reluctant judiciary.

When the Framers assigned the power to “declare war and grant letters of marque and reprisal”¹ to Congress, they committed a revolutionary act. The grant of war powers to a legislative rather than executive body was unprecedented in the annals of history.² Yet it was an issue about which there was little dispute; the record of the Convention

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1. U.S. CONST. art. I, § 7, cl. 11.

2. C. WARREN, *THE MAKING OF THE CONSTITUTION* 480-81 (1928). Article 9 of the Articles of Confederation, passed in 1781, gave the “sole and exclusive right and the power of determining war and peace” to a national legislative body. E. KEYNES, *UNDECLARED WAR* (1982). The Constitution cannot be viewed as a wholly separate document from the Articles of Confederation; they are, in a sense, two steps in the constitutive act of our nation. The Articles’ war powers grant was effectively nullified by leaving to the states the power to tax and supply funds to the Confederation’s treasury and by requiring the assent of nine states to support any decision to go to war. *Id.* at 25-26.

accords only "one page out of . . . 1,273" to the debate over the war powers clause.³ The mere mention of executive-initiated wars led one delegate, Mr. Gerry, to declare that he "never expected to hear, in a republic, a motion to empower the Executive alone to declare war."⁴ The Framers considered congressional control of the power to go to war essential to a republican form of government.⁵

Since 1950, we have witnessed a reversal in the constitutional scheme. The war powers, clearly vested in Congress by the Framers, have come under de facto presidential control. While scholars differ as to the sources, causes, and historical details of this constitutional alteration, very few deny that the constitutional scheme has been radically frustrated.⁶

The judiciary has neither attempted to redress nor even recognized this problem. By dismissing in the name of "judicial restraint" challenges to presidential usurpation of the war powers, the courts have ignored *their* institutional role. They are to assure that fundamental alterations in the structure of government occur only through the constitutional process of amendment, and not through sheer exercises of power. They are "to say what the law is."⁷ When that law—particularly the preeminent law embodied in the Constitution—is manifestly disregarded, they are to enforce its dictates. The notion of a government of laws presupposes that laws can restrict and control the power of those within government. When power prevails over law, the latter's dependence on the former is uncovered, and all that is left to the judiciary is empty-handed self-restraint.

The de facto presidential war power undermines both the foundation of our republican form of government and the limitations imposed by a written constitution.⁸ If the Framers' premises were correct, it is

3. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 675 (1972).

4. RECORDS OF THE CONSTITUTIONAL CONVENTION 318 (M. Farrand ed. 1966).

5. Congressional responsibility for the initiation of war was also considered important for other reasons. The Framers believed that Congress would be less likely to involve the country in needless and dangerous wars than would a single man. The Framers also considered that because war could prove such a burden on the citizenry, the nation should only go to war in instances where the most representative body decided to do so. Thus, congressional war powers were to act both as a damper on dangerous (and possibly improper) military ambitions, and as an assurance that when the government went to war, it was acting in accordance with the people's will.

6. See, e.g., E. KEYNES, *supra* note 2; Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243 (1969).

7. *Marbury v. Madison*, 5 U.S. (1 Cranch) 48, 70 (1803).

8. See Firmage, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 65, 66 (1977) ("[T]he manner of the exercise of the war powers determines not only the

quite likely to lead the nation into unwarranted and dangerous military conflicts. Judicial disregard of regular violations of this central provision of our Constitution sanctions illegal presidential actions. The arrogation of presidential war powers and the refusal of the courts to act have created a constitutional crisis.

This article argues that the crisis can be resolved, and that, indeed, the first and most difficult steps to its resolution have already been taken. In 1973, in the shadow of the Vietnam War, Congress passed the War Powers Resolution. The Resolution establishes procedures for early congressional action when United States Armed Forces are introduced into hostilities. Its procedures, if followed, would go far toward restoring the constitutional balance. Congress intended it to do so. But the efficacy of those procedures depends largely on the Resolution's status as enforceable law, and *that* depends on the possibility of judicial action. Absent judicial enforcement, the War Powers Resolution loses the force of law and becomes merely a rallying cry for Congress. Absent judicial enforcement, the Resolution's purpose is all too easily frustrated by presidential action. Absent judicial enforcement, the War Powers Resolution does no more than the war powers clause itself did to maintain Congress' prerogative over war in the face of presidential usurpation.

A responsible judiciary, therefore, *must* enforce the War Powers Resolution. The Resolution, by defining situations requiring affirmative congressional approval, by clarifying what constitutes congressional approval, and by establishing a procedure for executive-legislative collaboration, provides a role for judicially appropriate relief. The War Powers Resolution makes adjudication possible. The translation of that possibility into reality requires judicial courage—the courage to demand that our government be conducted according to the Constitution, and that the Executive abide by the law.

Part II of this article examines the origins and early history of the war powers clause. That history makes clear: (1) that the Framers intended Congress to exercise control over the decision to go to war; and (2) that Presidents since 1900 have increasingly violated the spirit of the war powers clause. Part III argues that during the Vietnam War the gap between the Constitution and presidential practice reached crisis proportion, as presidents regularly escalated the war, Congress was unable to exert any effective control, and the judiciary repeatedly refused to challenge an unconstitutional status quo.

nation's freedom from external danger, but *also the respect which the national government has for law and for constitutional limitations on the exercise of power.*") (emphasis added).

Part IV outlines Congress' response, the War Powers Resolution. Part V, which details presidential noncompliance with the Resolution since 1973, demonstrates the impotence of a Congress standing alone against Presidents determined to evade constitutional and statutory limits.

Part VI argues, therefore, that if the War Powers Resolution is to have its intended effect, and if the constitutional scheme is to be protected, the War Powers Resolution requires judicial enforcement. Neither broad nor specific "political question" concerns justify judicial abdication, particularly where to abdicate is to render both the clause and the Resolution meaningless. Finally, the article concludes with a case study of the only judicial challenge to date to violations of the War Powers Resolution, *Crockett v. Reagan*.⁹ That case, like many of the later Vietnam cases, affirms the *possibility* of judicial enforcement but refrains from taking the final necessary step to action.

II. THE WAR POWERS CLAUSE: ITS ORIGINS AND EARLY HISTORY

Traditional interpretations of the proper allocation of war powers have looked to both the constitutional framework set in place in 1787 and the subsequent historical development and practice.¹⁰ What makes this task particularly difficult is that the origins and end-state are at virtually antithetical poles. Under the Constitution, Congress must declare or authorize any war effort before it is commenced. Under present day practice, however, Presidents regularly take the initiative in war unilaterally, asserting that while congressional approval would be appreciated, it is not necessary.¹¹

This radical disjuncture in law and practical reality is due to a variety of historical and institutional factors. Presidential usurpation of the war powers can be traced to changes in United States foreign policy, congressional abdication of responsibility, institutional characteristics of the legislative and executive branches, as well as to the overreaching of individual presidents. None of these factors, however,

9. 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983).

10. *See, e.g.*, W.T. REVELEY, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? (1981); Reveley, *supra* note 6; Reveley, Book Review, 83 COLUM. L. REV. 2117 (1983). Reveley assumes throughout that the immediate prospect of judicial involvement in resolving this problem is dim. This assumption, while it unfortunately may be accurate, underlies Reveley's emphasis on the importance of practice. In political give-and-take, practice looms large; in law, there is a strong presumption that illegal actions, no matter how oft-repeated, do not legitimate the action. *Immigration and Naturalization Serv. v. Chadha*, 103 S. Ct. 2764, 2779 at n.13 (1983).

11. *See infra* notes 110-59 and accompanying text.

provide compelling reasons for what is essentially a de facto constitutional amendment.

A significant portion of the blame for the disjuncture must be borne by the judiciary.¹² Its reluctance to enforce the mandates of the written Constitution, particularly during the longest undeclared war in our history, has effectively sanctioned unconstitutional presidential action and rendered the constitutional limits on war powers bankrupt. It is because the judiciary repeatedly refused to play a role in the articulation of constitutional standards during the Vietnam War that the law provided no protection.¹³ Without law, there is only politics; the carefully crafted checks and balances of the Constitution fall prey to the institution that acts first and speaks later: the Presidency.

A. *The War Powers Clause—Its Textual Meaning*

As a matter of textual analysis, the Constitution could not be clearer regarding allocation of war powers: Congress is given the power to declare war, grant letters of marque and reprisal, raise, support and regulate the armed forces, organize and arm the militia, and exercise control over all "needful" military arsenals and encampments.¹⁴ The President, on the other hand, is simply named Commander-in-Chief, and given the power to commission officers.¹⁵ As Commander-in-Chief, his authority extends to the day-to-day conduct of wars authorized or declared by Congress; in Hamilton's words, he is

12. Where the judiciary exercises its responsibility to interpret and *apply* the written laws, the law more closely coincides with reality, even where that reality requires change. *Compare, e.g.,* Plessy v. Ferguson, 163 U.S. 537 (1896); Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) with Brown v. Board of Educ., 347 U.S. 483 (1954). *Compare* Bradwell v. Illinois, 83 U.S. (16 Wall) 130 (1873) with Frontiero v. Richardson, 411 U.S. 677 (1973). The notions of due process, cruel and unusual punishment, and obscenity all change with the times, but this does not preclude the application of legal standards to complaints arising under the first, fifth, eighth or fourteenth amendments. The law, particularly constitutional law, is an evolving creature, but unless it is applied, it will lose touch with changing reality, and lose its force as a guiding and power-limiting tool.

13. Defenders of judicial restraint will point out that Vietnam was not the first time a presidential war was commenced and continued without the approval of Congress, and with express reliance on "inherent" presidential power. President Truman made this claim to justify the Korean War. But, for whatever reason, no litigation was brought to challenge that war, while dozens of cases challenged the legality of the Vietnam War. It may be that President Truman's action and Congress' acquiescence is in part to blame for the gap between law and practice. But the very existence of persistent litigation during the Vietnam War suggests that it was then, not during the Korean War, that the disjuncture reached constitutional crisis proportions. The consistent refusal of the courts to adjudicate the Vietnam War cases offered telling evidence of the poverty of law.

14. U.S. CONST. art. I, § 8.

15. U.S. CONST. art. II, § 2.

the "first General and Admiral," but has no power to initiate wars or unilaterally to call up the armed forces.¹⁶ Thus, the plain language of the Constitution clearly vests the bulk of the war power in Congress, while limiting the President to the conduct of wars once approved.

The history of the drafting confirms this plain meaning. The Framers wrote in a revolutionary period. Their rebellion had been directed in large part at the excesses of British monarchy, and they were wary of investing the Executive with significant powers. Under the Articles of Confederation, *all* national powers had been vested in Congress; "Executive there was none, beyond the committees which the congress might establish to work under its own direction . . ." ¹⁷ Under the Constitution, too, the Executive has few enumerated powers.¹⁸

The war power, considered one of the most dangerous of sovereign powers, was assigned almost exclusively to Congress. As a young and weak nation, the United States had a strong self-interest in maintaining peace and neutrality.¹⁹ The Framers felt that Congress would be less likely to get the country involved in wars than the President, who might be tempted to enter conflicts for self-aggrandizement. Requiring the affirmative joint action of both Houses would make going to war difficult; as George Mason stated, he was "for clogging rather than facilitating war, [but] for facilitating peace."²⁰ War should be difficult to

16. THE FEDERALIST No. 69, at 465 (A. Hamilton) (J. Cooke ed. 1961).

17. M. FARRAND, THE FRAMING OF THE CONSTITUTION 3 (1913); *see also* Articles of Confederation, *id.*, at 211-24. The infirmity of the Articles was largely attributed to the weakness of the national government vis-a-vis the states. 2 THE MADISON PAPERS 692 (1840); Note, *The War-Making Powers: The Intentions of the Framers in the Light of Parliamentary History*, 50 B.U.L. REV. 5, 10-11 (Special Issue 1970). The Constitution granted greatly increased power to the national government, but simultaneously established a system of checks and balances to restrain that power. The Framers were careful, however, not to grant many powers to the Executive, for they feared the tyranny of executive prerogative. *See generally*, E. KEYNES, *supra* note 2, at 25-30.

18. *See, e.g.*, Professor Charles Black on executive power under the Constitution:

The upshot is that under the Constitution, as it came from the Convention, the Presidency stood within the shadow of Congress. Without straining a single provision in the text, Congress might have made the President into a symbolic *chef d'etat*. His enumerated powers are those commonly enjoyed by persons in that position.

C. BLACK, PERSPECTIVES IN CONSTITUTIONAL LAW 57 (rev. ed. 1970); *see also id.* at 55-58.

19. Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, HARV. INT'L L.J. 1 (1983).

20. Remarks of George Mason, reported in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 314 (M. Farrand rev. ed. 1966) (Madison's notes, August 17). During ratification, Framers James Wilson made a similar comment to the Pennsylvania convention:

This system will not bring us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at

initiate, both because it posed dangers to the nation and because it raised serious moral and legal issues.²¹ Requiring bicameral affirmative approval of war was also more likely to ensure that wars were only initiated where there was broad public support.²² Finally, there may have been some notion that because the decision to wage war is a difficult one, subject to error and entailing serious consequences, the requirement of broad congressional consensus might minimize errors of judgment.²³

For some or all of these reasons, the Framers gave Congress virtually exclusive power to initiate war, whether declared or undeclared, perfect or imperfect.²⁴ The sole exception lies in the President's right to

large . . . from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into war.

2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (J. Elliot ed. 1888).

21. See J. ROGERS, *WAR POLICING AND THE CONSTITUTION* 34-35 (1945); Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1775 (1968).

22. J. ROGERS, *supra* note 21, at 34-35; Note, *supra* note 21, at 1775.

23. As Professor Bickel eloquently stated:

There is no assurance of wisdom in Congress, and no such assurance in the presidency The only assurance there is lies in the process, in the duty to explain, justify and persuade, to define the national interest by evoking it, and thus to act by consent Singly, either the President or Congress can fall into bad errors So they can together, too, but that is somewhat less likely, and in any event, together they're all we've got.

Bickel, *The Need for a War-Powers Bill*, THE NEW REPUBLIC, Jan. 22, 1972, at 18. See also Friedman, *Waging War Against Checks and Balances—The Claim of an Unlimited Presidential War Power*, 57 ST. JOHN'S L. REV. 213, 260-61 (1983).

24. The power "to grant letters of marque and reprisal" refers to the authority to initiate an "imperfect kind of limited war, or those acts of hostility which sovereigns exercise against each other, or, with their consent, the subjects of foreign commonwealth, that refuseth to do justice" 2 J. BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITICAL LAW 258 (3d ed. 1784). See also *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801). The Framers gave Congress this power in order to remove any remaining doubt about the authority of Congress, as opposed to the President, to authorize undeclared hostilities. See Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 692-700 (1972). Those war-making powers not within the "declare war" provision were residual in the "grant letters of marque and reprisal" provision. See Firmage, *supra* note 8, at 81 n.76. Professor Reveley has written of the powers granted to Congress by art. I, § 8, cl. 11:

The Framers' grant of authority to Congress to declare war and issue letters of marque and reprisal almost certainly was intended to convey control over all involvement of American forces in combat, whether for defensive or offensive purposes, except in response to sudden attack.

Reveley, Book Review, *supra* note 10, at 2121.

Jefferson recognized the importance of granting Congress the authority to grant letters of marque and reprisal:

The making of a reprisal on a nation is a very serious thing. Remonstrance and refusal of satisfaction ought to precede; and when reprisal follows, it is considered an act of war [I]f the case were important and ripe for that step, Congress

repel sudden attacks on the United States.²⁵ This exception has been interpreted not as a grant of war powers to the President, but as a "necessary concomitant" of national sovereignty and the right to self-defense.²⁶

Thus, under the Constitution as written and as interpreted in light of the Framers' intent, Congress is to decide whether and when the United States is to go to war. Once war is declared, the President is to execute the war, just as he executes the laws. Under the procedural framework envisioned by the Framers war could not be commenced until Congress had first authorized or declared that it should commence.

B. *The War Powers Exercised—A Historical Overview*

Presidential practice has undermined the Framers' intent. It has been the rare exception that a war has been undertaken only after positive congressional action. In one manner or another, presidents have regularly provoked wars—subtly or openly—and only then gone to Congress for approval. Still, it was not until the Korean War that a president explicitly claimed that he needed no congressional approval whatsoever to initiate and conduct an unauthorized war. Since Truman, presidents have maintained this position. Thus, outright defiance of the written constitutional requirement that Congress initiate war is a relatively recent phenomenon.²⁷ Earlier instances of presidential abuse of the war power demonstrate that at least until the close of World War II, constitutional law still imposed some constraints on executive power.

Professor Reveley identifies three stages in "the President's pro-

must be called upon to take it; the right of reprisal being expressly lodged with them by the Constitution, and not the Executive.

VII J. MOORE, DIGEST OF INTERNATIONAL LAW 123 (1906) (quoting 7 JEFFERSON'S WORKS 628).

25. The one alteration noted in the constitutional grant of congressional war powers is the substitution of "declare" for "make." The well-established reason for this change was, according to Madison, to leave to the Executive "the power to repel sudden attacks." 2 RECORDS OF THE FEDERAL CONVENTION OF 1789 318-19 (M. Farrand rev. ed. 1966). See also E. KEYNES, *supra* note 2, at 35-36; Lofgren, *supra* note 3, at 675; Note, *supra* note 21, at 1773 n.16; Reveley, *supra* note 6, at 1285 n.139.

26. Note, *supra* note 21, at 1778. The author argues that the right to self-defense, and the need for immediate exercise of that right when the nation is under sudden attack, need not find a basis in any specific constitutional provision or grant, for it necessarily derives from the notion of sovereignty itself.

27. It is no accident that the incidence of lawsuits challenging the legality of United States wars increased so dramatically shortly following President Truman's innovative and radical "interpretation." See *infra* notes 34-35 and accompanying text.

gress toward virtually complete control over the commitment of American troops abroad."²⁸ The first and longest stage, comprising the period from adoption of the Constitution to the end of the nineteenth century, was characterized by "genuine collaboration between the President and Congress, and [by] executive deference to legislative will regarding the initiation of foreign conflicts."²⁹ During this period of over one hundred years, unilateral executive military action was limited to action short of war, e.g., acts to suppress piracy and counter the American slave trade, "hot pursuit" of invaders, and neutral protection of United States lives or property abroad where that protection was not likely to provoke a war.³⁰

The second stage runs from about 1900-1941, the beginning of the Second World War. During this period, legislative-executive collaboration virtually ceased, but Congress continued to exert influence over military foreign policy. Unilateral executive military action became more prevalent, but Presidents always offered an excuse or rationale; never did they assert that they had inherent war power.³¹

28. Reveley, *supra* note 6, at 1257-65. Similar lines are drawn by many legal historians of the war powers clause. *See, e.g.*, SENATE COMM. ON FOREIGN RELATIONS, NATIONAL COMMITMENTS, S. REP. NO. 797, 90th Cong., 1st Sess. 9-18 (1967) (hereinafter NATIONAL COMMITMENTS REPORT); Freidman, *supra* note 23, at 228-37; Note, *supra* note 21, at 1788-91.

29. NATIONAL COMMITMENTS REPORT, *supra* note 28, at 9; Reveley, *supra* note 6, at 1257. During this period, President Adams led a limited naval war against France, in complete compliance with congressional statutes. NATIONAL COMMITMENTS REPORT, *supra* note 28, at 9; Reveley, *supra* note 6, at 1259 n.42. *See also* Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800). Jefferson, responding to attacks on United States ships by Bombay Pirates off the coast of Tripoli, refused to permit any offensive action by naval ships until he received congressional authorization. NATIONAL COMMITMENTS REPORT, *supra* note 28, at 10. Indeed, up to the 1890s, "only in the case of Texas and the Mexican War did the executive [President Polk] encroach upon the legislature's constitutional prerogative" with respect to war powers. R. LEOPOLD, THE GROWTH OF AMERICAN FOREIGN POLICY 99 (1962). (Two years later, the House censured Polk.)

30. NATIONAL COMMITMENTS REPORT, *supra* note 28, at 11-12. This first period included the Civil War, in which President Lincoln exercised broad unilateral emergency power, but that action (1) did not involve use of force against foreign countries, and (2) was characterized by the Supreme Court as a response to sudden attack on the nation. *See* The Prize Cases, 67 U.S. (2 Black) 635 (1862).

31. Thus, for example, widespread military involvements in the affairs of Caribbean and Central American governments, particularly by Presidents Theodore Roosevelt, Taft and Wilson, were labeled as "neutral interpositions," ostensibly limited to the protection of United States lives and property. In fact, a 1934 State Department report went to great lengths to distinguish between neutral interposition, which the executive could unilaterally order, and intervention—interference with the political concerns of another state—which required congressional authorization. United States Dep't of State, *Right to Protect Citizens in Foreign Countries by Landing Forces*, 24-34, 40, 44, 48 (3d rev. ed. 1934) (Memorandum of the Solicitor). An argument sometimes made, but which should rightfully be put to rest, suggests that because our involvement in Latin America during this period was unlikely to provoke major conflicts (because of United States strength and the opposition's weakness),

The post-World War II situation marks a virtually complete breakdown in the collaboration and interaction of the President and Congress on questions of war-making. The fear provoked by the Cold War and possible congressional embarrassment over its past isolationism in the face of Nazism gave the President a free hand in using military force abroad.³² "The decisions to employ arms off Formosa, in Korea, Lebanon, Cuba, the Dominican Republic and Vietnam were essentially the President's, as were the policies that led Washington to feel that force was essential."³³

The critical turning point in this history came when President Truman, in the summer of 1950, unilaterally committed 83,000 troops to fight North Korean forces. Unlike previous presidents, President Truman neither sought after-the-fact congressional authorization nor attempted to justify the act as falling within the "short of war" exception. Instead, he claimed, for the first time, that as Commander-in-Chief the President had the broad power to begin a war without congressional approval to protect an "interest of American foreign policy."³⁴ Truman's claims stirred great debate, and when in 1951 he asserted the authority to send troops to Europe without consulting Congress, the Senate passed a "sense of the Senate" resolution approving the troop deployment but requiring congressional authorization before any further troops were deployed.³⁵

But Truman had set a precedent, and his successors built upon it. Even Dwight Eisenhower, who generally worked closely with Congress on military matters, justified the unilateral dispatch of 14,000 troops to quell a civil war in Lebanon in 1958 on grounds of presidential prerogative in "national security" matters.³⁶ President Kennedy, during the

unilateral executive action was somehow justified. *See, e.g.*, Note, *supra* note 21, at 1790. *But cf.* Monaghan, *Presidential War-Making*, 50 B.U.L. REV. 19, 27 (Special Issue 1970) (noting that such an argument "amounts to recognition of presidential power to wage war against weak opponents for limited purposes"). A recent resuscitation of this argument was offered by the Defense Department to justify the Korean tree-cutting incident. *See infra* note 112.

32. NATIONAL COMMITMENTS REPORT, *supra* note 28, at 13.

33. Reveley, *supra* note 6, at 1263-64.

34. United States Dep't of State, *Authority of the President to Repel the Attack in Korea*, 23 DEP'T ST. BULL. 173 *passim* (1950) (quoted in Friedman, *supra* note 23, at 232 n.57). "[T]his claim of presidential power was without precedent in American history." *Id.* at 233. *See also* T. EAGLETON, WAR AND PRESIDENTIAL POWER 69-72 (1974).

35. Friedman, *supra* note 23, at 237 n.68; Reveley, *supra* note 6, at 1263 n.57.

36. Friedman, *supra* note 23, at 233 n.60 (citing A. SCHLESINGER, THE IMPERIAL PRESIDENCY 162 (1973)). Congress, perhaps lulled by President Eisenhower's assurances that he would always seek their authorization, practically sanctioned presidential prerogative with a broadly phrased Middle East Resolution in 1957. The Resolution read, in part, "if the Presi-

Cuban missile crisis, President Johnson in Vietnam and the Dominican Republic, President Nixon in the Yom Kippur War and in the bombing of Cambodia, and President Reagan in Lebanon, El Salvador, and Nicaragua, all took unilateral military action.³⁷ "Every President since World War II has asserted at one time or another that he had the authority to commit the armed forces to conflict without the consent of Congress."³⁸

An exhaustive examination of the causes for this shift in the war power is beyond the scope of this article.³⁹ Those who have studied the issue tend to focus on two general areas of causation: (1) institutional characteristics of Congress and the President;⁴⁰ and (2) developments in United States foreign policy.⁴¹ It is enough to say that neither of these developments *necessarily* renders the notion of congressional control over war powers outmoded. It is true that the Executive by virtue of its hierarchical structure, command of national attention, and concentration of power in one person, has certain institutional advantages vis-a-vis Congress in the field of foreign affairs. It is also true that in Congress, interests are more localized, responsibility more diffused, and decision-making more laborious. But all of this was true, or at least foreseeable, in 1787. The Framers gave the war powers to Congress, not because it might more easily or more efficiently wield power, but precisely because of its weaknesses; they were "for clogging rather than facilitating war." Correlatively, investment of the war powers in the executive branch threatened tyranny because of the President's inherent institutional power advantages. The location of the war powers was thus central to the system of checks and balances.

Some have argued that an 18th century war powers clause cannot guide us in the twentieth century.⁴² The Framers, they argue, cannot have envisioned a world of nuclear arms, nor a world in which the

dent determines the necessity thereof, the United States is prepared to use armed forces to assist any nation or group of nations requesting assistance against armed aggression from any country controlled by international communism." See T. EAGLETON, *supra* note 34, at 74-76.

37. See Friedman, *supra* note 23, at 234-36 & n.65.

38. NATIONAL COMMITMENTS REPORT, *supra* note 28, at 21.

39. See, e.g., Reveley, *supra* note 6, at 1265-71; Note, *Historical and Structural Limitations on Congressional Abilities to Make Foreign Policy*, 50 B.U.L. REV. 51 (Special Issue 1970).

40. Reveley, *supra* note 6, at 1265; Note, *The Appropriations Power as a Tool of Congressional Foreign Policy Making*, 50 B.U.L. REV. 34, 36 n.21 (Special Issue 1970).

41. NATIONAL COMMITMENTS REPORT, *supra* note 28, at 13-23; Reveley, *supra* note 6, at 1266, 1267 and n.68.

42. Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1 (1961). Ten years later, after experiencing the congressional-

United States' interests would reach as far and wide as they do today. Even were there merit to these arguments, which many people dispute, they cannot justify violations of existing law. Those favoring executive war-making should address themselves to amending the Constitution. Moreover, today's circumstances underscore the necessity for strict adherence to the constitutional allocation of war powers. The prospect and danger of nuclear war, certainly the overriding concern in foreign policy today, only reaffirms the wisdom of "clogging rather than facilitating war." When the Framers wrote, the nation had an interest in avoiding war because of its weakness vis-a-vis other nations. Today, the entire world has an interest in avoiding war because of human weakness in the face of the destructive force of nuclear weapons.⁴³

Neither Congress nor the people should be forced to convince the President not to infringe upon congressional war powers; the Constitution flatly forbids him to do so.⁴⁴ But where the President, who is to enforce the law, is breaking the law, and where the judiciary, which is to say what the law is, refuses to do so, we are left to the mercy of presidential prerogative. The law ceases to impose limits on executive action and executive power, freed of its constraints, shapes the world as it pleases. When the law that is slipping into obscurity is the Constitution, we have the makings of a constitutional crisis.

III. THE MAKING OF A CONSTITUTIONAL CRISIS—VIETNAM AND THE SEPARATION OF POWERS

The origins of the constitutional war powers crisis are, as noted above, relatively recent. President Truman, less than thirty-five years ago, was the first President to openly challenge the limits of the war powers clause and to assert inherent presidential authority to initiate

presidential battles over the Vietnam War, Senator Fulbright revised his opinion about the efficacy of constitutional restraints:

In those days, [of the 1950s and 1960s] . . . it was possible to forget the wisdom of the Founding Fathers who had taught us to mistrust power, to check it and balance it, and never to yield up the means of thwarting it. Now, after bitter experience, we are having to learn all over again that no single man or institution can ever be counted upon as a reliable or predictable repository of wisdom and benevolence; that the possession of great power can impair a man's judgment and cloud his perception of reality; and that our only protection against the misuse of power is the institutionalized interaction of a diversity of independent opinions.

Address by Senator Fulbright, Yale University (Apr. 3, 1971), *reprinted in* 117 CONG. REC. 10, 355-56 (1971). Senator Fulbright was not alone in drawing this lesson from the Vietnam War. *See infra* notes 60-83 and accompanying text.

43. *See, e.g.,* Schell, *The Abolition, Part II—A Deliberate Policy*, THE NEW YORKER, Jan. 9, 1984, at 43-94.

44. Similarly, because the Constitution contains a Bill of Rights, we are not required to "convince" prison guards not to torture prisoners or police not to coerce confessions.

armed conflict. President Truman was also, coincidentally, the first to engage United States forces in the Vietnam War.⁴⁵ That war, and the political struggle that it fostered at home, were to make manifest what was, in 1950, a latent constitutional crisis.

United States combat involvement in the Vietnam War lasted some twelve years. Its history is marked by several unilateral executive decisions to escalate and expand the war effort, after-the-fact but opened congressional authorization in the early years, and, by the early seventies, affirmative but still relatively fruitless congressional opposition. It is also marked by a slew of judicial challenges by citizens, taxpayers, members of Congress, and draftees; never before had so many gone to the courts to challenge a war's legality. With one short-lived exception, the courts left presidential usurpation unchallenged.⁴⁶ The reasoning offered by the various courts was often inconsistent, as the tenor of the times changed and as judicial embarrassment increased. But they were consistent about two things; no court upheld the legality of the war effort on a theory of inherent executive war power; and no court held the war effort illegal. Virtually all the decisions were characterized by a misguided judicial restraint, usually couched in terms of "political question."⁴⁷

45. T. EAGLETON, *supra* note 34, at 85.

46. *Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D.N.Y. 1973), *rev'd*, 484 F.2d 1307 (2d Cir. 1973) (Judge Judd enjoined bombing of Cambodia).

47. The much-maligned "political question" doctrine, *see infra* notes 160-99 and accompanying text, received its most famous formulation in *Baker v. Carr*, 369 U.S. 186 (1962), a case in which the Court sought to *restrict* earlier broad dicta concerning nonjusticiability. Justice Brennan lists six factors to be considered:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

Subsequent Supreme Court decisions demonstrate that the first factor is the most important, and that where a branch has acted beyond its constitutional powers, judicial review will not be barred by consideration of "embarrassment" or "respect." *See INS v. Chadha*, 103 S. Ct. 2764 (1983); *Powell v. McCormack*, 395 U.S. 486 (1969). Commentators have identified the first factor as "classical," the second two as "functional," and the last three concerns as "prudential." *See E. KEYNES, supra* note 2, at 68-74. The classical view is based on constitutional principles of the role of the judiciary, and some argue that it is the only justifiable ground for invoking the doctrine. *See Gunther, The Subtle Vices of the 'Passive Virtues'—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1

A. *The War at Home—Battles Between Congress and the President*

The judicial decisions cannot be understood without an understanding of the political interchange between Congress and the President through the Vietnam War years. The domestic history of that war demonstrates how far we have come from the framework envisioned in 1787. Congressional response to the Vietnam War ranged from broad authorization to quiet acquiescence to outright disapproval; through it all, presidents acted unilaterally without consulting or even paying much attention to Congress.

United States involvement in Vietnam began, not with the dispatch of troops, but "with more subtle investments of dollars and advisors."⁴⁸ By July 1954 the executive branch had already sent a small group of military advisors and some \$2.6 billion in aid to French and Vietnamese forces.⁴⁹ From 1961 to 1964, the number of United States military personnel mushroomed from 3,200 to 23,300, without specific congressional approval.⁵⁰ In February of 1964, President Kennedy authorized United States-controlled covert military action, again without notifying Congress.⁵¹

When, in August of 1964, two American destroyers were allegedly attacked by North Vietnamese torpedo boats, President Johnson retaliated immediately with heavy bombing raids, and only then went to Congress.⁵² Congress responded almost instantaneously, passing an open-ended Gulf of Tonkin Resolution that authorized the President to "take all necessary measures to repel armed attack against the forces of the United States and to prevent further aggression."⁵³ From 1964 to

(1959). The "functional" factors are more descriptive than normative, and provide all-too-convenient labels for avoiding decisions. See, e.g., *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *infra* at notes 206-21 and accompanying text. Few if any courts rely solely on the "prudential" factors, particularly where a violation of the separation of powers is at issue. As Justice Douglas has noted, "[i]t is far more important to be respectful to the Constitution than to a coordinate branch of government." *Massachusetts v. Laird*, 400 U.S. 886, 894 (1970) (Douglas, J., dissenting). See also *Powell v. McCormack*, 395 U.S. at 548-49.

48. T. EAGLETON, *supra* note 34, at 90.

49. E. KEYNES, *supra* note 2, at 111.

50. *Id.* at 112.

51. T. EAGLETON, *supra* note 34, at 98.

52. *Id.* at 100.

53. Pub. L. No. 88-408, 78 Stat. 384 (1964), approved by the President, Aug. 10, 1964. The Resolution passed the Senate 88-2 after only six hours of debate. In the House, forty minutes of discussion were allotted before the Resolution was approved, 416-9. E. KEYNES, *supra* note 2, at 113. As Professor Keynes points out, the overbroad language of the Resolution was not unprecedented in Congress, where similarly broad delegation of war powers had been passed in 1955, regarding Formosa, and 1957, regarding the Middle East. *Id.* See also T. EAGLETON, *supra* note 34, at 72-76.

1969, Congress proceeded to pass no less than twenty-four public laws supporting presidential action in Vietnam.⁵⁴

Despite consistent congressional support, President Johnson's State Department insisted, in a 1966 memorandum, that the President had unilateral authority to commit United States Armed Forces whenever "the President deems such action necessary to maintain the security and defense of the United States."⁵⁵ Thus, although President Johnson may have appreciated the Gulf of Tonkin Resolution, he did not consider it necessary.

The subsequent history of the Vietnam War indicates that, as a matter of fact if not law, President Johnson was correct. Beginning in 1969, Congress began to express disapproval with the war, virtually to no avail.⁵⁶ Between 1969 and 1973, Congress passed ten laws limiting or restricting presidential authority to conduct the Vietnam War, but President Nixon nonetheless took repeated unilateral action to escalate the war effort.⁵⁷ Even after the repeal of the Gulf of Tonkin Resolution in 1970, congressional attempts to limit, control or end the war were largely futile.⁵⁸ Even the appropriations power proved no check to

54. E. KEYNES, *supra* note 2, at 114.

55. U.S. Dep't of State, *The Legality of United States Participation in the Defense of Vietnam*, DEP'T ST. BULL. 474-89 (March 28, 1966). See also STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 97TH CONG., 2D SESS., *THE WAR POWERS RESOLUTION: A SPECIAL STUDY OF THE HOUSE COMMITTEE ON FOREIGN AFFAIRS 12-13* (Comm. Print 1982) [hereinafter COMMITTEE ON FOREIGN AFFAIRS STUDY]. T. EAGLETON, *supra* note 34, at 124-25.

56. See, e.g., T. EAGLETON, *supra* note 34, at 111.

57. E. KEYNES, *supra* note 2, at 114-16. Thus, for example, President Nixon began the bombing of Cambodia, in April 1970, without any real congressional consultation, despite several opportunities to do so in confidential settings. COMMITTEE ON FOREIGN AFFAIRS STUDY, *supra* note 55, at 26-28. As one commentator noted, "it is a telling measure of the estrangement between President and Congress that while the Governments of Cambodia and South Vietnam had advance notice of the U.S. decision to attack the North Vietnamese sanctuaries, the Congress had none." A. FRYE, *A RESPONSIBLE CONGRESS: THE POLITICS OF NATIONAL SECURITY* 203 (1975).

58. President Nixon took the position that, because of his right and duty to protect American troops, repeal of the Resolution was meaningless. COMMITTEE ON FOREIGN AFFAIRS STUDY, *supra* note 55, at 37. Senator Eagleton relates an example of the Administration putting Congress in a no-win position. In March 1973, the Administration requested authorization to transfer \$500 million to fund the bombing of Cambodia. According to statements by Secretary Richardson, if the authority were granted, it would be viewed as approval of the activity, but if it was denied, the denial would "not impact on [sic] U.S. air operations in Cambodia." T. EAGLETON, *supra* note 34, at 157.

When an absolute cut-off of all funds for military activity in Cambodia and Laos was finally passed, the President vetoed the bill and forced a compromise, effectively a 45-day authorization of war. In Senator Eagleton's words, "after twelve years of combat in Indochina, Congress finally ended our involvement by authorizing it for forty-five more days." T. EAGLETON, *supra* note 34, at 182.

presidential war-making.⁵⁹

B. The Judicial Response—Abdication in A Time of Crisis

Congressional impotence in the face of presidential *faits accomplis* was exacerbated by the judiciary's failure to enforce the separation of powers so carefully crafted by the Framers. The Vietnam War provoked unprecedented and widespread recourse to the courts. The groundswell of litigation, unabated by the frustration of non-decision after non-decision, indicates the extent to which Vietnam marked not merely an unpopular war but a constitutional crisis. Litigants did not challenge the wisdom of the war effort, but rather its constitutionality.⁶⁰ Unilateral executive initiation and escalation of an undeclared war seemed to violate clear constitutional dictates that Congress, not the President, commence and declare war.

No court affirmed the legality of unilateral presidential war, but neither did any court, with one exception, declare the war illegal. Judicial avoidance was consistent. In the district and circuit courts, judge after judge declared the issue, at one level or another, for one reason or another, non-justiciable. The Supreme Court routinely denied certiorari.⁶¹

Yet there is a discernible development in the sophistication of decisions, in the courts' ability to recognize the constitutional problem, and in the willingness, in the abstract, to decide. The development can be traced along chronological lines, and no doubt marks a response to domestic conditions: the growing unpopularity of the war among the general public, heightened conflict between Congress and the President, and increasingly bold assertions and acts of presidential prerogative. More purely "judicial" factors also may have played a part in the development. In 1969, the Supreme Court decided *Powell v. McCord*

59. Congress' inability to control presidential war-making through its appropriation power was not limited to the Vietnam War. The argument, sometimes offered, that Congress can protect itself with the power of the purse, overlooks the reality of appropriations practice. Control of executive action through appropriations is rendered virtually impossible by the sheer size and complexity of the budget, the need to allow flexibility in the use of funds, and the practices of "no year" appropriations, emergency funds, and impoundment. See Note, *supra* note 39, at 51, 57, 73; Note, *supra* note 40, at 43-45.

The argument that the power of the purse is sufficient also overlooks the Constitution. The Framers gave Congress the power of the purse *and* the war powers; presumably, if the former had been considered sufficient, art. I, § 8, cl. 11 would have been left out.

60. *Atlee v. Laird*, 347 F. Supp. 689, 712 (E.D. Pa. 1972) (Lord, J., dissenting), *aff'd sub nom.* *Atlee v. Richardson*, 411 U.S. 811 (1973); *Mottola v. Nixon*, 318 F. Supp. 538, 540 (N.D. Cal. 1970), *rev'd on other grounds*, 464 F.2d 178 (9th Cir. 1972).

61. See, e.g., *Massachusetts v. Laird*, 400 U.S. 886 (1970); *Mora v. McNamara*, 389 U.S. 934 (1967).

mack,⁶² cutting back significantly on what had been a dangerously amorphous "political question" doctrine of judicial avoidance. And throughout the years of Vietnam War litigation, one gets a sense that the courts were influenced by creeping judicial embarrassment at the consequences of repeated abdication in the face of clear constitutional violations.⁶³

The judicial response can be divided into three stages. Early cases—most of which came before congressional and public opposition began to mount—routinely dismissed the entire issue as a political question.⁶⁴ Beginning in 1970, a few courts, most notably the First and Second Circuits, applied a more discriminating analysis. These cases explicitly affirmed the justiciability of the existence and sufficiency of congressional assent to war but found implied assent constitutional.⁶⁵ As the war entered its concluding phase, and explicit congressional opposition made findings of implicit assent impossible, several courts continued to find the war powers issue justiciable, but refrained from interfering with presidential discretion in tactical decisions "winding down" the war.⁶⁶ While the development demonstrates a recognition of the need for judicial enforcement of the Constitution, it also points all too clearly to an ultimate lack of confidence in the judiciary's ability to control illegal exercises of presidential power.

*Luftig v. McNamara*⁶⁷ is representative of the first class of cases. An army private sought to enjoin the Secretary of Defense from sending him to Vietnam, on the ground that the war was unconstitutional. The district court dismissed the matter as "obviously a political ques-

62. 395 U.S. 486 (1969).

63. It became increasingly difficult to brush aside the argument that if constitutional law is to mean anything, the judiciary must reject executive assertions of prerogative to ignore the Constitution. Advocates of judicial restraint argued, in theory, that intervention might threaten judicial legitimacy if a court's order was ignored. In fact, the consequences for judicial legitimacy of repeated abdication proved at least equally, if not more, dangerous, as it suggested that the law could not provide checks to overbroad assertions of governmental power.

64. See, e.g., *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); *Davi v. Laird*, 318 F. Supp. 478 (W.D. Va. 1970); *United States v. Sisson*, 294 F. Supp. 511 (D. Mass. 1968); *Velvel v. Johnson*, 287 F. Supp. 846 (D. Kan. 1968), *aff'd sub nom. Velvel v. Nixon*, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970).

65. *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971); *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971); *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970), *cert. denied*, *Orlando v. Laird*, 404 U.S. 869 (1971).

66. *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971).

67. 373 F.2d 664 (D.C. Cir.) (per curiam), *cert. denied*, 387 U.S. 945 (1967).

tion."⁶⁸ The court of appeals affirmed *per curiam*, finding the political question determination "so clear that no discussion or citation of authority [was] needed."⁶⁹

The simplicity of the *Luftig* approach could not withstand repeated attacks, however, and when, in 1972, two judges on a three-judge district court wanted to reach a *Luftig* result, they issued a fifty-page opinion exhaustively discussing virtually every authority on the political question doctrine.⁷⁰ *Atlee v. Laird* marks a transitional case: Its majority opinion harks back to, and attempts to rationalize, the outright dismissals of early Vietnam litigation, while its dissent raises the constitutional cry that had led most courts since 1970 to assert, if not to exercise, their duty to decide questions of unconstitutional abuses of power.

Writing for the majority in *Atlee*, Judge Adams invoked a parade of horrors to demonstrate why a court should never decide the following questions: (1) whether military activity constitutes a "war"; (2) whether Congress has authorized such military activity; and (3) whether the President has unilateral authority to exercise military power abroad.⁷¹ Each question, he determined, was a political question, because of constitutional commitments to political branches, a lack of judicially manageable standards, and the danger of adverse international consequences.⁷² In dissent, Judge Lord strongly repudiated

68. 252 F. Supp. 819 (D.D.C. 1966), *aff'd per curiam*, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967). The district court also involved the doctrine of sovereign immunity. 252 F. Supp. at 82.

69. 373 F.2d at 665. Nevertheless, the court cited two Supreme Court cases, neither of which incurred dismissal on political question grounds. *Id.* at 666 (citing *Johnson v. Eisen-trager*, 339 U.S. 763 (1950) (decision on merits denying writ of habeas corpus to German national convicted by military commission); *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948) (decision on merits as to whether Civil Aeronautics Act provided statutory review)).

The court hoped that its opinion would serve as a warning: "[t]he only purpose to be accomplished by saying this much on the subject is to make it clear to others comparably situated and similarly inclined that resort to the courts is futile, in addition to being wasteful of judicial time. . . ." 373 F.2d at 665.

70. *Atlee v. Laird*, 347 F. Supp. 687 (E.D. Pa. 1972) (three-judge court) (as reported in the Federal Supplement, the majority opinion covers approximately twenty pages) *aff'd sub nom.* *Atlee v. Richardson*, 411 U.S. 911 (1973).

71. 347 F. Supp. at 705-06.

72. Judge Adams' reasoning, if applied in a principled fashion across the board, would eviscerate judicial review. He suggested, contrary to Justice Brennan's opinion in *Baker v. Carr*, that review is nearly always inappropriate in the realm of foreign affairs, 347 F. Supp. at 701-03, but his rationale extends to domestic matters. Thus, he claimed that whether Vietnam was a war was judicially unascertainable in part because the question is committed to the executive and legislative branches, to the exclusion of the courts. This suggests, contrary to Supreme Court cases from *Marbury* to *Chadha*, that where the Framers chose to

the majority's fears, and insisted that concern for the separation of powers, on which the political question doctrine is founded, "dictates that a court proceed to the merits of a controversy" where the executive "exceeds its constitutional authority."⁷³ He noted that judicial avoidance would write a central provision of the Constitution out of existence:

The effect of the majority decision is to remove an entire provision of the Constitution from judicial scrutiny. This is not a provision of little consequence to the American people. The harm produced by most wars is of tragic proportions, as is no more readily evident than from the current hostilities in Southeast Asia. If the Executive or the Legislature acts unconstitutionally, it is not a sufficient remedy that at some future date on election day leaders may be replaced by those who hopefully will not violate the Constitution.⁷⁴

The later Vietnam cases reflect Judge Lord's views, in the abstract, and insist on the justiciability of the fundamental war powers question: whether Congress has provided the constitutionally required assent to

separate powers between the Executive and the Legislature—as, for example, in the procedures for legislation—they meant the Constitution to be no more than a starting point in an extended, no-holds-barred, political struggle. *But cf.* *INS v. Chadha*, 103 S. Ct. 2764 (1983). Such a reading belittles the notion of a written, controlling Constitution, the very foundation for judicial review. *Marbury v. Madison*, 5 U.S. (1 Cranch) 48 (1803).

As to whether Congress had authorized the war, Judge Adams noted that such an inquiry would require "interrogation of members of Congress." 347 F. Supp. at 706. But the judiciary parses the intent of Congress virtually every time it interprets legislation, and never yet has such interpretation required personal interviews.

Finally, Judge Adams found that even if the court held Vietnam to be a war undertaken without congressional authorization, it could not determine the final question: whether the President has unilateral authority to make war. This conclusion gives presidents a blank check in military affairs; it tells the Executive that whatever authority it asserts, it will have. While as a practical matter this may be true, it is far from legally correct. "[I]t is the province . . . of the judicial department to determine . . . whether the powers of any branch of government . . . have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void." *Powell v. McCormack*, 395 U.S. 486, 506 (1969) (quoting *Kilbourn v. Thompson*, 103 U.S. (13 Otto) 168, 199 (1880)).

73. 347 F. Supp. at 710 (Lord, J., dissenting).

74. *Id.* at 709.

Atlee v. Laird demonstrates the tension that led many of the post-1969 courts to insist on some degree of justiciability but to continue to avoid decision. Judge Adams' fears run through the literature on prudential judicial restraint, but Judge Lord's criticisms are soundly based on the most fundamental principle of constitutional law—that the limits on governmental power of the written Constitution must be judicially enforceable if law is to provide any check to brute power. Judicial review derives its legitimacy from the court's role as interpreter and enforcer of a written constitution. If vague notions of "restraint" incapacitate the judiciary where the Constitution has been violated, judicial review itself loses its moorings.

military activities.⁷⁵ The Second Circuit, in a series of cases beginning in 1970, affirmed the ability and duty of the courts to decide "whether there is any action by the Congress sufficient to authorize or ratify the military activity in question."⁷⁶ In each case, however, the court found sufficient authorization for the Vietnam War implicit in the Tonkin Gulf Resolution, appropriations and selective service acts. It limited its inquiry to finding sufficient "mutual participation" by Congress and the Executive, holding that the particular *form* of congressional authorization was a political question.⁷⁷

When, still later in the war, congressional opposition became so clear that an inference of assent was no longer tenable, the courts took a third approach to avoid challenging the status quo. For example, in *Mitchell v. Laird*,⁷⁸ the District of Columbia Circuit overruled its earlier decision in *Luftig v. McNamara*,⁷⁹ and asserted the authority to determine whether involvement in Vietnam constituted a "war" and whether Congress had authorized that war.⁸⁰ The *Mitchell* court refused to infer congressional approval from "appropriation or draft act[s]";⁸¹ and held the Gulf of Tonkin Resolution an insufficient "justi-

75. See, e.g., *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Massachusetts v. Laird*, 452 F.2d 26, 34 (1st Cir. 1971); *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir.), cert. denied, 404 U.S. 869 (1971).

76. *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971); *Orlando v. Laird*, 443 F.2d at 1042; *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970).

77. The court ruled, in *Orlando v. Laird*, that: "The form which congressional authorization should take is one of policy, committed to the discretion of the Congress and outside the power and competency of the judiciary, because there are no intelligible and objectively manageable standards by which to judge such actions" 443 F.2d at 1043-44 (citations omitted). The First Circuit, in *Massachusetts v. Laird*, applied similar reasoning, and found that the war had been assented to by Congress. It carefully restricted its holding to what it characterized as "a situation of prolonged but undeclared hostilities, where the executive continues to act not only in the absence of any conflicting Congressional claim of authority but with steady Congressional support . . ." 451 F.2d at 34. In direct response to this holding, Congress has now provided the courts with an "intelligible and objectively manageable standard," in § 8(a) of the War Powers Resolution. See *infra* notes 181-91 and accompanying text.

78. 488 F.2d 611, 614 (D.C. Cir. 1973).

79. 373 F.2d 664 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967).

80. 488 F.2d at 614-15.

81. *Id.* at 615. The court wrote:

This court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to draft men a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war. A Congressman wholly opposed to the war's commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting. An honorable, decent, compassionate act of aiding those already in peril is no proof of consent to the actions that placed and continued them in that dangerous posture. We should not construe votes cast in pity and piety as though

fication for the *indefinite* continuance of the war since it was repealed by subsequent Congressional action."⁸² Nevertheless, it refused to declare the war illegal. The court's rationale for avoidance was that the war was winding down, and absent a "clear abuse amounting to bad faith," the President should be afforded wide latitude in bringing the war to an end.⁸³

The judicial response to the longest undeclared war in United States history is characterized by a consistent reluctance to decide where decision might upset the status quo. At first the reluctance to decide blinded courts to the fundamental question of law that the cases raised: the constitutional authority of the executive to wage war. Later, as courts began to recognize the danger of abdicating their authority to decide such fundamental constitutional issues, they approached the merits, but only to affirm the status quo. Only Judge Judd, in his quickly reversed injunction of the Cambodia bombing, had the courage to exercise the authority that other courts were claiming. During the Vietnam War, in the courts, in the executive branch, and even, to a large extent, in Congress, the Constitution was more honored in the breach than in the observance. The failure of court after court to impose any constitutional limit on presidential war-making marked a constitutional crisis.

IV. THE WAR POWERS RESOLUTION—CONGRESS REAFFIRMS ITS WAR POWERS

The lessons of the Vietnam War were not lost on Congress. Efforts to control and/or end the war by legislation had proved largely futile,⁸⁴ and the judicial branch had done nothing to protect Congress' prerogative over war.⁸⁵ Without presidential compliance or judicial enforce-

they were votes freely given to express consent. Hence Chief Judge Bazelon and I believe none of the legislation drawn to the court's attention may serve as a valid assent to the Vietnam war.

Id.

82. *Id.* at 614 (citation omitted) (emphasis in original).

83. *Id.* at 616. The Second Circuit, in *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974), applied similar reasoning in reversing the only court to enjoin the war. Judge Judd, in *Holtzman v. Richardson*, 361 F. Supp. 553, 564 (E.D.N.Y. 1973), had enjoined the bombing of Cambodia because he found it to be unauthorized by Congress. He found that Congress had never authorized the expansion of the war to Cambodia, and had in fact imposed limits ignored by the Executive. He refused to infer authorization up to August 15, 1973 from a statute demanding termination on the 15th. The Second Circuit reversed, finding the manner in which the President winds down a war a non-justiciable political question. 484 F.2d at 1311.

84. See *supra* notes 56-59 and accompanying text.

85. See *supra* notes 60-83 and accompanying text.

ment, the Constitution's grant of war powers to Congress meant little.

The Vietnam War had made clear that, despite the guarantees of the Constitution, Congress would have to act affirmatively to protect itself. In 1970, no less than ten different versions of war powers legislation were introduced in the House of Representatives.⁸⁶ For the next three years, various versions of war powers legislation were debated and acted upon in both Houses. The result was the War Powers Resolution of 1973,⁸⁷ passed over a presidential veto on November 7, 1973.

The purpose of the War Powers Resolution was to reaffirm Congress' constitutional war powers.⁸⁸ Congress was reacting to a constitutional crisis that had its roots in the Korean War but had become manifestly untenable during the Vietnam War.⁸⁹ The War Powers Resolution altered nothing in the Constitution; it sought only to create a procedural mechanism to effectuate the constitutional scheme.⁹⁰ The

86. COMMITTEE ON FOREIGN AFFAIRS STUDY, *supra* note 55, at 48.

87. Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548 (1976)). The Resolution is set out in full in the Appendix. 17 LOY. L.A.L. REV. 803, (1984).

88. As stated in the House Report on the Resolution, "[t]he committee's objective was to reaffirm the constitutionally given authority of Congress to declare war." The House Report pointed out that "the constitutional 'balance' of authority over warmaking has swung heavily to the President in modern times. To restore the balance provided for and mandated in the Constitution, Congress must now reassert its own prerogatives and responsibilities." H.R. REP. NO. 93-287, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2346, 2349.

Senator Javits, one of the authors of the bill, in introducing it on behalf of 57 other Senators, said:

It is an effort to learn from the lessons of the last tragic decade of war which has cost our Nation so heavily in blood, treasure, and morals. The War Powers Act would assure that any future decision to commit the United States to any warmaking must be shared in by the Congress to be lawful.

119 CONG. REC. 1394 (1973) (statement of Sen. Javits).

89. In 1967, Senator Fulbright pointed to the "marked constitutional imbalance between the Executive and the Congress . . . developed in the last 25 years as a result of which the Executive has acquired virtually unrestricted power to commit the United States abroad politically and militarily." COMMITTEE ON FOREIGN AFFAIRS STUDY, *supra* note 55, at 18.

90. As Senator Muskie, floor manager of the Senate bill and a conferee, stated:

[T]he bill is a procedural bill, undertaken to insure consultation by the President with Congress and undertaking to put in the hands of Congress the procedure for terminating any hostilities into which the President may have plunged us, whether or not his actions in so doing conformed with our view as to what his constitutional powers might be.

119 CONG. REC. 36, 194 (1973) (statement of Sen. Muskie).

Similarly, Senator Spong wrote:

The Resolution does not add to the President's authority as Commander-in-Chief. Indeed, considering the expansion of that authority during the past quarter-century through custom, usage, and congressional acquiescence, there is little power to add. The Resolution does establish by law a methodology by which Congress may terminate hostilities it considers unwise or unconstitutional without resort to the ultimate legislative weapon of withholding funds

Spong, *The War Powers Resolution Revisited: Historic Accomplishment or Surrender?*, 16

Resolution requires the President to consult with, report to, and seek affirmative authorization from Congress regarding the deployment of armed forces in situations of hostilities or imminent hostilities. The legislation achieves this through a unique mechanism—the automatic termination requirement. Without presidential compliance with this “fail-safe” provision, the Resolution is gutted and Congress’ intent is for naught.

The opening sections of the War Powers Resolution, entitled “Purpose and Policy,” represent a reassertion by Congress of its authority to commit United States Armed Forces into hostilities. The Resolution begins with a “Congressional declaration” that its purpose is “to fulfill the intent of the framers of the Constitution . . . and insure that the collective judgment of both the Congress and the President will apply to” the introduction and continued use of United States Armed Forces in hostilities or situations of imminent hostilities.⁹¹

The Resolution then sets forth the authority of the President to introduce United States Armed Forces into hostilities or imminent hostilities. That authority is limited to three circumstances: “(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.”⁹²

The purpose and policy section does not have the same binding effect as the remainder of the statute; it is not the operative language of the Resolution. Yet, it does demonstrate that Congress saw its war powers much as they were intended by the framers. It marks an explicit congressional rejection of the presidential assertions of unilateral war-making authority that had proliferated since the Korean War.⁹³

The primary function of the statute is not to set up a precise delineation of those circumstances where the President can use military force.⁹⁴ Rather, it establishes a procedural mechanism for ensuring congressional involvement at an early stage in the decision to commit United States Armed Forces to hostilities. The statute must be read in that light if it is to guarantee Congress its constitutional war powers.

The procedural mechanism is triggered by the reporting require-

WM. & MARY L. REV. 823, 845-46 (1975). See *supra* note 59 on insufficiency of “withholding funds.”

91. 50 U.S.C. § 1541(a). Section 1541(b) cites the necessary and proper clause as authority to enact legislation to implement constitutional powers. U.S. CONST. art. I, § 8.

92. 50 U.S.C. § 1541(c).

93. See *supra* notes 34-38 and accompanying text.

94. See generally Spong, *supra* note 90, at 841-45; A. SCHLESINGER, THE IMPERIAL PRESIDENCY 301-03 (1973).

ment of section 4.⁹⁵ This section requires that in the absence of a declaration of war the President must submit a report, within forty-eight hours, to the Speaker of the House and to the President pro tempore of the Senate 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.⁹⁶

Section 4(a)(1) is the most important of the reporting provisions.⁹⁷ Only the situations that require section 4(a)(1) reports—the commitment of United States Armed Forces to hostilities or imminent hostilities—trigger the Resolution's automatic termination provisions.⁹⁸ Once the President reports or is required to report pursuant to section 4(a)(1), Congress has three options:

(1) Congress can refuse to give authorization, even by inaction, in which case all United States Armed Forces must be automatically withdrawn within sixty days; or

(2) Congress can pass a concurrent resolution mandating that the United States Armed Forces be removed prior to the sixtieth day,⁹⁹ or

95. 50 U.S.C. § 1543. Section 3 requires consultation by the President with Congress "in every possible instance" prior to introducing United States Armed Forces into hostilities or imminent hostilities, and on a regular basis thereafter until United States involvement ceases. 50 U.S.C. § 1542. This section, even though it carries no enforceable limitations, has also been regularly disregarded by recent Presidents. See Collier, *War Powers Resolution: Presidential Compliance*, CRS Issue Brief IB81050 (Oct. 26, 1983) at 12.

96. 50 U.S.C. § 1543(a).

97. Section 4(a)(1) reports are treated unlike reports under §§ 4(a)(2) and 4(a)(3). Section 4(a)(1) reports must be referred immediately to the House Committee on International Relations and the Committee on Foreign Relations of the Senate. If Congress is adjourned when a § 4(a)(1) report is given, the Speaker and the President pro tempore can jointly request the President to reconvene Congress pursuant to § 5(a) of the Resolution.

98. See 50 U.S.C. § 1544(b), discussed *infra* note 100.

99. The constitutionality of the concurrent resolution provision has been called into question by the Supreme Court's invalidation of a legislative veto in a different context. *INS v. Chadha*, 103 S. Ct. 2764 (1983). A distinction can be drawn, however, between the War Powers Resolution and the statutes at issue in *Chadha*, *Consumers Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982), and *Consumer Energy Council of America v. FERC*, 673 F.2d 425

(3) Congress can declare war or give specific statutory authorization for use of United States Armed Forces.¹⁰⁰

The heart of the Resolution is the automatic termination provi-

(D.C. Cir. 1981), *aff'd*, 103 S. Ct. 3556 (1983). The legislative veto provisions in the three latter cases were conditions on express delegations of congressional authority. Congress had chosen to delegate its constitutional authority to one or another administrative agency, and had sought to condition that delegation upon the retention of limited control via legislative veto. The Supreme Court and the District of Columbia Circuit both emphasized that such a "condition" is unconstitutional. Authority must be delegated through the bicameralism and presentment procedures, and such delegation can only be altered or revoked through the same bicameralism and presentment procedures. *Chadha*, 103 S. Ct. at 2786; *FERC*, 673 F.2d at 469-70 ("merely styling something as a condition on a grant of power does not make that condition constitutional"). This is because a delegation of authority is a legislative act, insofar as it has the "purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch." *Chadha*, 103 S. Ct. at 2784.

The War Powers Resolution alters no legal duties. Its opening and penultimate sections expressly disavow *any* delegation of authority whatsoever. The Resolution essentially implements the war powers clause; its purpose is "to fulfill the intent of the framers," 50 U.S.C. § 1541, and its effect is expressly *not* "to alter the constitutional authority of Congress or of the President," nor to grant the President any more authority than he would have had in the absence of the Resolution. 50 U.S.C. § 1547(d). Thus, it would be wrong to characterize the War Powers Resolution's concurrent resolution as a condition on delegated authority, for Congress has not delegated any of its authority. Rather, it has clarified and implemented the separation of powers principles inherent in the war powers clause. The Resolution, as a legal matter, might seem to be unnecessary, as by its own terms it does nothing to alter the constitutional status quo. As a practical matter of governance, however, it was necessary, for presidents had increasingly misappropriated congressional war powers in the name of executive discretion and national security, and the courts had demonstrated a reluctance to intervene.

The concurrent resolution provision of the War Powers Resolution is not a legislative enactment, and thus should not be subject to bicameralism and presentment requirements. A concurrent resolution demanding that military personnel be removed is essentially a non-declaration of war, or a declaration of no-war. A concurrent resolution would simply be a mark of congressional intent, a mark more explicit than silence, and therefore possibly judicially enforceable. It does not alter legal rights because, according to the Constitution, the President has no legal right to go to war until Congress so declares. The concurrent resolution is a non-declaration, a declaration that war is *not* declared, an articulation of silence practically required by judicial reluctance to enforce the Constitution in the face of unarticulated silence.

In fact, as a constitutional matter, Congress need not have required even a concurrent resolution. Since wars are to be commenced only with the affirmative approval of both Houses of Congress, one House's express disapproval should be constitutionally sufficient to halt a war.

100. 50 U.S.C. §§ 1544(b)-(c). Special statutory procedures give concurrent and joint resolutions under the War Powers Resolution priority in Congress. The concurrent resolution does not require presentment to the President, and permits troops to be disengaged prior to the expiration of sixty days. The joint resolution requires the signature of the President and is the method employed when Congress gives specific authority to employ United States Armed Forces beyond sixty days. The sixty-day period can be extended to ninety days if the President certifies to Congress 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." 50 U.S.C. § 1544 (b).

sion.¹⁰¹ The effectiveness of the entire statutory scheme hinges on this provision. It requires the removal of all United States Armed Forces within sixty-two days of their introduction into hostilities or into situations where imminent hostilities are clearly indicated by the circumstances, unless Congress acts affirmatively to authorize the involvement.¹⁰² Termination of troop involvement must occur even if Congress does nothing; there is no requirement of congressional disapproval. This comports with the constitutional scheme, which gives Congress the power to declare war, and *not* the obligation to negative it. It was specifically meant to address situations such as Vietnam, where Congress was faced with a *fait accompli* and the virtually impossible task of halting a presidential war.¹⁰³

The importance of this automatic termination provision cannot be underestimated. Senator Javits referred to the House of Representative's agreement to automatic termination as "a historic breakthrough."¹⁰⁴ Retaining the automatic cut-off provision was no easy matter; numerous efforts were made to amend it out,¹⁰⁵ and it was the single most important reason for the Nixon veto.¹⁰⁶ The provision ensures that Congress is relieved of the unconstitutional burden of acting affirmatively to stop a presidential war by two automatic mechanisms.

101. 50 U.S.C. § 1544(b).

102. The termination provision, § 5(b) states:

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, 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 the United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

50 U.S.C. § 1544(b).

103. As Senator Javits, one of the principal authors of the bill, stated:

The approach taken in the War Powers Bill reverses the situation by placing the burden on the Executive to come to Congress for specific authority. The sponsors of the Bill believe that this provision [the 60 day automatic cutoff] will provide an important national safeguard against creeping involvement in future Vietnam style wars.

119 CONG. REC. 1400 (1973) (statement of Sen. Javits). *See also* Crockett v. Reagan, 558 F. Supp. 893, 899-900 (D.D.C. 1982).

104. J. JAVITS, JAVITS, THE AUTOBIOGRAPHY OF A PUBLIC MAN 411 (1981); *see also* COMMITTEE ON FOREIGN AFFAIRS STUDY, *supra* note 55, at 145-46.

105. *See infra* notes 203-05 and accompanying text.

106. President Nixon's Message to the House of Representatives Vetoing the War Powers Resolution, PUB. PAPERS 893, 894 (Oct. 24, 1973).

First, the termination provision is triggered by objective circumstances. Whether or not a section 4(a)(1) report is actually filed, if *objective circumstances* are such that the President should have filed a report but did not, the sixty-day cut-off period is triggered.¹⁰⁷ Second, at the close of that sixty-day period, termination is to occur automatically unless Congress takes certain actions to affirmatively approve the continued presence of United States Armed Forces in a situation of hostilities or imminent hostilities. The termination provision gives meaning and effect to congressional inaction.¹⁰⁸ Without the provision the statute would be of little value: it would leave the power to commence war in the hands of the President and would do nothing to alleviate Congress' unconstitutional burden.¹⁰⁹

107. The Lebanon Resolution, S.J. Res. 159, 98th Cong., 1st Sess., 129 CONG. REC. S13,167-68 (daily ed. Sept. 29, 1983); *id.* at H7726-27 (House approval), discussed *infra* at notes 138-41 and accompanying text, demonstrates that objective circumstances trigger the § 4(a)(1) reporting and § 5(b) termination provisions. The Lebanon Resolution includes a determination that "the requirements of section 4(a)(1) of the War Powers Resolution became operative on August 29, 1983." S.J. Res. 159, § 2(a)(5); § 2(b). In the extended debates on this resolution, there was virtually unanimous agreement that "hostilities" existed in Lebanon, and that the existence of such hostilities triggered § 4(a)(1) and § 5(b) of the War Powers Resolution. *See, e.g.*, 129 CONG. REC. S12,170-72 (daily ed. Sept. 14, 1983)(remarks of Sen. Byrd); *id.* at S12,176-77 (remarks of Sen. Kennedy) (60-day requirement is self-executing regardless of whether a report is filed); *id.* at S12,177-90 (remarks of Sens. Riegle, Zorinsky, Bentsen, Exon, Bumpers, Biden, Sarbanes, Dodd and Eagleton). As the language of the Lebanon Resolution makes clear, it was the existence of hostilities *per se*, and *not* the subsequent passage of a resolution by Congress, that legally triggered the reporting requirements. As Senator Byrd succinctly explained:

Since the first two of our Marines were killed on August 29 our men have come under hostile fire. We have returned that fire in self-defense. The Marine commander of our forces in Lebanon has awarded hostile fire pay for the entire Marine contingent for the month of August. He was right in doing so, and I am sure he will do so for the month of September.

Last month was the first time since the multinational force was introduced a year ago that hostile fire pay was awarded. Last month was the first instance in which an American Marine died as a result of direct hostile action.

So it is a clear sign that circumstances have changed in the last few weeks, and because of these changed circumstances, there should not be any doubt that full congressional participation is now required regarding U.S. policy toward Lebanon.

Id. at S12,170.

While as a practical matter, presidential reluctance to follow the law required Congress to act affirmatively, as a legal matter the trigger is automatic, and should be enforceable by a court. *See infra* notes 197-98 and accompanying text. *See also* Tribe, *The Legislative Veto Decision: A Law By Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 20 n.95 (1984) (War Powers Resolution reporting and termination requirements "must be triggered by the objective presence of events such as 'hostilities'").

108. As such, the provision can be analogized to "sunset laws" which routinely assign operational meaning to congressional inaction. *See* Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 528-29 (1982).

109. As the Court in *Crockett v. Reagan* found:

V. MORE OF THE SAME—PRESIDENTIAL NON-COMPLIANCE WITH THE WAR POWERS RESOLUTION

Congress assumed that the President would abide by the War Powers Resolution and would consult, report responsibly, and terminate the involvement of United States Armed Forces as the statute requires. As Senator Javits stated: "The thirty-day provision [sixty days in the final Resolution] contained in Section 5 thus assumes that the President will act according to law. No other assumption is possible unless we are to discard our whole constitutional system."¹¹⁰ Congress' assumption was misplaced. Presidents have not adhered to the statute's requirements, but have continued the practice of unilateral presidential wars. The history below demonstrates that congressional action alone cannot redress the constitutional imbalance effected by executive usurpation. Without the force of law, the War Powers Resolution cannot resolve the continuing constitutional crisis.

One of the earliest examples of a failure to report concerned Air Force reconnaissance flights over Cambodia in late 1974. A number of planes returned with battle damage. The Ford Administration claimed it did not need to report because the incidents were "isolated" and United States forces were merely present in areas where hostilities were occurring. Representative Findley, principle author of the reporting provisions, disagreed: "The fact that an attack upon U.S. forces may be 'unanticipated' and 'isolated' is entirely irrelevant for purposes of the reporting requirement. What is relevant is that flying over enemy territory inherently carries with it the strong and likely possibility (i.e., 'clear potential') of drawing fire."¹¹¹ Subsequent presidents have followed President Ford's interpretation of the reporting requirement in almost every instance.¹¹²

[T]he automatic cutoff after 60 days was intended to place the burden on the President to seek positive approval from the Congress, rather than to require the Congress positively to disapprove the action, which had proven so politically difficult during the Vietnam War. To give force to congressional power to declare war, Presidential warmaking would not be justified by congressional silence, but only by a congressional initiative to "declare war."

558 F. Supp. at 899.

110. 119 CONG. REC. 1401 (1973) (statement of Sen. Javits). At another point, Javits stated that "[w]e all believe that if we codify the law, as we plan here, and if this becomes the law, the President will obey it. At least, he will make every good faith effort to obey it." 118 CONG. REC. 11,039 (1972) (remarks of Sen. Javits).

111. COMMITTEE ON FOREIGN AFFAIRS STUDY, *supra* note 55, at 176.

112. *See generally, id.* at 169-254. The danger of allowing the President to bypass the War Powers Resolution reporting and consultation requirements, in what might be viewed arguably as the twilight zone of concurrent authority, is illustrated by President Ford's unilateral use of 300 soldiers, squadrons of F-4s, and B-52 bombers to cut down a tree in 1976.

The Vietnam evacuation and the *Mayaguez* incident provide examples of presidential reluctance to report under section 4(a)(1) even when it would entail no immediate consequences. In the Vietnam evacuation, which lasted nineteen hours, four marines were killed, ground forces returned fire, and fighter aircraft were required to suppress Vietnamese artillery fire on the evacuating helicopters.¹¹³ Although the situation clearly called for a section 4(a)(1) report, President Ford submitted only a vague "communication" to the Speaker "to keep the Congress fully informed on this matter, and taking note of the provision of section 4 of the War Powers Resolution."¹¹⁴ In the *Mayaguez* situation, which involved intense fighting, bombing, and the death of at least thirty-eight marines, President Ford wrote another "communication," in accordance with the President's "desire that Congress be informed on this matter and taking note of Section 4(a)(1) of the War Powers Resolution."¹¹⁵ Again, the President did not acknowledge that he was required to report under section 4(a)(1).¹¹⁶

In May and June 1975, the House Foreign Affairs Committee held

The tree, in a demilitarized zone in Korea, allegedly blocked the United States sentry's view. The United States wanted to cut it down; North Korea wanted it to remain. When an American tree-cutting party was attacked by North Koreans, President Ford responded by raising a worldwide defense alert, sending in 300 soldiers, with tactical air support from as far away as Idaho, and cutting down the tree. Some members of Congress felt that the deployment of such force in a situation demanding worldwide alert raised the possibility of imminent hostilities, and that they should have been consulted under the Resolution. The Administration offered a number of responses, but apparently the underlying rationale offered in executive councils was that with such an overwhelming show of force, North Korea would never fight back. *Id.* at 225-28.

113. President Ford's Letter to the President Pro Tempore of the Senate Reporting on the Evacuation of U.S. Citizens and Others from South Vietnam (Apr. 30, 1975), reprinted in 3 M. GLENNON & T. FRANCK, UNITED STATES FOREIGN RELATIONS LAW: DOCUMENTS AND SOURCES 151-52 (1980).

114. SUBCOMM. ON INT'L SEC. & SCIENTIFIC AFFAIRS OF HOUSE COMM. ON FOREIGN AFFAIRS, 97TH CONG., 1ST SESS., THE WAR POWERS RESOLUTION: RELEVANT DOCUMENTS, CORRESPONDENCE, REPORTS 43 (Comm. Print 1981). State Department Legal Advisor Monroe Leigh later argued that § 4(a)(1) was not necessarily triggered "because the proximity of Communist artillery fire changed from day to day." COMMITTEE ON FOREIGN AFFAIRS STUDY, *supra* note 55, at 189.

115. President Ford's Letter to the Speaker of the House and the President Pro Tempore of the Senate Reporting on U.S. Actions in the Recovery of the SS *Mayaguez*, 1 PUB. PAPERS 669 (May 15, 1975).

116. This is the closest any President has come to submitting a § 4(a)(1) report. That the "taking note of" language, however, was a deliberate avoidance of the triggering requirement can no longer be doubted. After he left office, President Ford stated that he "never admitted that the WPR was applicable" to instances where he had committed United States Armed Forces. He further believed that the Resolution was not constitutionally binding on the President. *The President and Political Leadership*, in 2 THE VIRGINIA PAPERS ON THE PRESIDENCY 28 (K. Thompson ed. 1980).

hearings on presidential compliance with the War Powers Resolution.¹¹⁷ Committee members expressed concern regarding the President's failure to designate the particular section under which he was reporting, the fact that personal "communications" were offered instead of required reports, and the narrow manner in which the executive had defined hostilities.¹¹⁸

President Carter, despite early assurances that his administration would comply with the War Powers Resolution, did no better. In his communication on the Iran hostage rescue attempt, the President did not even refer to section 4, yet it was clear that section 4(a)(1) had been triggered.¹¹⁹ Instead, he contended that the operation was conducted under his powers as Chief Executive and Commander-in-Chief.¹²⁰ His administration gave an especially technical reading to the statute, arguing that United States Armed Forces had not been introduced into a situation of hostilities or imminent hostilities because the first evening that the rescue team went to Iran did not involve hostilities.¹²¹

The Reagan Administration has had the worst record of performance under the Resolution. In three situations (El Salvador, Grenada and Lebanon) where reporting under section 4(a)(1) was clearly required, President Reagan failed to make any report citing this section. There have been at least fifty-six United States Armed Forces personnel in El Salvador since 1981.¹²² These personnel have been involved

117. *War Powers: A Test of Compliance Relative to the Danag Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the Subcomm. on Int'l Sec. & Scientific Affairs of the House Comm. on Int'l Relations*, 94th Cong., 1st Sess. (1975).

118. The Executive maintained its view, contrary to the definition in the House Report, that hostilities and imminent hostilities did not encompass "irregular or infrequent violence which may occur in a particular area." Hearings, *supra* note 117, at 38-39 (statement of Monroe Leigh, Legal Advisor, Dep't of State, & Martin R. Hoffman, Gen'l Counsel, Dep't of Defense). The State Department admitted that even though the Saigon evacuation expedition of 1975 "was at least a 4(a)(1) situation . . . it didn't seem to us that we were called upon to tell Congress exactly which subparagraph applied." *Id.* at 10 (statement of Monroe Leigh, Legal Advisor, Dep't of State), *quoted in* COMMITTEE ON FOREIGN AFFAIRS STUDY, *supra* note 55, at 201.

119. The rescue attempt involved United States Armed Forces, helicopters, C-130 transports and included an attack on the embassy as part of the plan. COMMITTEE ON FOREIGN AFFAIRS STUDY, *supra* note 55, at 239-41.

120. President Carter's Letter to Congress Reporting on the Rescue Attempt for American Hostages in Iran, 1 PUB. PAPERS 777, 779 (Apr. 26, 1980).

121. Legal Opinion of Lloyd N. Cutler, Counsel to the President, on War Powers Consultation Relative to the Iran Rescue Mission (May 9, 1980), *reprinted in* THE WAR POWERS RESOLUTION: RELEVANT DOCUMENTS, *supra* note 114, at 49; *see also* COMMITTEE ON FOREIGN AFFAIRS STUDY, *supra* note 55, at 243.

122. The latest official reports set the number of U.S. military personnel in El Salvador at 97. N.Y. Times, Feb. 27, 1984, at A3, col.1.

in hostilities and are continuously subject to imminent hostilities.¹²³ They have been photographed carrying grenades and machine guns in the areas of heaviest fighting,¹²⁴ have participated in battles where one was wounded,¹²⁵ and are helping to direct the fighting against the guerillas.

Significantly, a report by the Comptroller General points out that United States military personnel in El Salvador are drawing special "hostile fire pay." To receive such "hostile fire pay" a soldier must sign a monthly statement saying, "I was subjected to hostile fire," and the approving officer must certify that the soldier "was subjected to small arms fire or he was close enough to the trajectory, point of impact or explosion of hostile ordnance so that he was in danger of being wounded, injured or killed."¹²⁶ Despite this strong evidence, the Reagan Administration has refused to submit a section 4(a)(1) report.¹²⁷

President Reagan's actions regarding the commitment of United State Armed Forces to Lebanon demonstrate: (1) the continued refusal of the Executive to report under section 4(a)(1); (2) the refusal to acknowledge that the Executive is bound by the Resolution; and (3) the Executive's refusal to be bound by legislation signed pursuant to the Resolution. Congressional attempts to invoke the War Powers Resolution regarding Lebanon make clear that if Congress must act affirmatively to trigger the Resolution's "automatic" provision, the Resolution's purpose is frustrated.

123. For example, "on April 4, 1981, 100 armed personnel, part of the military forces of the FMLN, attacked the San Salvador air base housing the United States Military Advisors involved in the helicopter 'counter-insurgency program.'" Complaint, *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982).

124. On February 11, 1982, a crew from Cable News Network videotaped three United States military "advisors" carrying M-16 rifles and M-79 grenades in a guerrilla-contested area in the far eastern portion of the country. Wash. Post, Feb. 12, 1982, at A1.

125. On February 2, 1983, the United States admitted that a United States soldier suffered a leg wound from ground fire during a helicopter mission. He was one of five United States soldiers accompanying Salvadoran personnel aboard two helicopters engaged in a combat mission intended to make direct contact with a Salvadoran unit on a tactical operation. The second helicopter drew fire as well. Wash. Post, Feb. 4, 1983, at A1. See also Wash. Post, June 24, 1982, at A24 (United States advisors "fighting side by side" with El Salvador troops).

126. See Wash. Post, July 30, 1982, at A24. The report states that the Pentagon initially designated all of El Salvador as a "hostile fire zone," which would have made unnecessary monthly reports by each soldier. *Applicability of Certain United States Laws That Pertain to U.S. Military Involvement in El Salvador*, General Accounting Office, Report by the Comptroller General, GAO ID-82-53 (1982). This tentative ruling was, however, reversed "for policy reasons" presumably because it would have required a report to Congress under the War Powers Resolution.

127. RELEVANT DOCUMENTS, *supra* note 114, at 51-52.

In several reports to Congress on Lebanon, the President has never referred to a specific section of the Resolution. On August 25, 1982, 800 marines arrived in Beirut to provide security for the evacuation of the PLO. Prior to the introduction of troops, the administration had indicated that if troops were sent to Beirut the President would send Congress a report citing the "equipped for combat" section 4(a)(2). Senators Percy and Pell, and Representative Zablocki wrote to President Reagan, asserting that such a report would not accurately reflect the situation in Beirut, and that a section 4(a)(1) report was necessary to comply with the War Powers Resolution.¹²⁸ On August 24, the President filed a report "in accordance with [his] desire that the Congress be fully informed on this matter" and "consistent with" the War Powers Resolution, but citing no specific section.¹²⁹ The marines left Lebanon, temporarily, on September 4, 1982.¹³⁰

On September 20, 1982, President Reagan announced that the marines were returning to Lebanon as part of a multinational peacekeeping force.¹³¹ Senator Percy and Senator Pell again wrote to the President, urging him to file his report under section 4(a)(1), and not section 4(a)(2). They pointed to the increased "bitterness and volatility of the situation in Beirut."¹³² On September 29, 1983, 1200 marines arrived in Lebanon. On the same day the President sent a communication to Senator Thurmond, President pro tempore of the Senate, again informing him of the deployment "consistent with the War Powers Resolution" but failing to cite any specific section.¹³³ President Reagan thus sidestepped the sixty-day automatic cut-off by refusing to acknowledge that the "communications" were reports as required by section 4(a)(1). The situation in Lebanon deteriorated rapidly.¹³⁴ On August 28 and 29, United States marine positions were

128. 40 CONG. Q. 2158 (1982).

129. *Id.* at 2157.

130. Prior to their redeployment, more violence erupted in Lebanon. Bashir Gemayel was assassinated and his supporters massacred several hundred refugees.

131. Address to the Nation Announcing the Formation of a New Multinational Force, 18 WEEKLY COMP. PRES. DOC. 1182-84 (Sept. 20, 1982) cited in R. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLICATION IN THEORY AND PRACTICE* (1983).

132. 129 CONG. REC. S11,961 (daily ed. Sept. 12, 1983).

133. Letter to the Speaker of the House and the President Pro Tempore of the Senate, 18 WEEKLY COMP. PRES. DOC. 1232 (Sept. 29, 1982) 1232, cited in TURNER, *supra* note 131.

134. In April, 1983, a car bomb attack on the United States Embassy killed 63 people. "By mid-to-late August, 1983, Druze, Shia, and Syrian leaders had begun making statements to the effect that the Multinational Force, especially the U.S. element, was one of 'the enemy.'" On August 12, 1983, the Chairman of the Joint Chiefs of Staff notified the Secretary of Defense that he would start authorizing hostile fire pay as of August 31. Department of Defense Report on Lebanon ("Long Commission Report"), Dec. 20, 1983, cited in 130

attacked; the marines returned fire. On August 29, two marines were killed and fourteen wounded.¹³⁵ Attacks continued through the next weeks, killing two more marines. Despite the clear triggering of section 4(a)(1),¹³⁶ the President still refrained from reporting under that provision.¹³⁷

As presidential recalcitrance continued, Congress was forced to take the initiative. As Senator Bentsen said, "if the War Powers Act is not invoked under these kinds of conditions, then it is worthless."¹³⁸ Senator Kennedy insisted that the President's failure to cite section 4(a)(1) was not determinative because the provision's requirements were self-executing.¹³⁹ On September 28, 1983, Congress passed legislation declaring that sections 4(a)(1) and 5(b) of the War Powers Resolution had been triggered on August 29, when the first two marines were killed. However, enforcement of the Resolution's procedures by legislation required a costly substantive compromise; the only bill that received sufficient support simultaneously authorized the continued deployment of United States forces for eighteen months from the date of enactment.¹⁴⁰ By the time the Lebanon issue arose in Congress, United States involvement was practically a foregone conclusion, and the only real debates concerned how long, not *whether*, to authorize continued United States presence.¹⁴¹

The Administration's response to the Lebanon Resolution was

CONG. REC. E45 (daily ed. Jan. 23, 1984) (Cong. Lowry); Democratic Study Group, *Special Report: Lebanon and the War Powers Act*, No. 09-11, 11 (Sept. 19, 1983) [hereinafter cited as "DSG"].

135. Letter from President Reagan to Senator Thurmond, Aug. 20, 1983, reprinted in 129 CONG. REC. S12,175 (daily ed. Sept. 14, 1983).

136. See 129 CONG. REC. S12,175 (daily ed. Sept. 14, 1983) (Sen. Byrd's plea for § 4(a)(1) report).

137. On September 13, 1983, President Reagan authorized air strikes against the opposition shelling positions, and next day United States forces shelled Druze and Moslem positions in the hills above Beirut. DSG, *supra* note 134, at 12.

138. 129 CONG. REC. S12,180 (daily ed. Sept. 14, 1983).

139. *Id.* at S12,176 (daily ed. Sept. 14, 1983). Senator Byrd cited the authorization of hostile fire pay, *id.* at S12,170 (daily ed. Sept. 14, 1983), and said he had said he had spoken to Senator Javits who agreed that "recent events had triggered the 4(a)(1) mechanism." *Id.* at S12,172.

140. 129 CONG. REC. H7593 (daily ed. Sept. 28, 1983). The bill required periodic reports from the President, and although "protective measures" were not precluded, congressional authorization was required for "any substantial expansion in the number or role of United States Armed Forces." *Id.* Congress specifically incorporated the conditions of the Lebanon Emergency Assistance Act of 1983, 129 CONG. REC. H3441 (daily ed. June 1, 1983), into its Lebanon Resolution, H.R.J. Res. 364. *Id.*

141. See, e.g., 129 CONG. REC. S12,181 (daily ed. Sept. 14, 1983) (remarks of Sen. Exon) (noting that although he was against involvement from the beginning, it was now too late to "cut and run").

consistent with its earlier refusals to recognize Congress' legitimate war powers. Secretary Schultz stated that the Lebanon Resolution would not affect the President's power.¹⁴² Schultz refused to guarantee that the marines would be withdrawn within the congressionally specified period, or that the force would not be substantially increased.¹⁴³ Reagan signed the Resolution on October 2, 1983 with the following caveat:

[W]ith regard to the congressional determination that the requirements of section 4(a)(1) of the War Powers Resolution became operative on August 29, 1983, I would note that the initiation of isolated or infrequent acts of violence against United States Armed Forces does not necessarily constitute actual or imminent involvement in hostilities¹⁴⁴

He also did not cede that congressional authorization was needed for an extension of the marines' stay in Lebanon beyond the eighteen-month period.¹⁴⁵

Although the Resolution limited military activities to the protection of United States soldiers,¹⁴⁶ United States airstrikes continued, and in December American fighter bombers blasted Syrian positions.¹⁴⁷ On February 7, the President announced that United States forces were authorized to shell any Syrian positions, not just those attacking American positions.¹⁴⁸ The next day the *New Jersey* conducted the heaviest American bombardment since Vietnam.¹⁴⁹ The indiscriminate shelling, which hit small towns in the hills, killed scores of civilians. Speaker O'Neill contended that the shelling was "absolutely not" permitted by the Lebanon Resolution and even Senate Majority Leader Baker questioned its legality.¹⁵⁰ Larry Speakes, White House Press Secretary, claimed the bombing was necessary to protect the American forces, and that the President had authority outside of the legislation to

142. 41 CONG. Q. 2095 (1983); see 129 CONG. REC. 13,033 (daily ed. Sept. 28, 1983).

143. N.Y. Times, Sept. 25, 1983, at A1, col. 3.

144. 41 CONG. Q. 2142 (1983).

145. *Id.* Immediately subsequent to the passage of this act two marines were killed in mid-October; on October 23, 241 marines were killed in a bomb explosion at the marine compound.

146. 129 CONG. REC. H7593 (daily ed. Sept. 28, 1981).

147. 130 CONG. REC. S737 (daily ed. Feb. 2, 1984). Senator Kennedy articulated his anguish arising from the apparent impotence of Congress in the face of these events when he lamented that it was if Congress had said to the President, "[t]ake the *New Jersey* and take 1,600 Marines and do what you want in Lebanon. Do not call us until after the 1984 election." 130 CONG. REC. S737 (daily ed. Feb. 2, 1984).

148. N.Y. Times, Feb. 8, 1984, at A9, col. 3.

149. 130 CONG. REC. H701 (daily ed. Feb. 9, 1984) (statement of Rep. Oakar).

150. N.Y. Times, Feb. 9, 1983, at A1, col. 3.

engage in the bombing.¹⁵¹

The President's failure to report under section 4(a)(1) and his assertion of inherent authority to authorize military activities was repeated during the invasion of Grenada. On October 25, 1983, 1900 marines invaded Grenada. In fighting that continued for a week, at least 160 Grenadians were killed and 100 wounded; fifty to sixty Cubans were killed and 600 captured; and eighteen Americans were killed and eighty-eight wounded.¹⁵²

The decision to invade was made unilaterally by the Executive.¹⁵³ On the day of the invasion the President sent letters to the House and the Senate notifying them and asserting that his communication was "consistent with" the War Powers Resolution.¹⁵⁴ Members of Congress

151. N.Y. Times, Nov. 1, 1983, at A18, col. 6. The bombing continued and escalated as United States troops were withdrawn in February to ships offshore, reminiscent of the Nixon-Kissinger Cambodian bombings of the final months of Vietnam. Conflicting statements from those in charge of the bombing and those responsible for public relations demonstrate the extent to which the Reagan Administration "honors" the Lebanon Resolution:

Take Tuesday, February 14th. The navy secretary, Mr. John Lehman, speaking the truth, said that the American warships off Lebanon's coast were firing their guns in support of the Lebanese army, and that their action was "not linked to specific fire at the marines." President Reagan's spokesman, Mr. Larry Speakes, said that this was "incorrect;" the navy would fire its guns only to protect Americans in Beirut, or their fellow-members of the multinational force. Mr. Speakes, unlike Mr. Lehman, was no doubt remembering that many in congress, including several senior Republicans, had last week lustily questioned whether firing in support of the Lebanese army was consistent with the resolution, passed in September, which provides the legal framework for America's military involvement in Lebanon.

THE ECONOMIST, Feb. 18-24, 1984, at 21.

152. N.Y. Times, Nov. 1, 1983, A18, col. 6. The attack included continuous airstrikes, bombing of anti-aircraft positions, helicopter assaults and a beach landing. *Id.*

153. The President's actions in Grenada are currently under challenge in *Conyers v. Reagan*, No. 83-3430 (D.D.C. Jan. 20, 1984) (available on LEXIS, GenFed library, Cases file). In *Conyers*, a suit under the war powers clause, plaintiff members of Congress claimed that the President's invasion of Grenada violated Congress' right to declare war. The defendants moved to dismiss, arguing that the case presented a political question, that plaintiffs lacked standing, and that the court should exercise its equitable discretion to dismiss the case. The defendants also asserted that the President had the unilateral right to use force because his goal, in part, was to protect United States citizens. *See Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction, Conyers v. Reagan*, No. 83-3430 (D.D.C., filed Dec. 7, 1983). The district court dismissed the case in the exercise of its equitable discretion. *See Conyers v. Reagan*, No. 83-3430 (D.D.C. Jan. 20, 1984). The case is on appeal to the District of Columbia Circuit.

154. *Reprinted in* 129 CONG. REC. S14,610 (daily ed. Oct. 26, 1983). The administration justified the invasion on two grounds: a request of the Organization of Eastern Caribbean States to intervene, and the protection of the lives of 1,000 Americans on the island. The OECS request does not provide a legal basis for presidential usurpation of war powers; in fact, the invasion violated Organization of American States agreements, as well as basic tenets of international law. The foundation for the latter justification has been subsequently

were not satisfied that this conformed to the Resolution because, yet again, the President had failed to file the report pursuant to section 4(a)(1).¹⁵⁵ Speaker O'Neill pointed out, however, that "legally speaking, you don't have to pass the resolution [determining that the sixty-day provision is triggered] in order for the sixty-day clock to start The act is not dependent on a Presidential determination of hostilities. If it was, it really would have no teeth whatsoever."¹⁵⁶

The Administration refused to say how long the troops would stay in Grenada. It asserted that even if Congress attempted to curtail their stay, the President would not necessarily heed their demand.¹⁵⁷ On November 17, the Administration announced that the troops would be pulled out by December 23, just a few days before the deadline.¹⁵⁸ Apparently all but 300 troops have been pulled out.¹⁵⁹

The history of presidential war-making since the passage of the War Powers Resolution sadly reaffirms the impotence of Congress to singlehandedly challenge presidential usurpations of its war powers. Every president has managed to frustrate the terms and requirements of the War Powers Resolution. President Reagan has done so even when Congress has passed further legislation reaffirming the applicability of their earlier law. El Salvador, Lebanon, and Grenada offer telling examples of the inability of unenforced law to restrict presidential prerogative.

eroded by a congressional fact-finding mission. The vice chancellor of St. George's Medical School told Rep. Louis Stokes that prior to the invasion "the students were never in any actual danger and never even saw a soldier." 129 CONG. REC. E5582 (daily ed. Nov. 16, 1983) (Rep. Louis Stokes' "Diary" from fact-finding trip to Grenada, appearing in the *Clev. Plain Dealer*, Nov. 13, 1983). After Bishop's assassination, officials of the Peoples Revolutionary Council had not only assured Embassy and school officials of the safety of Americans, but had offered to help evacuate any Americans who wished to leave. *Id.* See also 129 CONG. REC. H8639 (daily ed. Oct. 26, 1983) (statement of Rep. Edgar), 129 CONG. REC. S15,428 (daily ed. Nov. 4, 1983) (statement of Sen. Cranston).

155. See *N.Y. Times*, Oct. 27, 1983, at A18, col. 1 (Sen. Nunn says enforcing 60-day requirement is a "matter of principle"); 129 CONG. REC. S14,869, S14,875 (daily ed. Oct. 28, 1983) (Sen. Hart asserts § 4(a)(1) situation); *id.* at H8885 (Reps. Broomfield and Walker invoked § 4(a)(1)). Both the Senate and the House passed legislation stating that for purposes of § 5(b), the 60-day requirement, § 4(a)(1) had become operative the day of the invasion. 129 CONG. REC. S14,874 (daily ed. Oct. 28, 1983) (Senate amendment to debt ceiling bill passed); 41 CONG. Q. 2359-60 (1983) (House passage of H.J. Res. 402 on Nov. 1, 1983). The legislation eventually died.

156. *N.Y. Times*, Nov. 17, 1983, at A3, col. 4.

157. 129 CONG. REC. S14,870 (daily ed. Oct. 28, 1983) (statement of Sen. Hart on testimony of Deputy Secretary of State Dam before Senate Foreign Relations Committee).

158. *N.Y. Times*, Nov. 17, 1983, at A3, col. 4.

159. The question of what happens now that hostilities have ended, but the troops are still there is, as yet, unanswered.

VI. THE WAR POWERS RESOLUTION—THE NEED FOR JUDICIAL ENFORCEMENT

The history of United States involvement in foreign hostilities since 1973 underscores what is clear on the face of the War Powers Resolution: without the force of law, the Resolution cannot do what Congress intended it to do. Presidents, who have since Truman asserted and exercised unilateral war power without challenge from the courts, have little incentive to comply with the War Powers Resolution. As long as a President avoids a report under section 4(a)(1), and every President has, he can render the Resolution powerless. If neither the President nor the courts will trigger the Resolution's automatic cut-off provision, the burden is left to Congress to go forward and affirmatively seek the termination of hostilities. This is precisely the burden that the Framers did not intend Congress to bear, and it is precisely the burden that Congress sought to alleviate by enacting the War Powers Resolution. Only if the Resolution is given the force of law, by voluntary presidential compliance or by judicial enforcement, will it serve to redress the constitutional balance. We know from history that reliance on presidential compliance is hopelessly misplaced.

Judicial practice during the Vietnam War suggests that avoidance is nonetheless all too likely, on the grounds that the war powers issue presents a nonjusticiable "political question." Such a result, however, is unjustifiable. The later Vietnam cases establish conclusively that the fundamental war powers issue—which branch has the authority to involve the United States in a war—is not a political question. The War Powers Resolution addresses the specific difficulties that nonetheless were considered to warrant abstention in the later Vietnam cases. Judicial refusals to enforce the War Powers Resolution will give nunc pro tunc effect to President Nixon's overridden veto as well as to several failed attempts to amend the legislation. If the Constitution and Congress' reaffirmation of the Constitution are to be honored, judicial action is required.

Congress has acted affirmatively to recapture its constitutional war powers in the only way that it can: by enacting legislation. But a statute gains the force of law only where the judiciary performs its constitutional duty to enforce the law. This is especially true where, as here, the statute is directed at the Executive, who has consistently ignored its proscription. Congress has exercised its responsibility under the Constitution; it is up to the courts to exercise theirs.

A. *Political Questions: Broad Claims*

The vast majority of courts¹⁶⁰ and commentators¹⁶¹ have consistently rejected broad claims of "political question" regarding executive violations of the separation of powers. Nonetheless, executive defendants persist in seeking to resurrect long-rejected shibboleths about the impropriety of all judicial review touching on "foreign affairs," "national security," or "executive discretion."¹⁶² These overbroad claims should be put to rest. The Supreme Court has consistently refused to let such "talismanic incantations"¹⁶³ bar its review of constitutional violations.¹⁶⁴ While some of the earlier Vietnam War decisions insisted on such a broad reading of "political question," later courts applied the "more discriminating analysis" required by the doctrine.¹⁶⁵

The "political question" doctrine, in its classic formulation, forbids judicial review of questions constitutionally committed to a coordinate political branch.¹⁶⁶ The doctrine has its roots in the separation of powers and judicial respect for the coequal branches. However, at the same time, the judiciary must ensure that the separation of powers principles embodied in the Constitution are not breached. Thus, where litigants challenge governmental conduct that infringes upon the con-

160. See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731, 753-54 (1982); *United States v. United States Dist. Ct.*, 407 U.S. 297 (1972); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Judge Edwards of the District of Columbia Circuit succinctly disposed of political question arguments in a case involving a PLO terrorist attack on an Israeli bus as follows:

[To invoke the political question doctrine] would be to counter the movement of courts and scholars in the opposite direction. Indeed, commentators have noted the "judicial indifference and scathing scholarly attack" recently directed at the political question doctrine, see McGowan, *Congressmen in Court*, 15 GA. L. REV. 241, 256 (1981). As Judge McGowan has noted, other than the Taiwan treaty case, *Goldwater v. Carter*, 444 U.S. 996 (1979), the last Supreme Court case to cite the doctrine in any meaningful way was *Gilligan v. Morgan*, 413 U.S. 1 (1973), and the last Supreme Court case to rely squarely on it was *Colegrove v. Green*, 328 U.S. 549 (1946). See McGowan, *supra*, at 256-57.

Tel-Oren v. Libyan Arab Republic, No. 81-1870, slip op. at 49 (D.C. Cir. Feb. 3, 1984) (Edwards, J., concurring) (available on LEXIS, GenFed library, Cases file)

161. See, e.g., Firmage, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 65 (1977); Henkin, *Is There A "Political Question" Doctrine?* 85 YALE L.J. 597 (1976); Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135 (1970); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

162. See, e.g., *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975); *Dellums v. Smith*, 573 F. Supp. 1489 (N.D. Cal. 1983); *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 599 (D.D.C. 1983); *Crockett v. Reagan*, 558 F. Supp. 893, 898 (D.D.C. 1982).

163. *United States v. Robel*, 389 U.S. 258, 263 (1967).

164. See *infra* notes 169-74 and accompanying text.

165. *Baker v. Carr*, 369 U.S. 186, 211 (1962). See *infra* notes 169-70 and accompanying text.

166. 369 U.S. at 217.

stitutional power of a coequal branch, judicial restraint cannot be justified.¹⁶⁷ "It would stand the political question doctrine on its head to require the Judiciary to defer to another branch's determination that its acts do not violate the separation of powers principle."¹⁶⁸

In *Baker v. Carr*,¹⁶⁹ the Supreme Court expressly repudiated earlier dicta that the conduct of "foreign affairs" is exempt from judicial review simply because committed to "the political branches."¹⁷⁰ The invocation of "foreign affairs" and "national security" did not foreclose judicial review of President Carter's agreement with Iran concerning the release of hostages,¹⁷¹ President Nixon's efforts to withhold the Watergate tapes¹⁷² or suppress the Pentagon Papers,¹⁷³ or President Truman's war-time seizure of the Youngstown steel mills.¹⁷⁴

The later Vietnam War cases establish that claims based on presidential expropriation of congressional war powers are neither constitutionally committed to a coequal branch, nor barred by their implications for foreign affairs.¹⁷⁵ The War Powers Resolution itself only underscores the appropriateness of judicial review, for it constitutes a strong statement by Congress that its war powers are not to be

167. The Court in *Baker v. Carr* wrote, "Deciding whether a matter has in any measure been committed to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." 369 U.S. at 211 (emphasis added). See also *INS v. Chadha*, 103 S. Ct. 2764 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Powell v. McCormack*, 395 U.S. 486, 521 (1969).

168. *Chadha v. INS*, 634 F.2d 408, 419 (9th Cir. 1980), *aff'd*, *INS v. Chadha*, 103 S. Ct. 2764 (1983). The court continued, "It is the Judiciary's prerogative, after a showing that the source of a claimant's appeal is not textually committed to another branch, to adjudicate a claimed excess by a coordinate branch of its constitutional powers." *Id.* See also *INS v. Chadha*, 103 S. Ct. at 2779.

169. 369 U.S. 186 (1962).

170. *Id.* at 211 & n.31.

171. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

172. *United States v. Nixon*, 418 U.S. 683 (1974).

173. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

174. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The courts have not hesitated to reach the merits in challenges to the Executive's foreign relations and Commander-in-Chief powers in war, *Ludecke v. Watkins*, 335 U.S. 160 (1948) (reviewed President's power to expel enemy aliens during wartime); *Prize Cases*, 67 U.S. (2 Black) 635 (1862) (Court decided question of President's power to take independent military action in the nation's defense during the Civil War); and in peace, *Haig v. Agee*, 453 U.S. 280 (1981) (reviewed executive power to revoke passports); *Zemel v. Rusk*, 381 U.S. 1, 17-18 (1965) (reviewed executive power to refuse to validate passports), *Reid v. Covert*, 345 U.S. 1 (1957) (reviewed executive power to affect military law and its jurisdiction over civilian personnel).

175. See, e.g., *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971); *Orlando v. Laird*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 889 (1971); *Mottola v. Nixon*, 318 F. Supp. 538 (N.D. Cal. 1970), *rev'd on other grounds*, 464 F.2d 178 (9th Cir. 1972).

bypassed by executive action.¹⁷⁶ Moreover, as established below, the Resolution speaks directly to more specific concerns falling under the rubric of "political question." Neither general nor specific invocations of the "political question" doctrine justify judicial abdication where the President usurps the war powers.

B. Political Questions—More Specific Concerns

Courts hearing challenges to the Vietnam War found a number of reasons for abstaining from decision or for upholding the status quo.¹⁷⁷ Specifically, the courts sometimes claimed that they could not determine whether the conflict was a "war" within the meaning of Article I,¹⁷⁸ or whether Congress had assented to the conflict in an appropriate form.¹⁷⁹ An underlying rationale for abstention was that the remedy required—a declaration that the war was illegal or a court order to enjoin the hostilities—was considered an improper interference with the prerogatives of the political branches.¹⁸⁰

The War Powers Resolution removes these restraints on judicial action. It makes possible judicial enforcement that executive violations of the war powers clause have made necessary. The Resolution gives substantive definition to the term "war" by defining those circumstances in which Congress believes its assent is required for "war" to continue. The Resolution specifies what constitutes appropriate congressional authorization of a war, and explicitly declares that appropriations are not sufficient. Finally, the Resolution permits a court to uphold the requirements of the Constitution without declaring a war illegal or ordering troop withdrawal. Enforcement of the Resolution only requires a court to order that a report be filed, leaving to Congress the question of approval of the war effort.

176. The court in *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1555 (D.C. Cir. 1983), flatly rejected the executive's broad invocations of political question:

The Court disagrees with defendants that this is the type of political question which involves potential judicial interference with executive discretion in the foreign affairs field. Plaintiffs do not seek relief that would dictate foreign policy but rather to enforce existing law concerning the procedures for decision-making. Moreover, the issue here is not a political question simply because it involves the apportionment of power between the executive and legislative branches. The duty of courts to decide such questions has been repeatedly reaffirmed by the Supreme Court.

Id. at 898. See *infra* notes 206-21 and accompanying text.

177. See *supra* notes 60-83 and accompanying text.

178. See, e.g., *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd*, 411 U.S. 911 (1973).

179. See, e.g., *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971).

180. See, e.g., *Holtzman v. Schlesinger*, 414 U.S. 1304, 1309 (1973); *Atlee v. Laird*, 347 F. Supp. at 702; *cf.* *Ramirez v. Weinberger*, 724 F.2d 143 (D.C. Cir. 1983).

Congress clearly defined those military activities that require congressional assent if they are to continue beyond sixty days.¹⁸¹ In doing so it gave courts a "judicially discoverable and manageable standard."¹⁸² In sections 4(a)(1) and 5(b), Congress articulated a triggering standard based on objective circumstances: the duration and level of hostilities. The statute requires congressional assent where United States Armed Forces are "introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," and where such activity continues for more than sixty days.¹⁸³

The legislative history shows that Congress carefully defined the standard precisely in order to avoid presidential non-compliance, and that it expected the President to report in a broad range of circumstances. The original House bill required a report when the President "(1) commits United States military forces to armed conflict." According to the House Report, this language contemplated the commitment of United States Armed Forces "to situations in which hostilities already have broken out and where there is reasonable expectation that American military personnel will be subject to hostile fire."¹⁸⁴ The House Report offers three examples of situations which would trigger a report: the Cambodian invasion of 1970;¹⁸⁵ the Dominican Republic invasion of 1965;¹⁸⁶ and the earliest bombing of Laos.¹⁸⁷ The bill's proponents intended that the definition be clear so that it would be subject to as little interpretation by the Executive as possible.¹⁸⁸

The subsequent substitution of the word "hostilities" for "armed

181. *See supra* notes 97-98 and accompanying text.

182. *Baker v. Carr*, 369 U.S. at 217; *Orlando v. Laird*, 443 F.2d at 1042.

183. 50 U.S.C. §§ 1543(a)(1), 1544(b) (1976).

184. H.R. REP. NO. 1547, 91st Cong., 2d Sess. 5, *reprinted in* COMMITTEE ON FOREIGN AFFAIRS STUDY, *supra* note 55, at 65.

185. In 1970, President Nixon, without congressional knowledge or consent, authorized United States Armed Forces to invade a claimed North Vietnam sanctuary area in Cambodia. Nixon asserted that the invasion was to protect United States Armed Forces in Vietnam. The invasion caused a major outcry in Congress. COMMITTEE ON FOREIGN AFFAIRS STUDY, *supra* note 55, at 26-32.

186. In 1965, without congressional knowledge or consent, President Johnson ordered over 4,000 U.S. Armed Forces into the Dominican Republic purportedly to protect United States citizens. Eventually 21,000 U.S. Forces were sent to the Dominican Republic. The Administration eventually admitted that their mission was to stop the threat of a communist takeover. COMMITTEE ON FOREIGN AFFAIRS STUDY, *supra* note 55, at 7.

187. H.R. REP. NO. 1547, 91st Cong., 2d Sess. 5, *reprinted in* COMMITTEE ON FOREIGN AFFAIRS STUDY, *supra* note 55, at 65.

188. *See* COMMITTEE ON FOREIGN AFFAIRS STUDY, *supra* note 55, at 66, citing 1970 House War Powers Hearings, at 412-14.

conflict" was intended to ensure presidential reporting in a *broader* range of circumstances:

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 no shots have been fired but where there is a clear and present danger of armed conflict. "*Imminent hostilities*" denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.¹⁸⁹

The statute also defines what is meant by "introduction of United States Armed Forces." This includes assignment of 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."¹⁹⁰ In view of the careful drafting of these provisions, the standards for reporting pursuant to section 4(a)(1) are judicially ascertainable.¹⁹¹

A second major concern for courts in the Vietnam litigation was their inability to determine the significance to be given to various actions of Congress, such as appropriations legislation.¹⁹² The Resolution specifically addresses this problem. Section 8(a)(1) states that no authority to introduce United States Armed Forces into hostilities or imminent hostilities is to be inferred:

from any provision of law . . . including any provision contained in any appropriation act, unless such provision specifically authorizes the introduction of United States Armed

189. H.R. REP. NO. 287, 93d Cong., 1st Sess. 7, reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2346, 2351. That Congress meant to require the President to report formally in a broad range of situations can be seen from a colloquy between Senator Javits and Senator Johnston. Senator Johnston asked whether the terms would include in their definition the introduction of United States Armed Forces to guard a United States airbase in a country where hostilities were occurring. Senator Javits answered affirmatively, stating that in such a situation the Act would "immediately apply." 119 CONG. REC. 25,100-02 (1973).

190. War Powers Resolution, § 8(c), 50 U.S.C. § 1547(c) (1976).

191. As discussed earlier, the Executive has sought to narrow the congressional definition of hostilities. For example, Monroe Leigh, Legal Adviser to the Department of State under President Ford, claimed that "irregular or infrequent violence which may occur in a particular area" does not come within the definition. *War Powers Resolution, 1975: Hearings of Subcomm. on Int'l Sec. and Scientific Affairs of the Comm. on Int'l Relations, 94th Cong., 1st Sess. (1975)* (letter of Monroe Leigh to Representative Zablocki).

192. See, e.g., *Drinan v. Nixon*, 364 F. Supp. 854 (D. Mass. 1973); *Orlando v. Laird*, 443 F.2d at 1042.

Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter.¹⁹³

This provision means that congressional actions such as the Gulf of Tonkin Resolution, appropriations and selective service acts are not to be considered the equivalent of a declaration of war or congressional assent to hostilities. The Senate Report notes that this section was intended to overrule the Second Circuit Vietnam decisions that found implicit authorization in such acts.¹⁹⁴ Thus, there can no longer be any question as to which congressional actions constitute authorization of war.¹⁹⁵

An underlying problem with much of the litigation challenging the legality of the Vietnam war was the nature of the remedy. Courts were reluctant to declare a war illegal or to order a cessation in hostilities, even where such a result seemed to be required.¹⁹⁶ The procedural mechanism established by the War Powers Resolution obviates that concern. It permits a court to protect and implement the constitutional scheme without declaring a war illegal and enjoining any military operations. Judicial enforcement of the statute's provisions, and thus of the war powers clause, can be effectuated by an order that the situation requires the issuance of a report under section 4(a)(1).¹⁹⁷ Such a ruling

193. 50 U.S.C. § 1547(a)(1) (1976).

194. The Senate Report reads:

The purpose of this clause is to counteract the opinion in the *Orlando v. Laird* decision of the Second Circuit Court holding that passage of defense appropriations bills, and extension of the Selective Service Act, could be construed as implied Congressional authorization for the Vietnam War.

S. REP. NO. 220, 93d Cong., 1st Sess. 25 (1973).

195. In § 8(a)(2) Congress ensured that treaty provisions cannot be used as a substitute for the specific assent by Congress. This is an argument frequently relied on by the Executive. For example, in testifying about Vietnam, Secretary of State Rusk relied on the SEATO treaty to justify the President's actions. COMMITTEE ON FOREIGN AFFAIRS STUDY, *supra* note 55, at 12. Section 8(a)(2) states that for the treaty to constitute assent it must be implemented by legislation specifically authorizing the introduction of armed forces within the meaning of the War Powers Resolution. 50 U.S.C. § 1547(a)(2) (1976).

196. *See, e.g.,* *Holtzman v. Schlesinger*, 414 U.S. 1304, 1309 (1973); *Mitchell v. Laird*, 488 F.2d at 615.

197. That the interposition of a statutory reporting requirement can enable judicial review in an area traditionally considered non-justiciable is demonstrated by three recent cases enforcing the Ethics in Government Act, 28 U.S.C. §§ 591-598 (Supp. V 1981): *Banzhof v. Smith*, No. 83-3161 (D.D.C. filed Feb. 29, 1984); *Dellums v. Smith*, 573 F. Supp. 148 (N.D. Cal. 1983); *Nathan v. Attorney General*, 557 F. Supp. 1188 (D.D.C. 1983). The Ethics in Government Act requires the Attorney General to conduct a preliminary investigation and report its results to a special division of the District of Columbia Circuit whenever he receives credible and specific information that a high-level executive official has committed a crime. By constructing a reporting requirement, the statute enables judicial review of decisions traditionally considered within the judicially untouchable realm of prosecutorial discretion. *See, e.g.,* *Dellums v. Smith*, 573 F. Supp. at 1498-99 (distinguishing prosecutorial

would not be a determination that the war is illegal, but only that affirmative congressional action is required.¹⁹⁸ If Congress then chose to authorize the hostilities, they could do so. Congress, and not the Court, would determine whether United States military activity should continue.¹⁹⁹

Thus, the War Powers Resolution specifically addresses the "political question" concerns that induced courts to dismiss challenges to the Vietnam War. It clarifies the meaning of war and congressional authorization, and provides an appropriate avenue for judicial action. The Resolution places Congress on record as opposed to presidential assertions of broad unilateral war-making activity, and insists on Congress' unwillingness to allow unilateral presidential usurpation to alter the constitutional scheme. It is a recognition of responsibility and an affirmation of the Constitution.

C. *The Effect of Judicial Abdication*

If the judiciary maintains its reluctance to enforce the war powers clause in the face of a congressional statute that makes enforcement possible, and presidential action that makes it necessary, the constitu-

discretion cases); *cf.* *Wren v. Merit Systems Protection Bd.*, 681 F.2d 867, 875-76 n.9 (D.C. Cir. 1982).

Just as the courts can enforce the Ethics in Government Act, and so ensure that the criminal laws are applied equally to executive officials without requiring a full-fledged prosecution, so too the courts can enforce the War Powers Resolution and ensure that executive officials do not rise above constitutional constraints without ordering troop withdrawal. In both instances, Congress has made judicial participation possible in areas where untrammelled executive discretion is particularly dangerous.

198. A court order that a § 4(a)(1) report must be filed requires a determination that United States troops have been introduced into hostilities or imminent hostilities. If the President urges in his defense that his actions were taken within his authority to repel sudden attack or to protect United States citizens, the court must further determine whether in fact the Constitution grants the President sole authority. The express language of the Constitution, the Framers' general understanding that collaborative decisionmaking is preferable to unilateral action, and the Resolution itself create a strong presumption against unilateral military acts. Termination does not take place until 60 days after a report is required to be filed; it is exceedingly unlikely that any hostilities beyond a full-scale attack on the nation that continues for over 60 days are within unilateral executive authority. Requiring a § 4(a)(1) report induces collaboration and guarantees that Congress can exercise its war powers with full effect.

199. While in the first instance a court might for prudential reasons require that only a report be filed, the statutory scheme indicates that withdrawal of troops could be ordered as well. As discussed earlier, the 60-day automatic termination provision is triggered whether a report is filed or not; it is the objective circumstances of troop involvement that starts the running of the 60-day period. For example, where involvement in hostilities had clearly lasted more than 60 days, a court could order withdrawal. See Tribe, *The Legislative Veto Decision: A Law By Any Other Name*, 21 HARV. J. ON LEGIS. 1, 20 n.95 (1984), discussed *infra* at note 217.

tional crisis in war powers will continue unaltered. Any court that intends to dismiss a War Powers Resolution case on political question grounds must therefore squarely confront the effect of such a dismissal.²⁰⁰

All that is required to resolve this constitutional crisis and reaffirm the Framers' intent is a court order that the President file a section 4(a)(1) report. A refusal to so order will render Congress' hard-fought statute essentially meaningless. Without judicial recognition that a section 4(a)(1) report is required by the objective circumstances of hostilities or imminent hostilities, the termination provision can only be triggered by Congressional action.²⁰¹ Judicial abdication would require Congress to go forward and pass a statute, probably over a veto, to declare that another statute—the War Powers Resolution—should be followed. Congress has already been forced by judicial abdication to pass a statute to implement the Constitution. Further abdication raises the possibility of a never-ending series of statutes to implement statutes to implement statutes, all requiring a two-thirds vote of Congress, and all as unenforceable as the Constitutional provision that they seek to implement.

A refusal to order that the Resolution is triggered will effectively write the automatic termination provision out of the statute. The purpose of that provision—the heart of the statute—was to ensure that Congress would no longer be forced to go forward and act affirmatively to stop an unauthorized war.²⁰² The automatic termination provision redresses the constitutional imbalance by ensuring that absent congressional action, United States involvement in hostilities cannot continue beyond sixty, or at most, ninety days. It was understood by all concerned that automatic termination meant that congressional *inaction* could halt a war. Numerous attempts were made to amend the statute to require affirmative congressional disapproval before termination would be effected; all such attempts failed.²⁰³ President Nixon vetoed

200. Political question dismissals, as traditionally understood, are particularly dangerous. Unlike standing, ripeness or mootness, a determination that a case presents a non-justiciable political question is not limited to the particular posture of a particular plaintiff and case, but rather applies broadly to the entire issue. To refuse to decide on political question grounds is therefore to erase an entire issue from the slate of judicially controllable action. E. KEYNES, *supra* note 2, at 68; Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 537-38 (1966).

201. It is evident that even in the clearest circumstances Presidents are unwilling to file a § 4(a)(1) report. See *supra* notes 110-59 and accompanying text.

202. See *supra* note 103.

203. Both the House and Senate versions of the War Powers Resolution had automatic termination provisions. See H.R.J. Res. 542, 93d Cong., 1st Sess., 119 CONG. REC. 24,708

the statute in large part because of his objection to this aspect of the bill; his veto was overridden.²⁰⁴ The termination provision is critical to the resurrection of Congress' constitutional war power. As Representative Bingham remarked: "The Constitution does not say the Congress shall vote yes or no on a declaration of war. What happens if the Congress does nothing? Then there is no declaration of war, so that is action by inaction, if you will, right in the Constitution."²⁰⁵ If the courts

(1973); S. 440, 93d Cong., 1st Sess., 119 CONG. REC. 25,119-20 (1973). When H.R.J. Res. 542 went to the House Foreign Affairs Committee, the Nixon Administration submitted a memorandum particularly focusing on the automatic cut-off. It claimed that the provision could generate pressure for escalation in order to achieve objectives within 120 days and that it would infringe on the President's constitutional power to repel sudden attacks. COMMITTEE ON FOREIGN AFFAIRS STUDY, *supra* note 55, at 125. Several Committee members argued that Congress should not be permitted to stop the President by inaction; their motion to strike the provision was defeated 25 to 7. *Id.* at 125-26.

When the House Bill came to the floor the cut-off was again the primary focus. Minority Leader Gerald Ford read into the record a telegram from President Nixon stating that he would veto any bill containing an automatic termination provision. 119 CONG. REC. 24,663 (1973). Representative Whalen offered an amendment requiring Congress to pass a resolution disapproving military action before termination could take effect. Representative Zablocki, opposing the change, stressed the importance of the automatic cut-off, pointing out that to require disapproval of Congress would thwart the will of the majority: such a bill could be vetoed and one-third of either House could prevent an override. *Id.* at 24,689. Congressman Bingham said the Whalen amendment went to the "heart" of the House Bill. The Whalen amendment was defeated and the automatic cut-off remained in the legislation.

204. President Nixon, after repeated attempts to delete the automatic termination provision before the bill's passage and while in conference, ultimately vetoed the War Powers Resolution, in large part because of the automatic termination provision. *See* COMMITTEE ON FOREIGN AFFAIRS STUDY, *supra* note 55, at 143-44, 156-67. The Veto Message reads, in part:

One of its provisions would automatically cut off certain authorities after sixty days unless Congress extended them. . . . I am particularly disturbed by the fact that certain of the President's constitutional powers as Commander in Chief of the Armed Forces would terminate automatically under this resolution 60 days after they were invoked. No overt Congressional action would be required to cut off these powers—they would disappear automatically unless the Congress extended them. In effect, the Congress is here attempting to increase its policy-making role through a provision which requires it to take absolutely no action at all.

Veto Message concerning H.R.J. Res. 542, *reprinted in* 119 CONG. REC. 34,991 (1973). *See also* Spong, *supra* note 90, at 835-36. President Nixon's veto was overridden on November 7, 1973. 119 CONG. REC. 36,202, 36,220 (1973).

205. 119 CONG. REC. 24,662 (1973). Other remarks demonstrated the central significance of the automatic termination provision. Representative Dupont noted that, "if nothing happens, the military action stops . . . under the Constitution the presumption ought to be in favor of the Congress and not the executive." 119 CONG. REC. 24,690 (1973). Representative Findley commented that:

One would almost assume . . . from hearing the discussion during the last couple of hours that inaction on the part of the Congress is a very novel and strange way that the Congress has to prevent unwise policy. Exactly the opposite is the case.

Inaction has been the traditional way by which the Congress has rejected unwise policy, not only in the foreign field, but in the domestic field as well.

refuse to give the automatic termination provision the force of law, judicial "restraint" will have resurrected not the Constitution, but Representative Whalen's defeated amendment and President Nixon's overridden veto. In such a situation, "restraint" can only be termed "abdication."

VII. *CROCKETT V. REAGAN*—A CASE STUDY

The only case to date seeking judicial enforcement of the War Powers Resolution is *Crockett v. Reagan*.²⁰⁶ Congressman George Crockett and twenty-eight fellow members of Congress challenged President Reagan's failure to comply with the War Powers Resolution's reporting and termination requirements regarding United States military involvement in El Salvador. They claimed that the dispatch of fifty-six military advisors to El Salvador constituted an introduction of Armed Forces into hostilities or imminent hostilities, thereby triggering the Resolution's cut-off mechanism. Plaintiffs alleged that the advisors had suffered casualties, worked in combat areas, had been subject to at least two direct attacks, fought side by side with government troops, and were drawing "hostile fire pay."²⁰⁷ They sought, *inter alia*, a declaratory judgment that the Resolution's sixty-day cut-off provision had been triggered, and/or injunctive relief directing that the United States Armed Forces be withdrawn from El Salvador.²⁰⁸

The district court dismissed the case on the ground that the fact finding necessary to determine whether a section 4(a)(1) report was required to be filed would be too difficult.²⁰⁹ In doing so, the court carefully restricted its holding of non-justiciability to the particular facts posed by the case "in its present posture".²¹⁰ The court rejected defend-

Id.

206. 558 F. Supp. 893 (D.D.C. 1982), *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983), *petition for cert. pending*.

207. 558 F. Supp. at 897. For details of these and other instances of involvement in hostilities, see *supra* notes 122-27 and accompanying text. Defendants submitted a declaration denying these claims, urging that the "sole function of training Salvadoran military personnel [was] to create a self-training capability . . ." 558 F. Supp. at 897.

208. Plaintiffs also alleged violation of § 502B of the Foreign Assistance Act (codified at 22 U.S.C. § 2304(a)(2) (1976)), which prohibits the provision of security assistance to "any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights." These claims were dismissed on equitable discretion grounds. 558 F. Supp. at 902 (quoting 22 U.S.C. § 2304(a)(2)).

209. 558 F. Supp. at 898. The circuit court's *per curiam* affirmance, reminiscent in its brevity of *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967), adds nothing to a consideration of the issue; this section will concentrate on the district court decision.

210. 558 F. Supp. at 896.

ants' broad claim that the case raised a political question simply because it might interfere with executive discretion in foreign affairs. The Resolution obviated this concern; "plaintiffs do not seek relief that would dictate foreign policy but rather to enforce existing law concerning the procedures for decision-making".²¹¹ Similarly, the court was careful—unlike many of the Vietnam War courts²¹²—to insist that "[t]he duty of courts to decide such questions [of the apportionment of power between the executive and legislative branches] has been repeatedly reaffirmed by the Supreme Court".²¹³ Thus, the court refused to dismiss the case on defendants' broad political question grounds.²¹⁴

Nevertheless, the court dismissed the case as a political question on a narrower ground. It determined that whether the situation in El

211. *Id.* at 898 (emphasis added).

212. *See, e.g.*, Luftig v. McNamara, 373 F.2d at 665-66; Atlee v. Laird, 347 F. Supp. at 704-05; Velvel v. Johnson, 287 F. Supp. 846, 852 (D. Kan. 1968), *aff'd sub nom.* Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970). In each of these cases, the court treated the textual commitment standard of the political question doctrine loosely, looking only to see if the decision was committed to "the political branches." The question, however, is whether the decision is committed to a particular coordinate branch. *See* Baker v. Carr, 369 U.S. 186, 217 (1962). Since each of the above courts found no dispute between Congress and the President, they presumably need not have gone beyond the question of commitment to "the political branches," but such a framing of the political question doctrine suggests that even where the branches are in conflict, the judiciary will abstain. In any case, the War Powers Resolution itself creates a presumption of conflict between the branches whenever troops are introduced into hostilities without the required § 4(a)(1) report. More generally, the Resolution indicates a conflict between the President and Congress as to which particular branch has the authority to commence war-like activities. *See supra* notes 14-16 and accompanying text.

213. 558 F. Supp. at 898.

214. In *Crockett v. Reagan*, defendants also argued that plaintiffs lacked standing, that the case should be dismissed in the exercise of the court's equitable discretion, and that plaintiffs had no private right of action. Neither the district court nor the per curiam affirmance of the court of appeals addresses these issues.

At least two classes of plaintiffs appear to have standing to litigate War Powers Resolution claims. Members of Congress have standing under the District of Columbia Circuit decision in *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). Where Congress' role in government is diminished by unlawful executive action, or where a particular vote is nullified, individual Congressmen have standing. *Id.* at 436-36; *see also* Riegle v. Federal Open Market Committee (FOMC), 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1882 (1981). Members of the military who refuse an order to fight in hostilities undertaken in violation of the War Powers Resolution may also be able to raise the claim in federal courts. *See, e.g.*, Berk v. Laird, 429 F.2d 302 (2d Cir. 1970), *cert. denied sub nom.* Orlando v. Laird, 404 U.S. 869 (1971).

The doctrine of equitable discretion mandates dismissal of congressional claims where members have an effective in-House remedy for their alleged injuries. *Riegle v. FOMC*, 656 F.2d at 879. *Riegle* should not be read to mean that members of Congress have an "in-House" remedy because Congress can pass another resolution informing the Executive that, when it adopted the statute in the first place, it really meant it. Moreover, passage of another statute could not remedy the congressional injury which arises from the executive

Salvador in 1982 involved hostilities or imminent hostilities would require resolution of disputed questions of fact beyond judicial competence. In essence, it found the case too close to call, and, relying in part on the fact that Congress had taken no action on the question, refused to adjudicate it.²¹⁵ The court insisted that where the facts were less elusive, a court could and should trigger the Resolution's cut-off provision. It distinguished between Vietnam, where "it would be absurd for [a court] to decline to find that United States forces had been introduced into hostilities," and El Salvador, where "a small number of American military personnel . . . apparently have suffered no casualties."²¹⁶

The court went on to find that the appropriate judicial response under a War Powers Resolution claim where no report had been filed

alteration of the constitutional scheme. Congress would still bear the burden of affirmatively stopping hostilities.

Lastly, Congress and members of the military clearly have a private right of action under the Constitution. *Cf.* *Davis v. Passman*, 442 U.S. 228, 242 (1979).

It would not make sense that a right of action existing under a clause of the Constitution can be exterminated by a statute passed to clarify and implement that clause, unless such statute either provides an effective alternative remedy or specifically abolishes such right of action. The War Powers Resolution does neither. Moreover, the language and legislative history of the Resolution establish that under the elements set forth in *Cort v. Ash*, 422 U.S. 66, 78 (1975), there exists a private right of action for members of Congress to enforce the statute. Congressional plaintiffs are members of the class for whose *special* benefit the Resolution was enacted. The statute expressly identifies Congress as the class Congress intended to benefit. For example, § 1541 is intended to *assure* that Congress will exercise collective judgment with the President on the introduction of United States Armed Forces into hostilities. The War Powers Resolution thus evinces an "unmistakable focus" on the rights of Congress. *Cf.* *Cannon v. University of Chicago*, 441 U.S. 677, 690-93 (1979).

215. 558 F. Supp. at 898-99. The court observed that some cases would be justiciable. "[W]ere Congress to pass a resolution to the effect that a report was required under the WPR, or to the effect that the forces should be withdrawn, and the President disregarded it, a constitutional impasse appropriate for judicial resolution would be presented." *Id.* at 899. But this leaves a non-justiciable gap almost as wide as existed prior to the War Powers Resolution, and frustrates the central purpose—"to prevent another situation in which a President could gradually build up American involvement in a foreign war without congressional knowledge or approval, eventually presenting Congress with a full-blown undeclared war which on a practical level it was powerless to stop." *Id.* To restrict justiciability to such an "impasse" would be to require Congress to do what was "politically impossible to do" during Vietnam, and to frustrate the constitutional scheme.

216. *Id.* at 898-99. The court's focus on the difficulty of fact-finding was premature. When considering justiciability on a motion to dismiss, the court is to accept plaintiff's well-pleaded facts as true, so as not to decide the merits at the jurisdictional threshold. *Bell v. Hood*, 327 U.S. 678, 681-82 (1942). The court in *Crockett* relied on a counter-affidavit going to the merits in concluding that it should not reach the merits. At minimum, an in camera hearing on justiciability should have been afforded. *See, e.g., Data Disc, Inc. v. Systems Tech. Ass'n*, 557 F.2d 1280, 1285 (9th Cir. 1977). In any case, courts have frequently decided cases with facts as elusive as *Crockett*. *See, e.g., Pan American World Airways, Inc. v.*

would be to require the filing of a report. Even where the level of hostilities had been such as to require a report sixty or more days prior to decision, the court insisted that it would not order withdrawal of United States forces.²¹⁷ However, the court also rejected defendants' argument that if the President chooses to disregard the triggering requirement, Congress must affirmatively act to require a report. Leaving the burden to Congress would frustrate the Resolution's purpose, by imposing on Congress the same unconstitutional burden to go forward and expressly *disapprove* presidential action that it had faced before passage of the Resolution. In appropriate circumstances therefore, a court could require a report, thus triggering the cut-off provision but leaving Congress its full sixty (or ninety) days to consider the mat-

Aetna Casualty and Sur. Co., 368 F. Supp. 1098 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 989 (2d Cir. 1974).

Recently, the District of Columbia Circuit refused to dismiss a case solely on the ground that fact-finding would involve "sensitive" military matters:

As to the problem of "sensitive and confidential communications between the highest members of the Executive branch and officials of a foreign power": On the basis of a bare complaint, a motion to dismiss and related affidavits, we cannot say the resolution of this question will require discovery of such materials. . . . If and when Executive privilege is asserted and it develops that essential evidence is therefore undiscoverable, there will be time enough to dismiss. *See Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982); *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978) (prior disposition of connected case).

Ramirez v. Weinberger, No. 83-1950, slip op. at 5-6 (D.C. Cir. Dec. 22, 1983) (available on LEXIS, GenFed library, Cases file).

217. The Court found that:

the legislative scheme did not contemplate court-ordered withdrawal when no report has been filed, but rather, it leaves open the possibility for a court to order that a report be filed or, alternatively, withdrawal 60 days after a report was filed or required to be filed *by a court or Congress*.

558 F. Supp. at 901 (emphasis added).

The court's finding that the automatic termination provision of the War Powers Resolution does not operate unless the President has filed a report or been required to file a report by a court or Congress appears incorrect. The plain language of 50 U.S.C. § 1544(b) mandates that within sixty days after a report is "submitted *or is required to be submitted* . . . the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (*or required to be submitted*) . . . (emphasis added). The legislative history shows that the report is required by objective circumstances. *See supra* notes 97-109 and accompanying text.

The court's reading could also raise constitutional problems under the *Chadha* decision. As stated by Professor Tribe:

It follows from *Chadha*, however—as well as from the purpose of § 5(b) of the War Powers Resolution—that such reporting requirements and durational limits must be triggered by the objective presence of events such as "hostilities"—events whose presence or absence a court can itself ascertain—and *not* by a one-House or even two-House "resolution" that such events have indeed occurred. The contrary reading of § 5(b) in *Crockett v. Reagan* . . . is thus manifestly untenable after *Chadha*.

Tribe, *The Legislative Veto Decision: A Law By Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 20 n.20 (1984).

ter.²¹⁸ To order "the mere filing of a report cannot thwart congressional will, but can only supply information to aid congressional decisionmaking."²¹⁹

Crockett v. Reagan represents the only court ruling to date on the enforceability of the War Powers Resolution. Although problematic in its premature dismissal of the merits, the court's holding that "the procedures for decision-making" set out in the Resolution can be judicially enforced is an important first step in effectuating the purpose of the Resolution. Its language suggests that the judiciary has a role in giving the Resolution the force of law. On the other hand, the court's reluctance to find the facts, based in part on the finding that Congress had taken no action to require the filing of a report, is unfortunate. The statute's legislative history establishes that Congress specifically intended its inaction to have operational effect. As Professor Tribe pointed out, commenting on such sunset provisions: "Once authority has been delegated in this special way, such inaction by Congress functions *not* as a 'sign' of unenacted 'intent,' but rather as an operative fact giving final effect to an otherwise incomplete exercise of delegated power."²²⁰

The *Crockett* court's treatment recalls many of the later Vietnam War cases, in which courts were willing to recognize, in the abstract, the duty to decide, but refused to take the final step required for meaningful judicial action in each particular instance.²²¹ The question that remains open for future courts is whether the *Crockett* court's reasoning will be followed and applied, or whether its improvident and premature dismissal will be expanded. If the latter route is taken, the War Powers Resolution will be rendered as ineffectual as the war powers clause in assuring that Congress retains its power to decide on the initiation of war.

VIII. CONCLUSION

War-making in the United States has come increasingly under the

218. 558 F. Supp. at 901.

219. *Id.* The District of Columbia Circuit affirmed the district court's decision per curiam with no further elaboration of its reasoning. 720 F.2d 1355 (D.C. Cir. 1983). Judge Bork concurred in the result, finding that the members of Congress lacked standing because they had failed to allege a disenfranchisement. *Id.* at 1357. Judge Bork admits that his reasoning contradicts District of Columbia Circuit precedent. His opinion also fails to carefully consider the nature of the injury suffered by members of Congress when their power to declare war is negated by unilateral presidential action. *See supra* note 214.

220. Tribe, *supra* note 108, at 529.

221. *See supra* notes 66-77 and accompanying text.

unilateral de facto power of the President. The gap between the Framers' intent and presidential practice has grown exponentially since the beginning of the twentieth century. By the Vietnam era, the gap had reached crisis proportions, as the longest undeclared war in our history brought unprecedented public protest. Nonetheless, Congress, the most representative body, found it politically impossible to challenge presidential usurpation of its war power. Litigants regularly turned to the courts, but the courts just as regularly turned them away, invoking the cloak of "political question" nonjusticiability to avoid clear violations of unconstitutional authority.

The War Powers Resolution arose as a reaction to the constitutional crisis made manifest in the Vietnam War. It marks Congress' attempt to reestablish its constitutional authority. To date, it has failed, as presidents have regularly avoided its dictates through narrow legalisms and broad assertions of prerogative. If the Resolution is to fulfill the intentions of Congress and the Framers, it must be given the force of law.

It is the duty of the judiciary to enforce the laws. The courts refused to perform that duty under the war powers clause, and contributed to a constitutional crisis. The War Powers Resolution vitiates the "political question" concerns articulated by the Vietnam era courts. The Resolution makes judicial enforcement of war powers possible; executive intransigence makes it necessary. Congress has provided the means for resolution of a crisis; only the courts can give those means effect.