Strengthening the War Powers Resolution: The Case for Purse-String Restrictions

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The laws are silent amidst the clash of arms.  
—Cicero, Pro Milone

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In the aftermath of the long and bitter debate over United States military involvement in Vietnam, Congress determined "to fulfill the intent of the framers of the Constitution . . . [by ensuring] that the collective judgment of both the Congress and the President" would apply to future exercises of the war-making powers. The War Powers Resolution,2 enacted over President Nixon's veto in 1973,3 restricts the duration of any

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2. The War Powers Resolution is set forth in the Appendix, infra.  

In his veto message the President explained that

[w]hile I am in accord with the desire of the Congress to assert its proper role in the conduct of our foreign affairs, the restrictions which this resolution would impose upon the authority of the President are both unconstitutional and dangerous to the best interests of our Nation. Message from Richard Nixon to the House of Representatives, Oct. 24, 1973, in 9 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1285 (1973). The President's constitutional objection was essentially that the Resolution "would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years." Id. at 1286. The President's assertion represents one viewpoint in the controversy over the proper interpretation of the constitutional allocation of war-making powers between the President and Congress. See notes 19-29 infra and accompanying text.  

The President's conclusion that the Resolution would be "dangerous to the best interests of our Nation" derived from his opinion that it would "seriously undermine this Nation's ability to act decisively and convincingly in times of international crisis." Message from Richard Nixon to the House of Representatives, Oct. 24, 1973, in 9 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1285, 1286 (1973). He hypothesized that had the Resolution been in effect in recent years, "[w]e may well have been unable to respond in the way we did during the Berlin crisis of 1961, the Cuban missile crisis of 1962, the Congo rescue operation in 1964, and the Jordanian crisis of 1970—to mention just a few examples." Id.
involvement of United States armed forces in "hostilities" or in "situations where imminent involvement in hostilities is clearly indicated by the circumstances," when the introduction of those forces occurs without a declaration of war. It requires the President to submit a report to Congress within 48 hours after any such introduction of the armed forces, and to terminate the involvement within 60 days after the report was or should have been submitted, or sooner "if the Congress so directs by concurrent resolution." The Resolution also requires the President to consult with Congress before and during such involvements, and to report to Congress when forces are deployed in certain other situations. These are the only provisions of the Resolution that restrict presidential use of the armed forces. A "Purpose and Policy" section expresses the understanding of Congress as to the scope of the President's constitutional power to independently introduce the armed forces into hostilities, but it contains no mandatory language.

The President's veto message was apparently written before enactment of the Resolution, on the assumption that the conference committee would report the Senate version of the Resolution. It did not. See text accompanying note supra.

4. Resolution § 4(a) (1). For the sake of convenience, and unless otherwise indicated, the word "hostilities" will hereinafter encompass "situations where imminent involvement in hostilities is clearly indicated by the circumstances," as well as hostilities per se.

5. Id. § 4(a). The report must set forth the circumstances necessitating, the legal authority for, and the estimated duration of the involvement. Id. § 4(a) (A)-(C). In addition, the President must report periodically on the status of the involvement. Id. § 4(c).

6. Id. § 5(b). The 60-day period may be extended up to 30 days if the President determines and certifies to Congress in writing that the safe removal of the troops so requires. Id. This automatic termination does not apply if Congress has declared war, specifically authorized the involvement, extended the 60-day period, or is "unable to meet as a result of armed attack upon the United States." Id.

7. Id. § 5(c).

8. Id. § 3.

9. Id. § 4.

10. Other provisions of the Resolution require that Congress give expedited consideration to a concurrent resolution terminating hostilities, id. § 7, and to proposals to extend the 60-day limit on involvement, id. § 6; prohibit the inference that any law or treaty authorizes introduction of the armed forces into hostilities, unless such law or treaty "states that it is intended to constitute specific statutory authorization [for the introduction] within the meaning of this joint resolution," id. § 8(a); and states that the Resolution does not alter the constitutional authority of the President or Congress or grant any authority to the former that "he would not have had in the absence of this joint resolution." Id. § 8(d).

11. Id. § 2.

12. Id. § 2(c).
The Resolution, then, imposes only what may be termed "subsequent limitations" upon the President's use of the armed forces. This contrasts with the Senate version of the Resolution, rejected by the conference committee, which would have also imposed "prior restraints." It would have stated in operative terms, rather than merely as the understanding of Congress, the circumstances in which the armed forces may be introduced into hostilities without a declaration of war. The Senate version differed from the Resolution in two other important respects. It would have explicitly allowed the President to introduce the armed forces to evacuate United States citizens and nationals abroad in certain emergency situations, and, by avoiding reference to the Constitution in defining the circumstances in which the President could independently engage the armed forces in hostilities, it would have avoided indicating that the President has a constitutional right to act independently in those circumstances.

13. The bill, introduced by Senator Jacob Javits, provided in section 3 that

In the absence of a declaration of war by the Congress, the Armed Forces of the United States may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, only—

(1) to repel an armed attack upon the United States, its territories and possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack;

(2) to repel an armed attack against the Armed Forces of the United States located outside of the United States, its territories and possessions, and to forestall the direct and imminent threat of such an attack;

(3) to protect while evacuating citizens and nationals of the United States, as rapidly as possible, from (A) any situation on the high seas involving a direct and imminent threat to the lives of such citizens and nationals, or (B) any country in which such citizens and nationals are present with the express or tacit consent of the government of such country and are being subjected to a direct and imminent threat to their lives, either sponsored by such government or beyond the power of such government to control; but the President shall make every effort to terminate such a threat without using the Armed Forces of the United States, and shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States to protect citizens and nationals of the United States being evacuated from such country; or

(4) pursuant to specific statutory authorization . . . .


14. Compare id. § 3(3), with Resolution § 2(c).

15. Compare S. 440, 93d Cong., 1st Sess. § 3 (1973), quoted in note 13 supra, with Resolution § 2(c). The controversy over the proper
To date, four events—the Mayaguez incident and three military actions relating to the evacuation of American and other nationals from South Vietnam and Cambodia—have caused the President to submit a report to Congress under the Resolution. This Article suggests that the inability of the Resolution to control the President's use of the armed forces during those and similar crises necessitates amendment of the Resolution to interpret the constitutional allocation of war-making powers between the President and Congress is discussed generally in notes 19-29 infra and accompanying text.

Section 2(c) of the Resolution reflects a compromise reached in conference committee between section 3 of the Senate bill and the House bill, H.J. Res. 542, 93d Cong., 1st Sess. (1973), which contained no provision similar to either of those sections. (Otherwise the two bills were essentially similar, except that the Senate bill's counterpart of Resolution § 5(b) provided a basic 30-day limit, S. 449, 93d Cong., 1st Sess. § 5 (1973), while that of the House bill, H.J. Res. 542, 93d Cong., 1st Sess. § 4(b) (1973), allowed 120 days.) The prior restraints provision of the Senate bill was opposed on primarily two grounds. Some considered the President's powers to be more extensive than those recognized by that provision. Senator Strom Thurmond, for example, expressed this view during debate on the bill:

The legislation provides only four situations in which an immediate response is allowed, and it may well be questioned whether it is possible to define and describe in advance all possible potential emergency situations to which the President might be called on to respond.

It should also be pointed out that some constitutional law experts maintain that the independent authority of the President under the Constitution is substantially broader than the four categories specified in the bill.


The absence of prior restraints in the House bill and in the Resolution itself, on the other hand, was opposed on the ground that it
clude prior restraints of the sort contained in the Senate bill. The Ford administration, however, has indicated that it considers unconstitutional both the subsequent limitations contained in the Resolution and such prior restraints. At least with respect to the prior restraints, some members of Congress share this view—as is illustrated by the rejection of the Senate version of the Resolution. These objections create the danger that a President will consider himself justified in ignoring the subsequent limitations and any prior restraints that Congress enacts. Thus the Article also proposes that Congress obviate that danger by employing funding prohibitions to enforce both subsequent limitations and prior restraints. Its thesis is that, whatever the constitutional scope of the presidential war-making power, Congress can and should effectively limit the exercise of that power by means of its exclusive power over the purse.

After an introductory discussion of the constitutional allocation of the war-making powers between the President and Congress, the Article lays the foundation for these ideas by examining the legislative and executive responses to the recent events in Southeast Asia. It then examines the current political status of the power over the purse and the constitutional support for its use in the present context. It concludes by elaborating the proposals outlined above and other less crucial possibilities for strengthening the Resolution.

rendered ineffectual any legislation purporting to inhibit presidential initiation of wars unwanted by Congress. Thus Senators Thomas Eagleton and Gaylord Nelson, cosponsors of the Senate bill, voted against the Resolution. Senator Eagleton explained:

If we are reluctant to deal with the constitutional issue of prior authority, then we will continue to be confronted in years to come with the prospect of desperately trying to stop misbegotten wars.

War powers legislation that is meaningful has to deal with the fundamental causes of the constitutional impasse that plagued the Nation for the past decade. It must, in my judgment, in the most precise legal language, carefully spell out those powers which adhere to the Executive by reason of his status as Commander in Chief and his obligation to act in emergencies to repel attacks upon the Nation, its forces, and its citizens abroad. For the rest, such legislation must make clear that all remaining decisions involved in taking the Nation to war are reserved to the elected representatives of the people—as the Constitution so says, the Congress.

Representative Elizabeth Holtzman also voted against the Resolution, stating that “it does not prevent the commencement of an illegal war, but allows one to continue for from 60 to 90 days.” Id. at 33,572 (1973).

17. See note 15 supra.
18. U.S. Const. art I, § 9, cl. 7.
I. THE WAR-MAKING POWERS

The scope of the President's power to make war has been the subject of much controversy in recent years. The wide divergence of opinion is illustrated by a comparison of the most recent statement on the matter by Congress, section 2(c) of the War Powers Resolution, with the opinion of Monroe Leigh, Legal Advisor to the State Department. The Resolution states:

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

Mr. Leigh, on the other hand, believes:

Besides the three situations listed in subsection 2(c) of the War Powers Resolution, it appears that the President has the constitutional authority to use the Armed Forces to rescue American citizens abroad, to rescue foreign nationals where such action directly facilitates the rescue of U.S. citizens abroad, to protect U.S. Embassies and Legations abroad, to suppress civil insurrection, to implement and administer the terms of an armistice or cease-fire designed to terminate hostilities involving the United States, and to carry out the terms of security commitments contained in treaties. We do not, however, believe that any such list can be a complete one, just as we do not believe that any single definitional statement can clearly encompass every conceivable situation in which the President's Commander in Chief authority could be exercised.

It is not the purpose of this Article to explore the merits of this controversy; indeed, the proposition advanced here is that the scope of the President's war-making power is irrelevant insofar as Congress refuses to provide funds for unwanted presidential uses of the armed forces. For present purposes, then, it will suffice to make the following points: First, the Constitution's textual grants of war-making power to the President are paltry in comparison with, and are subordinate to, its grants to Con-
moreover, original constitutional materials indicate

21. As indicated by the testimony of Mr. Leigh, see text accompanying note 20 supra, the primary source of the President's war-making power, whatever its scope, is the commander-in-chief clause: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . . ." U.S. CONST. art. II, § 2, cl. 1.

Article II, section 1, clause 1, vests the "executive Power" of the United States in the President. This clause is properly viewed not as a grant of independent authority to the chief executive, but rather as imposing upon him the duty to "take Care that the Laws [including treaties and customary international laws] be faithfully executed," art. II, § 3. Nevertheless, it has been cited by Presidents as justification for their claims that United States treaty commitments authorized them to send troops abroad for purposes short of war, even when Congress had not enacted implementing legislation. See L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 55 (1972) (citing examples) [hereinafter cited as HENKIN].

The grants to Congress of war-related powers are numerous: Article I, section 8, vests Congress with the power "to lay and collect Taxes . . . to . . . provide for the common Defense," clause 1; "[t]o define and punish . . . Offenses against the Law of Nations," clause 10; "[t]o declare War," clause 1; "[t]o raise and support Armies . . . ." clause 12; "[t]o provide and maintain a Navy," clause 13; "[t]o make Rules for the Government and Regulation of the land and naval Forces," clause 14; "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," clause 15; and "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States," clause 16.

Also important in this regard are the general provisions vesting in Congress "[a]ll legislative Powers" granted to the federal government, art. I, § 1, cl. 1; the power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," art. I, § 8, cl. 13; and the exclusive power to appropriate funds from the Treasury, art. I, § 9, cl. 7. The first of these, in conjunction with article II, section 1, clause 1, placing the "executive Power" in the President, establishes Congress as the fount of federal laws and the President as their executor.

The second, as the late Professor Alexander Bickel of Yale Law School has noted, gives to Congress the sole power to implement not only its own powers, but also those of the Executive:

Whatever is needed to flesh out the slender recital of Executive functions must be done by Congress under the "necessary-and-proper" clause. Congress alone can make the laws which will carry into execution the powers of the Government as a whole, and of its officers, including the President.

Hearings on War Powers Legislation Before the Senate Comm. on Foreign Relations, 92d Cong., 1st Sess. 551 (1971) [hereinafter cited as War Powers Legislation]. Note, in this context, that section 2(b) of the War Powers Resolution cites the "necessary-and-proper" clause as authority for the Resolution, emphasizing that that clause authorizes Congress to implement "not only its own powers but also all other powers vested . . . in the Government . . . or in any department or officer thereof." For a discussion of the power over the purse in the war powers context see notes 100-39 infra and accompanying text.
that the Framers intended a narrowly circumscribed presidential war-making power, with the commander-in-chief clause conferring minimal policy-making authority\textsuperscript{22} and no authority to

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\textsuperscript{22} Writing in 1793, Madison, the principal architect of the Constitution, addressed the problem of executive power to make war:

Every just view that can be taken of this subject, admonishes the public of the necessity of a rigid adherence to the simple, the received, and the fundamental doctrine of the constitution, that the power to declare war, including the power of judging of the causes of war, is fully and exclusively vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war; that the right of convening and informing congress, whenever such a question seems to call for a decision, is all the right which the constitution has deemed requisite or proper

\textbf{VI} \textit{The Writings of James Madison} 174 (G. Hunt, ed. 1906).

Likewise Thomas Jefferson. In an oft-quoted letter to Madison in 1789, he wrote:

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

\textbf{15} \textit{The Papers of Thomas Jefferson} 397 (J. Boyd ed. 1958).

Alexander Hamilton, among the founding fathers a relative admirer of the executive, concurred:

The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of a magistrate, created and circumstanced, as would be a president of the United States.

\textbf{The Federalist} No. 75, at 505-06 (J. Cooke ed. 1961) (A. Hamilton).

And in Federalist No. 69 he explained the commander-in-chief clause:

[T]he President is to be Commander in Chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Great-Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British King extends to the declaring of war and to the raising and regulating of fleets and armies; all which, by the Constitution under consideration, would appertain to the Legislature.

\textbf{The Federalist} No. 69, at 485 (J. Cooke ed. 1961) (A. Hamilton).

The Framers' concept of the commander in chief as "first general" derives from the relationship between the Continental Congress and General Washington during the Revolutionary War. The commission given Washington as commander in chief reflects the subordination of that officer to the will of Congress. After reciting their "especial trust and confidence" in Washington and enjoining him to cause "strict discipline and order to be observed in the army and that the soldiers are duly exercised and provided with all convenient necessaries," the commission concluded:

And you are to regulate your conduct in every respect by the rules and discipline of war (as herewith given you) and punctually to observe and follow such orders and directions from time to time as you shall receive from this or a future
independently commit the armed forces to combat, except in order to repel "sudden attacks."  

23. Early drafts of the Constitution gave Congress the power to "make war." On the motion of James Madison and Eldridge Gerry "declare" was substituted for "make." 2 The Records of the Federal Convention of 1787, at 318-19 (M. Farrand ed. 1911). The reason given in Madison's notes was to "[leave] to the Executive the power to repel sudden attacks." Id. at 318. Rufus King added that "'make' war might be understood to 'conduct' it which was an Executive function." Id. at 319.

It has been argued that the change from "make" to "declare" recognized "the warmaking authority of the President, implied by his role as executive and commander-in-chief and by congressional power to declare, but not make, war." Ratner, The Coordinated Warmaking Power—Legislative, Executive and Judicial Roles, 44 S. Cal. L. Rev. 461, 467 (1971). But, as Professor Raoul Berger of Harvard Law School points out in refuting this contention, the commander-in-chief clause conferred only the first generalship of the forces and the "executive powers . . . do not include the rights of war and peace." Berger, War-Making by the President, 121 U. Pa. L. Rev. 29, 41 (1972) (citing 1 The Records of the Federal Convention of 1787, at 66-67 (M. Farrand ed. 1911)) [hereinafter cited as Berger]. Professor Berger concludes that "[o]nly in a very limited sense—command of the armed forces plus authority to repel sudden attacks—can one accurately refer to a presidential war-making power." Id. Professor Berger adds that the sudden attacks to be repelled were those on the United States or its armed forces, id. at 42 & n.99, not on its allies. He also makes a cogent argument, based on original materials, that the term "sudden attacks" was not meant to include threats of attack, for in such cases the ability of Congress to respond promptly would obviate the need for immediate presidential action that the change from "make" to "declare" had recognized. Id. at 43-45.

Section 2(c) of the War Powers Resolution conforms precisely, it will be noted, with Professor Berger's views. The Senate version of the Resolution, on the other hand, would have allowed the President to use force to evacuate United States citizens and nationals in certain emergency situations, S. 440, 93rd Cong., 1st Sess. § 3(3) (1973), see note 13 supra, and to "forestall direct and imminent" threats of attack on the United States, its territories and possessions, and its armed forces abroad, id. §§ 3(1)-(2), see note 13 supra. But the Senate version did not indicate that such uses were the constitutional prerogative of the President. See text accompanying note 15 supra. Addressing the "forestall direct and imminent" threats provision of this bill, Professor Berger concluded that it represented a constitutionally permissible delegation of power. Berger, supra, at 45-47. The evacuation provision might have been similarly viewed; on the other hand, there is some reason to believe that the Framers intended that the President be able
generally respected the primacy of Congress in the war powers area, but in recent decades Presidents have assumed the
to use force to rescue United States citizens abroad when there is no time for Congress to authorize such use and Congress has not explicitly prohibited it. See note 24 infra (message of President Jefferson).

24. See War Powers Legislation, supra note 21, at 75 et seq. (testimony of Professor Richard B. Morris of Columbia University); Presidential Statements Acknowledging Need for Explicit Congressional Exercise of the War Power, app. A to Statement of Leon Friedman, Special Counsel, ACLU, id. at 805-08; Berger, supra note 23, at 61-63. Two examples are particularly relevant to this Article in that they reflect not only presidential deference to the congressional war-making power, but also presidential recognition of the need for congressional authorization of the funds necessary to any use of the armed forces. Confronted with a dispute with Spain on the Florida border, President Jefferson requested instruction from Congress:

That which they have chosen to pursue will appear from the documents now communicated. They authorize the inference that it is their intention to advance on our possessions until they shall be repressed by an opposing force. Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force in any degree which could be avoided. I have barely instructed the officers stationed in the neighborhood of the aggressions to protect our citizens from violence, to patrol within the borders actually delivered to us, and not to go out of them but when necessary to repel an inroad or to rescue a citizen or his property; and the Spanish officers remaining at New Orleans are required to depart without further delay. . . .

But the course to be pursued will require the command of means which it belongs to Congress exclusively to yield or to deny. To them I communicate every fact material for their information and the documents necessary to enable them to judge for themselves. To their wisdom, then, I look for the course I am to pursue, and will pursue with sincere zeal that which they shall approve.

Message from Thomas Jefferson to the Senate and House of Representaties, Dec. 6, 1805, in 1 Messages and Papers of the Presidents 389-90 (J. Richardson ed. 1897) (emphasis added).

President Jackson similarly looked to Congress for guidance and "means" when United States shipping was plagued by marauders in South American waters:

In the course of the present year one of our vessels, engaged in the pursuit of a trade which we have always enjoyed without molestation, has been captured by a band acting as they pretend, under the authority of the Government of Buenos Ayres. I have therefore given orders for the dispatch of an armed vessel to join our squadron in those seas and aid in affording all lawful protection to our trade which shall be necessary, and shall without delay send a minister to inquire into the nature of the circumstances and also of the claim, if any, that is set up by that Government to those islands. In the meantime, I submit the case to the consideration of Congress, to the end that they may clothe the Executive with such authority and means as they may deem necessary for providing a force adequate to the complete protection of our fellow-citizens fishing and trading in these seas.
power to involve the armed forces in "full scale and sustained warfare." In this connection it is debated whether repeated exercise by one branch of the government of a power not granted to it by the Constitution accomplishes, by some process analogous to adverse possession, constitutional possession of that power.

1 State of the Union Messages of the Presidents 1790-1966, at 352 (F. Israel ed. 1966) (emphasis added).

25. S. Rep. No. 797, 90th Cong., 1st Sess. 24 (1967). A 1966 State Department memorandum states that "[s]ince the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior Congressional authorization, starting with the 'undeclared war' with France (1798-1800)." Office of the Legal Advisor, U.S. Dept of State, The Legality of the United States Participation in the Defense of Vietnam, reprinted in 75 Yale L.J. 1085, 1101 (1966).

It has been demonstrated, however, that "most of these [instances] were relatively minor uses of force." See Mora v. McNamara, 389 U.S. 934, 936 (1967) (Douglas, J., dissenting) (quoting statement of Under Secretary of State Nicolas Katzenbach); Corwin, The President's Power, in The President: Role and Powers 361 (1965) (the "vast majority" of the instances "involved fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts [to protect American citizens], the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border"); Wormuth, The Vietnam War: The President Versus the Constitution, in 2 The Vietnam War and International Law 711, 740-54 (1969). Examining these and other authorities, Professor Berger concludes that "only since 1950 have Presidents regarded themselves as having authority to commit the armed forces to full scale and sustained warfare."

26. See, e.g., War Powers Legislation, supra note 21, at 551 (testimony of Alexander Bickel):

The text of the Constitution and its history thus plainly limit the President. But the law of the Constitution under our system is defined not only by the text and by the history of the text, but by practice long accepted. The earliest practice, as the committee has heard, conformed to the division of war-making powers envisioned by the framers. But later practice, which again has been recited to this committee in the hearings of 1967 and more recently, the later practice, particularly in this century, has gone beyond.

See also McDougal & Lans, Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy, 54 Yale L.J. 181 (1945) ("continuance of [a] practice by successive administrations throughout our history makes its contemporary constitutionality unquestionable"). But compare Berger, supra note 23, at 57-58 (footnotes omitted), challenging this doctrine of "adaptation by usage":

To a believer in constitutional government, in the separation of powers as a safeguard against dictatorship, there is no room for a take-over by the President of powers that were denied to him and, as our own times demonstrate, denied with good reason. . . . For me Washington's advice remains the pole-star:
but what little Supreme Court attention has been addressed to this issue denies such a doctrine.\textsuperscript{27} Third, the case law is lean in the war powers area in general, giving original constitutional materials primary significance,\textsuperscript{28} but the cases do suggest that

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The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the Guardian of the Public Weal against invasion by the others, has been evinced. . . . To preserve them must be as necessary as to institute them. If in the opinion of the people, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly over-balance in permanent evil any partial or transient benefit which the use can at any time yield.

In any event, it is clear that the congressional war powers have not diminished with disuse. Thus Professor Bickel's testimony before the Senate Foreign Relations Committee:

Whatever aggrandizement of Presidential power may have occurred during the past generation, whether or not Presidential initiatives taken in the absence of legislation to the contrary were constitutional, the practice of recent decades or of a century cannot have worked a reduction of congressional power, which may in the last two or three decades have lain largely in disuse, but which is as legitimate now as the day it was conferred.

\textit{War Powers Legislation, supra} note 21, at 555.

27. In Powell v. McCormack, 395 U.S. 486 (1969) (holding that in judging the qualifications of its members under article I, section 5, Congress is limited to the qualifications expressly prescribed by the Constitution), Chief Justice Warren stated, in an opinion for seven of the Justices, "[t]hat an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date." \textit{Id.} at 546-47.

28. Generally, all now know, the Constitution is what the Supreme Court says it is, but since the Court has not said much about its foreign affairs aspects, and promises to say little more, many of these have no final, "infallible" arbiter and expositor and are "resolved" only \textit{ad hoc} without resolution in principle. Powerful Presidents and determined Congresses (or Congressmen) take constitutional positions and provide precedents to encourage even their weaker successors, but the issues remain to be fought again some new day. If old and not-so-old Supreme Court constitutional decisions do not escape reexamination, there is even less \textit{stare decisis} for what former Presidents and earlier Congressmen asserted in word or action. And so, major constitutional issues of foreign policy today are at bottom the struggles for constitutional power of our early history. The world is changed, the United States is changed, the institutions of government are changed, the Constitution itself is changed, but the constitutional materials, the Federalist Papers, the debates of Hamilton versus Jefferson or Hamilton versus Madison, remain fresh and relevant and are played back again and again by new voices in new contexts.

\textit{Henkin, supra} note 21, at 5, 6-7 (footnotes omitted).
the power of the President is at low ebb when he acts in opposition to the express will of Congress.29

II. OPERATION OF THE WAR POWERS RESOLUTION DURING THE EVACUATIONS FROM CAMBODIA AND VIETNAM AND THE MAYAGUEZ INCIDENT

The four events that have given rise to the submission of reports required by the War Powers Resolution must be viewed, for present purposes, in the light of a group of statutory provisions that Congress enacted between 1973 and 1975 in order to terminate and prevent further United States military involvement in Southeast Asia. The common effect of these essentially similar provisions is to prohibit the use of funds to finance "combat activities" and other "military or paramilitary operations" "in," "over," and "off the shores of" North and South Vietnam, Laos, and Cambodia.30

29. In his famous concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), Justice Jackson espoused the following theory of the relationship between presidential action and the will of Congress:

[Presidential action] pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation . . . .

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility . . . .

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

Id. at 637.

A. THE EVACUATIONS AND THE VIETNAM CONTINGENCY ACT

The first report was submitted on April 4, 1975. Three days earlier Cambodian Premier Lon Nol had left the capital, Phnom Penh, as Khmer Rouge insurgents closed in on the city. South Vietnamese forces had abandoned more than two-thirds of their country to the North Vietnamese. President Ford, "taking note of the provision of section 4(a)(2) of the War Powers Resolution," reported that he had ordered United States naval vessels carrying some 700 marines, equipped for combat, into the territorial waters of South Vietnam. Their "sole mission," the President said, was to "assist in the evacuation [of "refugees and U.S. nationals"] including the maintenance of order on board the vessels engaged in that task."

On April 10, the President, addressing a joint session of Congress, asked it to "clarify immediately its restrictions on the use of U.S. military forces in Southeast Asia for the limited purposes" of evacuating Americans and South Vietnamese. His reference to "restrictions" was undoubtedly to the statutory funding prohibitions, rather than to the War Powers Resolution, for the latter imposed no restrictions upon the introduction of armed forces into hostilities and its 60-day limit was unlikely to be exceeded by an evacuation effort.

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33. Id.
35. Id. If the President was correct that the action he had taken did not amount to an introduction of armed forces into a situation "where imminent involvement in hostilities was clearly indicated by the circumstances," Resolution § 4(a)(1), then the report was properly submitted under section 4(a)(2) and did not trigger the 60-day limit imposed by section 5(b) upon section 4(a)(1) involvements.
37. See note 30 supra and accompanying text.
38. Resolution § 5(b).
39. Although the President requested only "clarification," his speech also contained a cryptic reference to "authority": And now I ask Congress to clarify immediately its restrictions on the use of U.S. military forces in Southeast Asia for the limited purposes of protecting American lives by ensuring their evacuation, if this should become necessary. I also ask prompt revision of the law to cover those Vietnamese to whom we have a very special obligation and whose lives may be endangered, should the worst come to pass.
    I hope that this authority will never be used, but if it is
The second report was submitted two days later. The President, "taking note of section 4 of the War Powers Resolution," reported that Khmer Rouge forces had reached the outskirts of Phnom Penh and were within mortar range of Pochemtong Airfield, and that he had therefore "ordered U.S. military forces to proceed with the planned evacuation." These forces included 350 marines, 36 helicopters, and supporting tactical aircraft. A total of 82 United States citizens, 159 Cambodians, and 35 third-country nationals were evacuated during the four-hour operation. Although hostile recoilless rifle fire was encountered by the last forces to leave, the fire was not returned. No casualties were incurred.

On April 14, Senate Majority Whip Robert Byrd responded to the President's request for "clarification" of the statutory funding prohibitions by introducing legislation to authorize needed there will be no time for Congressional debate.

The significance of this reference was apparently made clear, however, to at least some members of the House during the ensuing consideration of the President's request. Representative Stephen Solarz, questioning State Department Legal Advisor Monroe Leigh concerning Mr. Leigh's assertion that "clarification" had not been needed to evacuate American citizens because the President had constitutional authority to do so regardless of the funding prohibitions, stated:

Based on your testimony, I gather you were suggesting that this [clarification] was requested largely for political rather than constitutional purposes because the President wanted, I gather, broad-based constitutional [sic? political?] support for the action he was taking. Yet, if in fact, that was the underlying rationale for the request, I must tell you that as one member of the International Relations Committee I feel that I was misled because during the course of the testimony and debates before our committee and during the course of the debates on the floor of the House, the argument was made not simply that the President wanted political legitimation of his efforts but rather that this authority was specifically needed.

Hearings, supra note 20, at 25.


41. Id. The only provision of the Resolution specifically mentioned in the report was section 4. Compare text accompanying note 34 supra. In this case the President's apparent conclusion that "imminent involvement in hostilities" had not occurred is highly dubious, as even the administration's definition of that phrase indicates:

As applied in the first three war powers reports, "hostilities" was used to mean a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces, and "imminent hostilities" was considered to mean a situation in which there is a serious risk from hostile fire to the safety of United States Forces.

Hearings, supra note 20, at 38–39.

42. S.J. Res. 72, 94th Cong., 1st Sess. (1975).
the use of the armed forces to protect United States citizens being evacuated from South Vietnam under circumstances posing a threat to their lives.\textsuperscript{43} The bill would have removed the statutory funding prohibitions "to the extent necessary to give effect to" that authorization.\textsuperscript{44}

On approximately the same date, the administration transmitted to Congress its own bill for "clarification" of the funding prohibitions. It provided simply that nothing contained in those prohibitions "shall be construed as limiting the availability of funds for the use of the Armed Forces of the United States to aid, assist, and carry out humanitarian evacuation, if ordered by the President."\textsuperscript{45} Unlike Senator Byrd's bill\textsuperscript{46} and the Senate version of the War Powers Resolution,\textsuperscript{47} it contained no authorization for the use of the armed forces and no limitations upon what persons could be evacuated or under what circumstances.\textsuperscript{48}

On April 17, the House International Relations Committee reported a bill essentially similar to the administration's model.\textsuperscript{49} It did not purport to confer authority to use the armed forces.\textsuperscript{50} Rather, it authorized funds for the evacuation,\textsuperscript{51} "without the use of military force, if possible," of citizens and dependents of citizens or permanent residents of the United States; of "Vietnamese nationals eligible for immigration to the United States by reason of their relationships to American citizens"; and of other foreign nationals under "direct and imminent threat" of death, if the armed forces "necessary to carry out their evacuation do not exceed those necessary to carry out the evacuation of" the prior two categories of persons.\textsuperscript{52}

\begin{itemize}
  \item \textsuperscript{43} Id. § 2(c). This provision was virtually identical to § 3(3) of S. 440, the Senate version of the War Powers Resolution. See note 13 supra.
  \item \textsuperscript{44} S.J. Res. 72, 94th Cong., 1st Sess. § 1(c) (1975).
  \item \textsuperscript{45} H.R. Doc. No. 103, 94th Cong., 1st Sess. 2 (1975).
  \item \textsuperscript{46} See notes 42-44 supra and accompanying text.
  \item \textsuperscript{47} See note 13 supra.
  \item \textsuperscript{48} Senator Frank Church, a member of the Senate Foreign Relations Committee, described the administration's proposal as being "as broad as the Gulf of Tonkin Resolution." XXXIII CONG. Q. WEEKLY REPORT 777 (1975).
  \item \textsuperscript{49} H.R. 6096, 94th Cong., 1st Sess. (1975).
  \item \textsuperscript{50} An amendment added on the House floor purported to limit "the authority granted by this section," id. § 4, but section 4 contained no authority; it merely defined the word "evacuation" for the purposes of section 2, which authorized appropriations.
  \item \textsuperscript{51} Id. § 2. The bill did not prohibit the use of funds authorized under other acts for the purpose of carrying out the evacuation of the designated persons. Funds authorized elsewhere were in fact used.
  \item \textsuperscript{52} Id. § 4.
\end{itemize}
The Senate Foreign Relations Committee, meeting the week of April 14-18, was thus confronted with three alternatives: do nothing; report a measure setting aside the funding prohibitions and suggesting that the President proceed on the basis of his own constitutional authority; or follow Senator Byrd's lead and report a measure authorizing use of the armed forces to evacuate certain persons in certain circumstances and lifting the funding prohibitions to the extent necessary to implement that authorization. The Committee selected the final alternative.

The Committee had already drafted a blueprint for implementing this choice. Six years earlier, in reporting the National Commitments Resolution, it had recommended that

in considering future resolutions involving the use or possible use of Armed Forces, Congress—

(1) Debate the proposed resolution at sufficient length to establish a legislative record showing the intent of Congress;

(2) Use the words authorize or empower or such other language as will leave no doubt that Congress alone has the right to authorize the initiation of war and that, in granting the President authority to use the armed forces, Congress is granting him power that he would not otherwise have;

(3) State in the resolution as explicitly as possible under the circumstances the kind of military action that is being authorized and the place and purpose of its use; and

(4) Put a time limit on the resolution, thereby assuring Congress the opportunity to review its decision and extend or terminate the President's authority to use military force.55

The Vietnam Contingency Act of 1975, reported April 18, comported with these guidelines. It authorized use of the armed forces "in a number and manner essential to and directly connected with the protection of . . . United States citizens and their dependents while they are being withdrawn" from South Vietnam.57 It required the President, upon any such use of the forces, to submit a report under section 4(a) of the War Powers Resolution and to certify that a direct and imminent threat existed to the lives of such citizens, that every effort had been made to terminate that threat diplomatically, and that the

53. This approach was favored by Senator Joseph Biden, who recommended that the Senate "[c]all to the attention of the President that he already has the authority to evacuate endangered Americans and their dependents from South Vietnam." S. REP. No. 88, 94th Cong., 1st Sess. 26 (1975).
54. See notes 42-44 supra and accompanying text.
57. Id. § 3(a).
evacuation was being carried out as rapidly as possible. The bill also authorized the use of the armed forces "to assist in bringing out endangered foreign nationals," but only if that could be done incidentally to, and without any expansion of, the evacuation of United States citizens and their dependents. Lastly, the bill set aside the statutory funding prohibitions "only to the extent necessary to give effect to" authorization for the evacuation of United States citizens and their dependents.

The Senate passed the bill in substantially the same form in which it had been reported, with the result that the conference committee was confronted with the same alternatives that the Senate Foreign Relations Committee had faced. Like the Senate Committee, the conference committee chose the route of authorizing and limiting use of the armed forces, and adopted the Senate language virtually without change in its report.

Adoption of the conference report would have been an important reassertion of the congressional war-making power, reclamation of which had begun with the enactment of the various funding prohibitions and the War Powers Resolution. A specifically limited congressional authorization would have prevented the evacuation from serving as a precedent for independent presidential use of the armed forces to rescue endangered United States citizens, or any other persons, when there is time to seek the permission of Congress. Indeed, it would have established a precedent for requiring congressional authorization. Such a precedent would have been most clearly justified insofar as it related to rescue of foreign nationals, for there the constitutional support for the President's independent action is particularly slim.

Perhaps even more importantly, enactment of the conference report would have avoided the erosion of the congressional power over the purse that was bound to occur if the President was permitted to proceed with the planned evacuation in the face of statutory prohibitions on the use of funds for that purpose.

58. Id. §§ 3(b), (c).
59. Id. § 4.
60. Id. § 6.
62. See note 23 supra and accompanying text.
63. Id.
64. See note 30 supra and accompanying text. In the past, Presidents have occasionally withdrawn funds from the Treasury without congressional approval. See generally L. WILMERRING, THE SPENDING POWER (1943). Most of these incidents occurred in the last century
In particular, it would have undermined any claim by the executive branch that funding prohibitions could not curtail activities allegedly supported by the commander-in-chief clause.\textsuperscript{65}

The conference report was passed by the Senate on April 25, the same day it was filed by the conferees. It was scheduled for consideration by the House the morning of April 29. However, that morning Speaker Carl Albert telephoned from the White House to remove the bill from the calendar.\textsuperscript{66} The evac-

\textsuperscript{65} Predictably, such claims were in fact made. See Hearings, supra note 20, at 34-35, 88; note 103 infra and accompanying text.

\textsuperscript{66} See 121 Cong. Rec. 3401-02 (daily ed. Apr. 29, 1975). The reasons for the Speaker's action were not clear. Apparently Mr. Albert and other Representatives thought that section 4 of the conference report, H.R. Rep. No. 176, 94th Cong., 1st Sess. § 4 (1975) (corresponding to section 3 of the Senate's Vietnam Contingency Act, see notes 57-58 supra and accompanying text), provided potential statutory support for reintroduction of United States forces into South Vietnam:

Ms. ABzuG. I am glad to see that at this time we are not forced to give the President authority which he could use to justify armed intervention here in Vietnam or in other conflict situations. I believe that removing the rule from the floor of the House this morning for the consideration of the conference report was a wise act.

Mr. ALBERT. Mr. Speaker, will the gentlewoman yield?

Ms. ABzuG. I am happy to yield to our Speaker, the gentleman from Oklahoma (Mr. ALBERT).

Mr. ALBERT. Mr. Speaker, I have just returned from the White House, where it was agreed there by the President that we would take this whole matter off for today because the section 4 part, which was the controversial part, may be moot before the day is over. If so, when we consider the bill, the parliamentary situation may permit removal of that part from the final version.

Ms. ABzuG. I thank the Speaker. I requested that the Chairman of the Rules Committee and the Chairman of the International Relations Committee not to call up the rule of the report today, because I too believe it to be moot.

\textit{Id.} at 3405-06.

Those who understood the issues were less pleased. Representative Thomas Morgan, Chairman of the House International Relations Committee, was later reported to be "extremely angry" with Majority Leader Thomas P. O'Neill for the latter's opposition to the conference report. N.Y. Times, May 2, 1975, at 1, col. 1. Representative Clement Zablocki, chief sponsor of the War Powers Resolution in the House, responded to Ms. Abzug and Mr. Albert as follows:

Mr. ZABLOCKL Mr. Speaker, I sincerely hope that as expeditiously as possible and as soon as possible we do act on the conference report. I submit that it is necessary . . . .

. . . .

Of course, the President would want us to strike section 4. That section clarifies the relationship of the evacuation with regard to the war powers resolution and sets a good precedent
uation was already in progress. Later that day, President Duong Van Minh in Saigon announced the unconditional surrender of South Vietnam. 67

On April 30, the President transmitted a report regarding the evacuation. 68 Again “taking note of the provision of section 4 of the War Powers Resolution,” he reported that the operation involved 70 helicopters, fighter aircraft, and 865 marines. The fighters “suppressed” anti-aircraft fire, and ground forces occasionally returned enemy fire. Four members of the armed forces were killed, including two marines “on regular duty” at Tan Son Nhut Airfield. Approximately 19 hours elapsed from the time United States forces entered South Vietnamese airspace until the last elements of the ground security forces departed Saigon.

On May 1, the House took up the conference report and rejected it, 162-246. 69

B. THE Mayaguez INCIDENT

Early in the morning hours 70 of Monday, May 12, 1975, the Mayaguez, a merchant vessel of United States registry with a crew of United States citizens, was seized by a Cambodian motor torpedo boat six and one-half miles southeast of Poulo Wai Island and taken to Kho Tang Island. That afternoon, 1100 marines were ordered flown from Okinawa and the Phillipines to Utapao Air Base in Thailand. This time the President did not request Congress to “clarify” the statutory funding prohibitions. At 1:00 a.m. Wednesday, May 14, United States aircraft sank a Cambodian patrol craft that had attempted to leave Kho Tang Island. Thereafter two other Cambodian patrol craft were destroyed and four immobilized. Several hours later the Maya-
crew members were put in a fishing vessel and taken to Kompong Som on the Cambodian mainland. At 7:00 p.m. Phnom Penh radio was overheard in Bangkok announcing that the Cambodian government would release the Mayaguez. Afterwards, at 7:20 p.m., about 135 marines landed on Koh Tang Island under heavy fire. At 9:00 p.m. marines, boarding from the U.S.S. Holt, took possession of the Mayaguez. At 10:45 p.m. the destroyer U.S.S. Wilson reported a small boat approaching, flying a white flag; at 10:53 p.m. the Wilson sent word to the Pentagon that at least 30 caucasians were aboard the boat. (After the incident, Secretary Schlesinger stated that the crewmen "arrived at the Wilson as a result of what is presumed to be the decision of the Cambodians to deliver them up in order to terminate combat activities directed primarily at the mainland." [71]) At 11:00 p.m. United States aircraft struck the airfield at Ream and an oil storage depot on the Cambodian mainland. [72] The Pentagon said that 17 enemy planes had been destroyed on the ground, a hangar smashed, and the runways cratered. [73] By the conclusion of hostilities 41 members of the United States armed forces had been killed. [74] The 39 members of the crew survived unharmed.

The President's report was submitted May 15. [75] Although "taking note of Section 4(a) (1) of the War Powers Resolution," it ignored Section 4(a) (3) in neglecting to mention the enlargement of United States forces in Thailand. Nor did it report any fatalities or refer to the statutory funding prohibitions.

C. FAILURE OF THE FUNDING PROHIBITIONS

The statements of facts contained in the four reports submitted by the President under section 4 of the War Powers Resolution [76] leave little doubt that in each case United States forces carried out "military operations" or "combat activities" "in," "over," or "off the shores of" Cambodia or South Vietnam, [77] and thus that in each case the several statutory funding

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[72] Id. May 20, 1975, at 14, col. 5.
[73] Id. May 16, 1975, at 14, col. 2.
[76] See text accompanying notes 35, 41, 68, and 75 supra.
[77] See note 30 supra and accompanying text.
prohibitions were violated. Indeed, in the case of the Mayaguez incident this conclusion is implicitly acknowledged by the report's reference to section 4(a)(1) of the War Powers Resolution—the section dealing with situations wherein forces are “introduced into hostilities.”

Nevertheless, on May 7, just prior to the Mayaguez incident, Monroe Leigh expressed to a subcommittee of the House International Relations Committee the view that the statutory funding prohibitions did not apply to the evacuations because “there was . . . a very substantial legislative history that it was not the intent of Congress in the funds limitation statutes to curtail . . . [the] exercise of presidential authority [to evacuate Americans].”

Is Mr. Leigh not familiar with the “plain meaning rule”? Moreover, if the statutes were not applicable, why did President Ford request, prior to the Vietnam evacuation, that they be “clarified immediately”? In any event, the legislative history provides almost no support for Mr. Leigh’s theory.

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78. Hearings, supra note 20, at 16-17. At the June 4 session of the hearings Mr. Leigh extended his opinion to the Mayaguez incident. Id. at 88-89.

In addition, Mr. Leigh questioned the constitutional authority of the Congress to circumscribe by means of funding prohibitions the President’s supposed authority as commander in chief to order such operations as the evacuations and the rescue of the Mayaguez crew. See text accompanying notes 103-16 infra.

79. “One of the most common of insights about the process of communication,” says Sutherland, “was given classic expression by the Supreme Court . . . in the declaration that ‘the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.’ [Caminetti v. United States, 242 U.S. 470 (1917).]” 2a C. SANDS, STATUTES Am STATUTORY CONSTRUCTION § 46.01 (4th ed. 1973).

Expressing that insight from the layman’s viewpoint, Representative Stephen Solarz remarked, in commenting on Mr. Leigh’s theory, that “one of the disadvantages of not being a lawyer [is that] you tend to think language means what it appears to mean . . . .” Hearings, supra note 20, at 22.

80. Or if the statutes were unconstitutional, as Mr. Leigh also suggested. See notes 103-16 infra and accompanying text.

81. See note 39 supra and accompanying text. Mr. Leigh’s answer is that “the President thought he had adequate constitutional power despite the funds limitation provisions to take out Americans . . . .” Hearings, supra note 20, at 26, but not to take out foreign nationals. Id. at 25. If this was the President’s thought, he certainly did not reveal it in his request that Congress “clarify” the funding prohibitions. Clarification was sought for evacuation of Americans as well as South Vietnamese. See XXXIII CONG. Q. WEEKLY REPORT 730 (1975); note 39 supra and accompanying text.

82. Mr. Leigh has offered only two items in support of his refer-
Only one reasonable inference can be drawn from Mr. Leigh's *ex post facto* claim of executive authority. The failure of Congress to pass the Vietnam Contingency Act and to object to the violation of the funding prohibitions during the evacuations had convinced the administration by the time of the *Mayaguez* incident that most members of Congress would not object to a further violation of the funding prohibitions if the activities constituting the violation were politically acceptable. The law had become a mere inconvenience which—thanks to public support, the legal theories of the State Department, and the acquiescence of Congress—could be ignored.

III. NEED FOR STRENGTHENING THE WAR POWERS RESOLUTION

A. PRIOR RESTRAINTS

Clearly the parade of horribles predicted by President

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ence, see note 78 *supra* and accompanying text, to a "very substantial" legislative history indicating the inapplicability of the funding prohibitions to the evacuations and the *Mayaguez* incident. See *Hearings, supra* note 20, at 27, 31. Each item relates to only one of the several prohibitions. One is a statement by Congressman Joseph Addabbo that seems to imply that the prohibition in question, Joint Resolution of July 1, 1973, Pub. L. No. 93-52, § 108, 87 Stat. 134, was not intended to prohibit the President from exercising any of his commander-in-chief powers. 119 Cong. Rec. 21,313 (1973). There is no evidence that other members of Congress shared Mr. Addabbo's view. Representative Jonathan Bingham, for one, disagreed. Responding to Mr. Leigh's interpretation of the legislative history, he said:

> Well, I would suggest to you that those provisions were put into the law to curtail what President Nixon at the time said was his authority as Commander in Chief to protect and safeguard the evacuation of American troops which was the reason he gave, for example, for going into Cambodia. If your interpretation is correct, then that statutory limitation had no effect.

*Hearings, supra* note 20, at 17.

The other item is an exchange of remarks that Mr. Leigh claims occurred during testimony given "in executive session . . . before the Senate Foreign Relations Committee" on August 3, 1973 by Admiral Moorer, then Chairman of the Joint Chiefs of Staff. *Id.* at 31. In fact, the Admiral did not testify before the Committee on that date. He did meet unofficially with congressional leaders at that time, but the transcript of that proceeding remained classified as of September 15, 1975. Thus the remarks, whatever their content, were heard by no more than a handful of the members of Congress who voted on the funding prohibition in question and are not part of its legislative history.

83. The apex of congressional legal acuity during the *Mayaguez* incident was reached by Senator Henry Jackson, who revealed on NBC's "Today" program of May 15 that the War Powers Resolution had "superseded" the statutory funding prohibitions. Four such prohibitions were enacted after passage of the Resolution.
Nixon has not been set to march by enactment of the War Powers Resolution. The evacuations and the Mayaguez incident demonstrate that the Resolution has not diminished the ability of the President to "act decisively and convincingly"—even in the face of statutory funding prohibitions.85

On the contrary, events during the spring of 1975 illustrate that the Resolution presents no bar to possible excesses of presidential war-making. The ratio of United States citizens evacuated to foreign nationals evacuated from Cambodia and Vietnam strongly suggests that, but for the dubiously constitutional evacuation of the latter,86 the exposure of United States forces to hostilities would have been considerably shortened and possibly eliminated.87 And during the Mayaguez incident, both the assault on Koh Tang Island after the Cambodian government had announced it would release the vessel and the attacks on the Cambodian mainland after the release of the Mayaguez crew were apparently retaliatory88 and thus also unconstitutional.89

84. See note 3 supra.
85. It appears that the primary burden imposed upon the President by the Resolution has been the interruption of his sleep to sign his name to a report. See Hearings, supra note 20, at 77 (testimony of Mr. Leigh).
86. See note 23 supra. Even Mr. Leigh declined to assert a presidential prerogative to evacuate foreign nationals without congressional authorization. See Hearings, supra note 20, at 34–35, 88.
87. A total of 82 United States citizens and 104 foreign nationals were evacuated during the four-hour operation in Phnom Penh. See Communication from Gerald R. Ford to the Speaker of the House and to the President of the Senate, Apr. 12, 1975, in 11 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 378 (1975). In the final removal from Saigon, about 1000 United States citizens and 5500 South Vietnamese were evacuated. Four marines were killed in the final withdrawal. XXXIII CONGRESSIONAL Q. WEEKLY REPORT 907 (1975).
88. See text accompanying notes 71–73 supra. The New York Times reported that the administration's rationale for the strikes on the mainland was to keep Cambodian forces from reinforcing the defenders of Tang Island.
But, judging by the Government's own reports, the Cambodians had no ships and planes that could not have been interdicted by the warships and aircraft that the United States had on the scene.
Schabecoff, Questions on Ship Rescue Persist Despite Briefings, N.Y. Times, May 20, 1975, at 1, col. 2, at 14, col. 5.
Senator Javits made the following observation concerning the incident:
Facts which were not revealed to the Congress in the unsatisfactory consultation process concerning the Mayaguez, but which have subsequently come to light, raise profound questions concerning the military actions taken in connection with securing release of the ship and the crew. For instance, we have learned
The validity of certain criticism of the Resolution has been vindicated; namely, lacking prior restraints it does not curb unwanted presidential uses of the armed forces. Major military operations can, in modern times, take far less than even 48 hours, let alone 60 or 90 days. The evacuations from Cambodia and Vietnam were completed before the reports required by the Resolution were submitted. Neither during those instances, nor during the Mayaguez incident, did the Resolution pose any obstacle to real or potential transgressions of the constitutional limits of the President's war-making power.

B. Subsequent Limitations

The effectiveness of the subsequent limitations of the Resolution as a deterrent to congressionally unauthorized use of military force by the President has not yet been tested, but the administration has suggested that it may ignore the subsequent limitations should the question arise. Mr. Leigh indicated, in testifying before the Subcommittee on National Security Policy and Scientific Developments of the House International Relations Committee, that if a President's use of the armed forces is pursuant to a constitutional grant of power—and what President?
dent will claim otherwise?—then any statutory provision (such as the 60-day limit of section 5(b)), to say nothing of a mere concurrent resolution (such as that provided for by section 5(c)), purporting to cut short that use is unconstitutional.  

91. A concurrent resolution requires approval by a majority of both houses, but because it is not signed by the President or subject to his veto, is without the force and effect of law. A joint resolution, on the other hand, is signed by the President and has the force and effect of law.

It is curious that proponents of a broad presidential war-making power argue that "adaptation by usage" has legitimized otherwise unconstitutional presidential activities, see note 26 supra and accompanying text, and yet refuse to apply the same principle to use of the "legislative veto"—a statutory provision authorizing Congress, by concurrent resolution (or one house, by simple resolution, or in some cases a congressional committee), to prevent a particular presidential action, otherwise permitted by the statute, from taking effect. The practice is well established. For a discussion of various laws employing the legislative veto, see Congressional Research Service, U.S. Library of Congress, Constitutionality of the Legislative Veto Amendment to the Foreign Military Sales and Assistance Act, Sept. 4, 1973, reprinted in 120 CONG. REC. 9855 (daily ed. June 6, 1974); Note, Congressional Adaptation: The Come-into-Agreement Provision, 37 GEO. WASH. L. REV. 387 (1968); Large, New Veto Powers for Congress, Wall Street Journal, Feb. 6, 1975, at 14, col. 4.  

92. Mr. Leigh testified as follows:

I think it would be unconstitutional on the simple logic that if the President had the power to put the men there in the first place that power could not be taken away by concurrent resolution because the power is constitutional in nature. There might, however, be all sorts of reasons as to why the political process would force him to wish to comply with that concurrent resolution.  

Hearings, supra note 20, at 91. Representative Zablocki responded that "our statutes are replete with cases where Congress has given temporary authority to the President .... But what Congress gives in this way it can also take back—by concurrent resolution." Id. at 94. To this Mr. Leigh replied,

[the Resolution] does not delegate anything to the President. It is not an act of delegation by the Congress of power to the President. It is, as Senator Javits was saying, a procedural scheme for arranging an interchange in what is obviously a difficult area between the two branches of the Government ....  

Therefore, the argument that this is like some of the earlier examples where Congress created a concurrent resolution procedure to control the exercise of authority delegated to the President—namely, the Legislative Reorganization Acts where Congress did delegate certain legislative powers—is arguable [sic? inapposite?] ....  

Therefore, to say that Congress would later by concurrent resolution take back what it had previously delegated overlooks the fact that nothing was delegated.  

Id. at 96-97.  

These arguments were also raised by opponents of the Resolution at the time of its enactment. See note 15 supra. They overlook the fact that any congressionally unauthorized "introduction" of the armed
It is worth noting, in this connection, the wording of the four reports submitted by President Ford. They were not submitted “in accordance with” or “pursuant to” or “as required by” section 4(a) of the War Powers Resolution; the President simply “took note of” the reporting requirement. Moreover, the reports submitted during the evacuations from Cambodia and Vietnam were not identified as “paragraph (1)” reports, the only type that triggers the 60-day limit. Whether this represented an attempt to evade the law is unclear; however, also worth noting is an executive-branch objection to various provisions of the Vietnam Contingency Act on the ground that they would “require the President to endorse the provisions of the War Powers Resolution.”

In the light of these unsubtle warnings that the present administration, like the last, considers the Resolution unconstitutional, it takes little prescience to realize that the day may come when a President chooses not to “take note of” the reporting requirement or any other provision of the Resolution.

And he may succeed in doing so, for the share of the war-making powers exercised by each branch is and has been less a function of the textual allotment of that power by the Constitution than of the political ability of Congress or the President to claim and exercise that power. The ability of Congress to exact future compliance with section 5(b) and 5(c) of the Resolution, if and when the occasion to do so arises, may thus rest more on the political leverage it can exercise than on the force of its legal arguments. The *Mayaguez* incident would certainly suggest as much. A clearer case of presidential violation of statutory law could hardly exist. But the President’s actions were

forces that fits the description of Section 4(a)(1) of the Resolution will be constitutionally justified only in relation to the emergency nature of the circumstances supposedly necessitating the introduction. See notes 22–23 supra and accompanying text. The theory is that an emergency justifies independent presidential action if Congress cannot act effectively in the available time. Once Congress acts to prevent or to terminate such an action, the emergency is over for constitutional purposes. (A preexisting statutory funding prohibition constitutes such a preventive measure, of course, because it indicates a congressional intent that no set of circumstances shall justify independent presidential action.)

93. See text accompanying notes 34, 41, 68, and 75 supra.
94. See note 41 supra.
96. Comment from the executive branch submitted to Senate Foreign Relations Committee, April 22, 1975.
97. See note 3 supra.
98. See text accompanying note 76 supra.
popular, as they normally are in such circumstances, and compliance with the funding prohibitions was not politically necessary. The determinative factors in a President's decision to comply or not to comply with section 5 of the War Powers Resolution may likewise be primarily political rather than legal in nature.

Consequently, it is possible that an effort to bolster the Resolution will be successful only to the extent that legal logic is an ingredient of political power. But insofar as the logic of the law is all Congress can ever with certainty rely on, Congress should ensure now that the fullest measure of its authority under the Constitution is brought to bear behind section 5.

IV. METHODS OF STRENGTHENING THE RESOLUTION

A. USE OF THE APPROPRIATIONS POWER TO LIMIT MILITARY ACTIVITIES

One exclusively congressional power—perhaps the most important of congressional powers—is the power over the purse. What is the status of that power? Clearly, congressional acquiescence in its usurpation during the evacuations from Vietnam and Cambodia and the *Mayaguez* incident did not

99. Presidential popularity has almost invariably increased during international crises—even embarrassing ones—as polls indicate:

<table>
<thead>
<tr>
<th>Date</th>
<th>Time</th>
<th>Yes (percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>June 1950</td>
<td>Before Korean outbreak</td>
<td>37</td>
</tr>
<tr>
<td>July 1950</td>
<td>After U.S. entry</td>
<td>46</td>
</tr>
<tr>
<td>August 1956</td>
<td>Before Israeli, British, French</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Attack on Suez</td>
<td>67</td>
</tr>
<tr>
<td>December 1956</td>
<td>After U.S. opposition to the attack</td>
<td>75</td>
</tr>
<tr>
<td>July 1958</td>
<td>Before Lebanon</td>
<td>52</td>
</tr>
<tr>
<td>August 1958</td>
<td>After U.S. marine landing</td>
<td>58</td>
</tr>
<tr>
<td>May 1960</td>
<td>Before U-2 incident</td>
<td>62</td>
</tr>
<tr>
<td>June 1960</td>
<td>U-2 debacle; collapse of Summit</td>
<td>68</td>
</tr>
<tr>
<td>March 1961</td>
<td>Before Bay of Pigs</td>
<td>73</td>
</tr>
<tr>
<td>April 1961</td>
<td>After Bay of Pigs</td>
<td>83</td>
</tr>
<tr>
<td>October 1962</td>
<td>Cave of Cuba crisis</td>
<td>61</td>
</tr>
<tr>
<td>December 1962</td>
<td>After missile crisis</td>
<td>74</td>
</tr>
<tr>
<td>October 1966</td>
<td>Before tour of Pacific</td>
<td>44</td>
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<tr>
<td>November 1966</td>
<td>After tour of Pacific</td>
<td>48</td>
</tr>
<tr>
<td>June 1967</td>
<td>Before Glassboro conference</td>
<td>44</td>
</tr>
<tr>
<td>June 1967</td>
<td>After Glassboro conference</td>
<td>52</td>
</tr>
</tbody>
</table>


100. U.S. Const. art. I, § 9, cl. 7.
redound to congressional benefit. Those events could conceivably be cited by future Presidents as precedents for military operations for which Congress has denied funds.

The Legal Advisor of the Department of State, in fact, has already entered a two-pronged challenge to the power of Congress to employ funding limitations to restrict presidential military activities. He contends that funding prohibitions are unconstitutional to the extent that they prohibit the exercise of authority granted by the commander-in-chief clause and, in any event, constitutionally ineffective to limit such authority as long as funds are elsewhere available. Each proposition warrants examination.

1. General Constitutionality

As previously noted, Mr. Leigh has indicated that he believes that the President possessed the authority to evacuate United States citizens from Cambodia and South Vietnam and to rescue the Mayaguez crew, notwithstanding prohibitions against the use of funds for those activities. Although he asserted that the prohibitions were inapplicable because of their legislative history, he also indicated that had they been applicable, he would have considered them unconstitutional:

I do believe personally that such matters [as the Cambodia and Vietnam evacuations] involve the inherent constitutional power of the President and I don't think that every limitation that Congress might enact on an appropriation or otherwise is necessarily a constitutional one. I think there are some that would be plainly unconstitutional.

Which appropriations limitations would be "plainly unconstitutional"? The Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The Supreme Court has never held unconstitutional any use of the appropriations power to limit the exercise of power by the executive branch. The only limita-

101. See note 78 supra and accompanying text.
102. See text accompanying note 78 supra.
103. Hearings, supra note 20, at 35. Mr. Leigh's argument in this context is basically the same, of course, as is his contention that the subsequent limitation contained in sections 5(b) and (c) of the War Powers Resolution are unconstitutional insofar as they purport to terminate presidential exercise of a power constitutionally his. See notes 91-92 supra and accompanying text.
104. U.S. Const. art. I, § 9, cl. 7.
tion on an appropriation act that the Court has invalidated exceeded a constitutional limitation on the power of Congress—the prohibition against bills of attainder. The only prohibitions in the Constitution against the use of the appropriations power to curtail the activities of another branch are the requirements that the Justices of the Supreme Court and the President receive a compensation that may not be diminished. Had the Framers intended further limitations on the appropriations power they surely would have included them. Indeed, in the case of military matters they went to the other extreme. In addition to the power to appropriate funds—and to refuse to do so—they gave Congress the power to “raise and support Armies” and to “provide and maintain a Navy”—and to refuse to do so. Far from giving the President power over the purse so that he could carry out the commander-in-chief clause, as Mr. Leigh suggests, the Framers believed it “particularly dangerous to give the keys of the treasury, and the command of the army, into the same hands.” As a result, they transferred the war power, in the words of Jefferson, “from the Executive to the Legislative body, from those who are to spend to those who are to pay.” Thus Presidents Jefferson and Jackson, when requesting congressional instructions as to the proper course to pursue in the fact of threatened aggression by Spain and marauding by South American pirates, respectively, recognized that control of the “means” necessary to carry out any military effort lies exclusively with Congress. The supremacy of the purse power was recognized by the Nixon administration even as it asserted broad power under the commander-in-chief clause to prosecute the war in Vietnam.

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107. U.S. CONST. art I, § 9, cl. 3.
108. Id. art II, § 1, cl. 6; Id. art. III, § 1.
109. Id. art. I, § 8, cl. 12.
110. Id. art. I, § 8, cl. 13.
112. 15 THE PAPERS OF THOMAS JEFFERSON 397 (J. Boyd ed. 1958).
113. See note 24 supra.
114. The following exchange took place between Senator Frank Church and Secretary of State William Rogers when the latter testified before the Senate Foreign Relations Committee on May 14, 1971:

   Senator Cruncn. If the Congress were to decide to limit the funds for the purpose of effecting a withdrawal of our forces
2. "Conditions Subsequent"?

The second basis for Mr. Leigh’s denial that Congress may constitutionally employ funding prohibitions to restrict the President in what he believes to be a constitutional use of armed force is his unexplained theory that such prohibitions are "conditions subsequent." In order to cut off funds for a specific activity, Mr. Leigh argues, Congress must wait for the President to "use up all the moneys appropriated."^118

Precisely what type of appropriation Mr. Leigh meant by "all the moneys appropriated" is not clear. Whether he meant the entire defense budget, something less, or something more, must be guessed, but is not important, for Mr. Leigh’s point is clear. The President can use for one purpose funds that were designated for another until those funds are exhausted, notwithstanding a law prohibiting that use.

This is nonsense. Followed to its logical conclusion, Mr. Leigh’s argument would deprive Congress of the power to specify

from Indochina and such defensive action as may be needed to protect them against imminent danger in the event that became necessary, as they withdrew, do you think that that falls within the constitutional power of the Congress to determine how public money is spent, or do you think that that would be an interference with the President’s inherent powers as Commander in Chief?

Secretary Roams. Here again, I would want to see the language, of course, but I fully recognize the power of the Congress to appropriate funds, and we do respect the wishes of Congress. For example, Congress included some restrictions on the use of ground troops in that area, and we have observed those restrictions. So we are not at odds with the Congress.

War Powers Legislation, supra note 21, at 508.

118. Mr. Solarz. Do you believe that in a situation where the President would commit American troops into combat pursuant to what he believed was his inherent constitutional authority that the Congress, if it determined that it did not want the troops there—would the Congress have the authority, in your judgment, to pass a law cutting off funding for the troops and thereby in effect requiring the President to withdraw them?

Mr. Leigh. Again, I make the distinction as between the condition subsequent in an appropriation not yet completely spent and new appropriations.

Mr. Solarz. I have to confess that without a legal background—

Mr. Leigh. If he has used up all the money appropriated and then Congress refuses to provide any more, I think the Congress has effectively stopped the President from continuing the military action. I don’t know how he can go on. If, on the other hand, he still had moneys that were unexpended, he could continue to spend those until such time as there was a court challenge and the court found that he was acting illegally. Hearings, supra note 20, at 92. The funding prohibitions are not, of course, conditions subsequent under any accepted legal definition of that term. Nor would it matter if they were.
the purpose for which funds are appropriated. The principle is long established that Congress has the exclusive power to specify how appropriated moneys shall be spent. The only difference between an appropriation for a specified object (a "line-item") and an express prohibition against the use of funds for a certain activity is a semantic one, the positive language of the one contrasting with the negative language of the other. Every appropriations act thus contains "conditions subsequent" in the sense that each specifies the purposes for which funds are appropriated—and, by implication, not appropriated. Transfer authority to take funds from one appropriations account and place them in another is a statutorily granted privilege, not a constitutional right.

B. THE PURSE AND THE WAR POWERS RESOLUTION

1. Subsequent Limitations

That, then, is the status of the congressional power over the purse: still intact, but under stress and in need of reassertion. Happily, the two desiderata dovetail at this point: there could be no more effective reassertion of the appropriations power, and no better means of strengthening the subsequent limitations of the Resolution, than placing the power over the purse behind those limitations—by prohibiting the expenditure of funds for the use of the armed forces in hostilities after the termination of the 60-day period or after the adoption of a concurrent resolution.

No statutory scheme constructed in the twilight zone of the war powers can be entirely immune from constitutional attack. But a funding cutoff, because it is the product of an unquestionably exclusive congressional power, is more force-

116. After 1665, states Hallam, it became "an undisputed principle" that moneys "granted by Parliament, are only to be expended for particular objects specified by itself . . ." The Framers were quite familiar with parliamentary practice; and we may be sure that in reposing in Congress the power of raising revenues and of making and reviewing appropriations for support of the armies they conferred the concomitant right to "specify" the "particular objects upon which its appropriations are to be expended."

117. Resolution § 5(b).

118. Id. § 5(c).


120. Cf. text accompanying note 115 supra.
ful constitutionally than the simple termination provisions of sections 5(b) and 5(c), which derive from the often usurped and much disputed congressional war-making power. For instance, because the authority of the President to expend appropriated funds is “delegated” while the President’s authority to repel “sudden attacks” is not, use of the purse power to enforce the subsequent limitations would undermine Mr. Leigh’s argument that the concurrent resolution provided for by section 5(c) is an unconstitutional attempt to divest the President of an undelegated power.

Moreover, innumerable precedents would support the sort of funding cutoff discussed. Congress clearly has the authority to make funds available for only a given purpose and a specified period of time; it does so frequently by prescribing availability for a particular department or agency within a designated fiscal year. A prohibition against the use of funds following termination of the 60-day period of section 5(b) would differ from fiscal year availability only in the sense that the former is contingent upon the occurrence of a particular event, the submission of a section 4(a)(1) report. But a cutoff based on a contingency is hardly unprecedented. Nor is a cutoff by concurrent resolution innovative.

In summary, even were Mr. Leigh correct in asserting that a constitutional use of the armed forces cannot be terminated by the exercise of congressional war-making power, it would not follow under any but the most extreme of constitutional theories that Congress cannot refuse to appropriate funds for that use or that in the absence of an appropriation such use may continue.

2. Prior Restraints

The advisability of using the appropriations power to bolster the subsequent limitations of the Resolution leads to an obvious question. Why should appropriated funds be available for uses

121. See note 25 supra and accompanying text.
122. See note 92 supra.
125. See notes 91-92 supra and accompanying text.
of the armed forces in situations not recognized by section 2(c)? Why should Congress, if it really means what section 2(c) says, not use its power over the purse to add teeth to that section? This form of "prior restraint," unlike the prior restraints contained in the Senate version of the War Powers Resolution,\textsuperscript{126} would not be subject to the objection that a constitutional power is being circumscribed by statute:\textsuperscript{127} Whether the President's war-making power is broader than recognized by section 2(c) would be beside the point since no military activity can be carried out in the absence of funds. The question is not even whether the congressional power over the purse can be used to deprive the President of his powers as commander in chief (or vice versa), since it is possible to read the constitutional provisions together as contemplating a chief executive who exercises a war-making power as extensive as the Constitution and appropriated funds allow.\textsuperscript{128} In fact, this is precisely the scheme the Framers intended.\textsuperscript{129}

Thus there would be several advantages to including a funding prohibition in section 2(c) as well. First, it would prevent unwanted presidential military excursions at the outset by denying funds to a President who intended to operate beyond the congressionally recognized limits of his power. Second, it would obviate the need for Congress, in order to prevent unauthorized presidential use of armed force, to hurriedly legislate ad hoc authorizations, limitations, and prohibitions every time the occasion arises. The scope of the President's independent authority to use the armed forces in an emergency situation would already be defined. Third, as with the subsequent limitations of section 5, prior restraints tied to the purse strings would be virtually immune from constitutional challenge and would thus provide a needed predictability that they would be respected in times of crisis. Including funding cutoffs would ensure, in short, that during the next involvement of the armed forces in hostilities, the Resolution will not be largely irrelevant.

If section 2(c) is thus amended to impose prior restraints upon independent presidential action, however, it should also be modified in several other respects. First, as Professor Berger recommended in discussing the Senate version of the War Powers

\textsuperscript{126} S. 440, 93d Cong., 1st Sess. § 3 (1973), quoted in note 13 supra.
\textsuperscript{127} See note 15 supra.
\textsuperscript{128} See notes 104-14 supra and accompanying text.
\textsuperscript{129} Id.
Resolution, independent presidential introduction of armed forces into hostilities should be sanctioned only where Congress is unable to act rapidly enough to be effective. Such a qualification would conform the presidential war-making power to its most appropriate constitutional interpretation, thus reducing the risk that the President will commit the nation to hostilities that Congress would have chosen to avoid.

Second, the section should be broadened to sanction, as did the Senate version of the Resolution, independent presidential use of armed force to evacuate United States citizens endangered abroad under certain narrowly defined circumstances. Here again, however, the President should be permitted to act only where Congress cannot act rapidly enough. This expansion is advisable because Presidents will probably assume the authority to act in such situations regardless of a lack of congressional authorization; thus Congress will be in a stronger position if it authorizes, rather than merely acquiesces in, their actions, for acquiescence would suggest that a President may constitutionally act without congressional authorization in still other situations not enumerated by the section.

Finally, the section, if so expanded to sanction certain presidential evacuations of United States citizens, should not purport, as it presently does, to define the constitutional scope of the President's power. In the first place, such a definition would be unnecessary if the section were coupled with purse-strings limitations. More importantly, it is not at all clear that the President can constitutionally evacuate United States citizens in any circumstances if Congress prescribes such action. Therefore a congressional concession that he can would undermine later congressional action denying that the President has such authority. Moreover, such a concession would support presidential assertions of constitutional authority to use armed force in situations somewhat analogous to but potentially more explosive than evacuation of United States citizens—e.g., the rescue of captured United States citizens, as in the Mayaguez incident.

130. Berger, supra note 23, at 47.
131. See notes 22–23 supra and accompanying text; note 92 supra.
133. With this modification, the Vietnam Contingency Act, S. 1484, 94th Cong., 1st Sess. § 3 (1975), see notes 56–58 supra and accompanying text, would provide a good model for broadening section 2(c).
134. See notes 22, 23, and 29 supra and accompanying text.
135. See note 89 supra.
C. Other Possibilities for Improvement

This Article has dealt with only the major possibilities for strengthening the War Powers Resolution. The events discussed, however, suggest the possibility of further improvements.

(1) Reference to the “introduction” of the armed forces into hostilities may not cover all situations that should trigger the reporting requirement of section 4(a)(1) and the subsequent limitation of sections 5(b) and 5(c). During the evacuation of Saigon, two marines on “regular duty” at Tan Son Nhut Airfield were killed. No report was submitted with respect to this action. Arguably the incident did not constitute “hostilities.” Perhaps a definition of “hostilities” should be included in the Resolution, since in the absence thereof the executive branch has formulated its own. But the important question raised by the Tan Son Nhut incident is whether a report should be required when hostilities arise involving forces that have not been “introduced” into such hostilities. Use of the term “committed,” as in the House version of the Resolution, might be desirable.

(2) Section 5(b) provides that the 60-day time limit is triggered when a report is submitted or is “required to be submitted.” The difficulty is, of course, who determines when the report was required to be submitted? Congress? The courts? There is no assurance that every President will “take note of” this requirement. Even if one assumes good faith on the part of a President, a gradual escalation of hostilities could generate honest differences of opinion as to the date on which the report was required to be submitted. This potential ambiguity can be easily remedied by allowing Congress, if it believes a report should have been submitted but was not, to so state by concurrent resolution and to set the date on which the 60-day requirement was triggered.

(3) It may be desirable to require the President to specify the paragraph of section 4(a) under which the report is submitted. President Ford did not do so in the second and third reports, submitted during the evacuations from Cambodia and Vietnam. Had the hostilities gradually increased, serious disagreement could have arisen as to whether the 60-day period had been triggered by the report.

(4) Under section 5(c) the concurrent resolution termination procedure is not available in the event the 60-day period

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136. See note 41 supra.
138. See notes 40, 41, and 68 supra and accompanying text.
is extended or in the event specific statutory authorization is enacted. Any specific statutory authorization conferred in the future will probably solve this problem by including the language of section 5 of the Vietnam Contingency Act, which provided, in effect, that the concurrent resolution procedure remained applicable notwithstanding its inapplicability as a result of the enactment of that Act. To eliminate the need to recite that paradoxical provision, section 5 should be amended to apply the concurrent resolution termination procedure to situations in which the armed forces are used pursuant to specific statutory authority.

(5) Section 8(a) of the Resolution prohibits the inference from any treaty or "provision of law," whether or not in effect prior to enactment of the Resolution, of presidential authority to introduce the armed forces into hostilities, unless the provision states that it is "intended to constitute specific statutory authorization within the meaning of this joint resolution. Thus the Resolution prohibits any such inference from provisions of law such as the Middle East Peace and Stability Act and the Cuban Resolution—both of which were joint resolutions enacted prior to the War Powers Resolution and could be construed, in the absence of the latter, to authorize presidential introduction of the armed forces into hostilities.

As presently written, however, section 8(a) does not prohibit the President from inferring such authority from the Berlin Resolution, because it is a concurrent resolution, not a "provision of law," or from various provisions of the September 1, 1975 Memorandum of Agreement between the Governments of Israel and the United States, because the agreement was an executive agreement rather than a treaty. Therefore the section should be broadened to include concurrent resolutions and executive agreements as well as laws and treaties.

(6) The effect of subsection (d) (1) of section 8—providing that no provision of the Resolution is "intended to alter . . . the

140. Resolution §§ 8(a) (1), (2).
143. 76 Stat. 1429 (1962).
144. Hearings on Memoranda of Agreements Between the Governments of Israel and the United States Before the Senate Comm. on Foreign Relations, 94th Cong., 1st Sess. 249-51 (1975). During the Senate debate on the Sinai Implementation Agreement, Pub. L. No. 94-110 (Oct. 13, 1975), there was considerable controversy over whether the September 1 Memorandum could be construed to authorize introduction of the armed forces into hostilities.
provisions of existing treaties"—is unclear, since presumably the purpose of subsection (a) (2) is to alter existing treaties (under domestic law) to the extent that they may be construed to authorize the introduction of armed forces into hostilities. Monroe Leigh, not surprisingly, has claimed independent constitutional authority on the part of the President to use the armed forces “to carry out the terms of security . . . treaties.”

The apparent conflict between subsections (d) (1) and (a) (2) should be clarified.

V. CONCLUSION

Enactment of the War Powers Resolution may have been “a crucial first step in reestablishing the constitutional balance so essential to the survival and proper functioning of our democratic political system.” But it was only a first step. During the Mayaguez incident and the evacuations from Cambodia and South Vietnam, Congress acquiesced in statutorily prohibited and constitutionally dubious military actions ordered by the President. The Resolution should not be viewed as a license for the abnegation by Congress of its constitutionally granted war and appropriations powers. Regardless of whether the policies behind those actions were wise, renunciation by Congress of its proper constitutional role can only abet excessive claims of executive authority and provide precedential support for military activities based on those claims. Enactment of amendments to the War Powers Resolution of the sort proposed in this Article would weaken those precedents and help secure a constitutional balance more in conformity with that intended by the Framers.

The criticisms recently directed at the Resolution by State Department Legal Advisor Monroe Leigh demonstrate that disagreements concerning the legal underpinnings of the Resolution have not been resolved since its enactment. They simply have not been forced to the surface by events. Consideration of amendments that would strengthen the Resolution and alleviate the discord could proceed more calmly now than amid the heated emotions and constitutional myopia inevitably generated by the nation's involvement in armed conflict. Peacetime legal arrangements have proven far more successful in preserving democratic principles than have wartime political accommodations.

145. *Hearings, supra* note 20, at 90.
Appendix

JOINT RESOLUTION

Concerning the war powers of Congress and the President.

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

SHORT TITLE

SECTION 1. This joint resolution may be cited as the "War Powers Resolution".

PURPOSE AND POLICY

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

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

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

CONSULTATION

SEC. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

REPORTING

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

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

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

(3) in numbers which substantially enlarge United States
Armed Forces equipped for combat already located in a foreign nation; the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

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

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

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

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

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

CONGRESSIONAL ACTION

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

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

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

CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTION OR BILL

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

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

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

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

CONGRESSIONAL PRIORITY PROCEDURES FOR CONCURRENT RESOLUTION

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

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

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

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

INTERPRETATION OF JOINT RESOLUTION

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

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

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

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

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

(d) Nothing in this joint resolution—

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

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

**SEPARABILITY CLAUSE**

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

**EFFECTIVE DATE**

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